

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 11.10.2012

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Judgment delivered on: 18.12.2012

+ **W.P.(C) 2063/2011**

MMTC

..... Petitioner

Through: Mr. A.K. Chhabra, Advocate.

versus

SURJIT SINGH KANDA AND ORS.

..... Respondents

Through: Mr. Satish Aggarwala, Advocate for
the respondent No.3.

Ms. Seema Gupta, Advocate for the
respondent No.4/Indian Bank.

+ **W.P.(C) 4553/2011**

UNION OF INDIA AND ANOTHER

..... Petitioners

Through: Mr. Satish Aggarwala, Advocate.

versus

INDIAN BANK AND ANOTHER

..... Respondents

Through: Ms. Seema Gupta, Advocate for the
respondent No.1/Indian Bank.

Mr. Sachin Chopra and Mr. Kamal
Bansal, Advocates for the respondent
No.2.

Mr. A.K. Chhabra, Advocate for the
respondent No.3/MMTC.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHL, J.

1. The aforesaid two writ petitions preferred by MMTC Ltd. (referred to as MMTC) (WP(C) No. 2063/2011) and the Union of India (W.P.(C.) No. 4553/2011) - pursued by the Assistant Commissioner of Customs, Noida Export Processing Zone (NEPZ) (referred to as the Customs Department), are directed against the common order passed by the Debt Recovery Appellate Tribunal (DRAT) in Appeal No.166/2005 preferred by the MMTC, in Appeal No.126/2005 (preferred by the Indian Bank) and Appeal No.13/2008 preferred by Customs Department. Since the impugned order is the same and the subject matter of dispute is also the same, we have heard common arguments of learned counsels for the parties and proceed to dispose of both the writ petitions by this common judgment.

2. Before we proceed to discuss the respective cases of the parties on merit, we wish to place on record our anguish about the failure of the parties concerned, i.e. the Customs Department, the MMTC and the Indian Bank to resolve the issues as raised in these petitions on their own, even though they all represent the State. On 14.11.2011, we had put it to counsel for the parties as to why the concerned Secretaries of the Govt. of India in the Ministry of Finance and the Ministry of Commerce should not sit together to resolve the issues. On 07.12.2011, we directed that the concerned Secretaries of the two Ministries should endeavor to work out an amicable resolution of the disputes, as all the parties are under the control of one or the other Ministries. In fact, the petitioners had sought time for the said purpose repeatedly, and on 20.07.2012 we had expressed the hope that since

the matter is not complicated, a decision would be taken soon, as sufficient time had already lapsed. We had observed that the only issue is as to which pocket of the Government would be enriched, and judicial time should not be wasted on such matters. However, on 24.08.2012 we were informed that the committee of three Secretaries of the Govt. of India had failed to resolve the issue. We are dismayed with this conclusion as we feel that the officers at the highest level of the bureaucracy should have exhibited the maturity and decisiveness necessary to resolve the issues in a practical manner so as to save the avoidable expense and wastage of judicial time, considering the fact that, in any eventuality, the asset in question would continue to vest in one or the other organs of the Govt. of India. We feel that the hands off approach adopted by the senior officers in the bureaucracy leads to a state of indecision and stalemate, which is the bane of good and efficient administration. Decisions taken consciously, for good reasons recorded in the concerned file, with honesty and sincerity should leave no officer with any sense of insecurity that the decision may expose him/her to any charge of favoritism, corruption, discrimination or the like. We hope that the decision makers would hence forth not shy away from taking decisions - even difficult decisions, by adopting the aforesaid parameters so as to save the government machinery from coming to a grinding halt.

3. It appears that the MMTC- acting as a canalizing agency, in response of the government's policy to boost export of jewellery made from gold and silver was permitted duty free import of gold and silver on the condition that the imported gold and silver would be got converted into jewellery and duly exported in a time bound manner, vide exemption notification bearing

No.258/87 dated 02.07.1987, No.177/94 dated 21.10.1994 as amended by notification No.3/88 dated 14.01.1988 issued under section 25 of the Customs Act, 1962 (the said Act). The MMTC executed the requisite bonds in favour of the Customs Department to fulfil its obligations of re-export of the manufactured jewellery in lieu of the duty free import of gold and silver made by it. The Bill of Entry for the imports was filed by MMTC.

4. After import of the precious metals, MMTC would give it on loan to manufacturers of jewellery items with the condition that the final product would be exported by them in a time bound manner and that the manufacturer would not create any encumbrance or charge of the said goods in favour of anyone else. The property in the gold and silver was not to vest in the exporter till the final product was exported.

5. It appears that about 45 kg. of gold was loaned by the MMTC to one Mr. Surjit Singh Kanda, (respondent No. 1 in WP(C) No. 2063/2011), who was carrying on his business under several business names, viz., Pearl Jewellers, Ramson Jewellers and Raja Jewellers Limited, for manufacture and export of gold jewellery. Out of the said quantity, it appears that Sh.S.S. Kanda exported gold ornaments of 26 kgs., but failed to export ornaments of the remaining about 19 kgs. It also appears that S.S. Kanda in breach of the conditions imposed by the MMTC, pledged the gold with Indian Bank – respondent No. 4 in WP(C) No. 2063/2011, and respondent No. 1 in WP(C) No. 4553/2011, to obtain credit facilities. The exporter Shri S.S. Kanda also hypothecated the plant and machinery, apart from the gold and gold jewellery with Indian Bank for obtaining the credit facilities. Shri S.S. Kanda was a Non-Resident Indian settled in Canada and after failing to

meet his obligations, as aforesaid, he vanished from the scene leaving the Customs Department, MMTC and the Indian Bank to fight it out amongst themselves to claim whatever was left at the factory premises.

6. It appears that on 08.10.1992, stock verification was conducted by the Customs Department and 6700.700 gms of gold jewellery was sealed and handed over to MMTC for safe custody. The Commissioner of Customs also confiscated and seized 11120.88 gm of gold, then valued at Rs. 50,04,396/- under panchnama dated 16.10.1997. On 20.06.2000, he directed confiscation of 40.775 kg. of silver, then valued at Rs. 2,43,950/- in different forms and confiscated non-duty paid imported capital goods valued at Rs.1,08,59,192/- lying at the unit of Shri S.S. Kanda.

7. Indian Bank preferred O.A. No. 806/1995 before the Debt Recovery Tribunal-I, Delhi, impleading Shri S.S. Kanda - through his aforesaid three firms, a guarantor Mr. T.Shah Singh, Assistant Collector of Customs and the MMTC as party respondents. The DRT allowed the said O.A. vide order dated 22.02.2005 issuing recovery certificate in the sum of Rs.75,90,977/- against Shri S.S. Kanda, his firms, and the guarantor Mr. T.Shah Singh. It was directed that in case they do not make the payment of the aforesaid amount, the same shall be recovered by auction/sale of hypothecated assets, mortgaged properties and other personal properties of these parties. Since no payment under the recovery certificate was forthcoming, the immovable property and plant & machinery was sold by the Recovery Officer by auction in favour of M/s Panna Jewellery on 05.05.2006, who has been impleaded as respondent No. 2 in WP(C) No. 4553/2011 preferred by the Customs Department.

8. Before us, the only issue raised is with regard to the right of appropriation of the gold and gold jewellery, which had been recovered and confiscated by the Customs Department. We are not concerned with regard to the rights of the parties in respect of the plant & machinery, immovable property and other items which may have been recovered from the factory premises of Sh.S.S. Kanda. Since the MMTC and the Customs Department were also respondents before the DRT, the inter se rights of the Indian Bank, the MMTC and the Customs Department over the recovered gold were also adjudicated under Issue No.6 which read: “*who has its first charge/lien over the hypothecated stock of gold and jewellery as well as the plant & machinery between the applicant and the respondents No.3 & 4?*” The DRT while holding that the MMTC had the first charge over the said gold in its discussion observed as follows:

“Issue No.6

In the evidence by way of affidavit of Shri M. Ravinder & documents filed by the defendant nos.4, it has been stated that the defendant no.4 (MMTC) after satisfying that Shri Surjit Singh Kanda is a manufacturer and exporter of gold and is registered by the NOIDA Export Processing Zone, issued gold on loan to Shri Surjit Singh Kanda from time to time. MMTC issued gold to him on the recommendations of the Development Commissioner, NEPZ, NOIDA and the present claim is only with respect to 19 kgs of gold. On issuance of gold, Shri Surjit Singh Kanda signed and executed ‘letters of undertaking’ each time. It has been further stated that Shri Surjit Singh Kanda was issued 45 Kgs of gold out of which he manufactured jewellery of 26 kgs. Of gold and executed ‘letters of undertaking’ from time to time. The jewellery manufactured out of remaining 19 Kgs of gold was never exported. MMTC realized payment with respect to 26 Kgs of gold but a sum of

Rs.1,05,62,770/- is due and payable as on 31.12.1996 inclusive of interest and other charges with respect to remaining 19 kgs of gold. Copies of various undertakings have been annexed as Exhibits AW-1/1 to AW-1/10. The gold issued by the MMTC was the property of foreign supplier being on loan basis and no charge could be created by Shri Surjit Singh Kanda in favour of any of the said gold. Shri Surjit Singh Kanda undertook to keep the gold free from all encumbrances/appropriation. When Shri Kanda failed to export jewellery manufactured out of 19 kgs gold given on loan by MMTC, MMTC stopped issuing further gold to him. It has been further stated that the Indian Bank was aware that charge cannot be created by Shri Surjit Singh Kanda.

In my view, to decide this issue as to who has its first charge/lien over the hypothecated stocks of gold and jewellery as well as the plant & machinery, we will have to refer to the documents on record. The defendant no.4 has filed various documents (DW4/1 to DW4/11) to show that Shri Surjit Singh Kanda undertook to keep the gold free from all encumbrances/appropriation. All these exhibits pertain to period starting from 13.9.1991. However, on perusal of the agreement for packing credit (pre-shipment advance) (Ex.-9) executed by the defendant no.1 on 4.4.1990, it is clear that the defendant no.1 had secured the bank with gold & jewellery available from time to time at Plot No.JC2 & 3 Jewellery Complex, NEPZ Noida. Similarly, from the agreement of hypothecation of moveables, plant & machinery (Ex.A-12) executed by the defendant no.1 dated 4.4.1990, it is clear that the plant & machinery was hypothecated with the applicant bank. From these documents, I am of the view that the applicant bank has first charge/lien over the plant & machinery because the documents have been executed by the defendant no.1 in favour of the applicant bank on 4.4.1990; whereas the documentary evidence produced by the defendant no.4 pertains to a period beginning from 13.9.1991. But so far as the gold of 19 kg. is concerned the MMTC i.e. defendant no.4 has first charge as Mr. N. Manoharan in his cross examination has admitted that the Indian Bank did not pay any amount to

MMTC for the sale of this gold. I am convinced that the applicant advances the loan to defendant no.1 for the purchase of the gold but the MMTC's claim that defendant no.4 was given 19 kg. gold through five transactions. So the gold seized by the Custom Department is having first charge of MMTC. Accordingly, the first part of the Issue no.6 regarding the gold of 19 kg is concerned, is decided in favour of defendant no.4. So far as jewellery, plant and machinery is concerned, this issue is decided in favour of the applicant bank."

9. The DRAT in the three appeals preferred by the MMTC (Appeal No.166/2005), Indian Bank (Appeal No.126/2005) and the Customs Department through the Assistant Commissioner of Customs (Appeal No. 13/2008) held that the claim of the Indian Bank will get precedence over the claims made by the MMTC and the Customs Department and that the Indian Bank has the first charge over the gold, silver and plant & machinery. While holding so, the DRAT has sought to place reliance on two decisions in ***Central Bank of India Vs. Siriguppa Sugars & Chemicals Ltd. & Another***, (2007) 8 SCC 353; and, ***UTI Bank Ltd. Vs. Deputy Commissioner of Central Excise & Another***, (2007) 135 Comp Cas 329 (Mad) (Full Bench). It is this finding which is assailed before us by the MMTC and by the Customs Department in their respective writ petitions.

10. The submission of the learned ASG is that upon the confiscation of the goods under the said Act, the property in the goods vested in the Central Government. In this case the confiscation order dated 20.06.2000 passed by the Commissioner of Customs has attained finality, as it was not appealed against by any person. It is argued that the claims of the Customs Department are governed by the provisions of the said Act which is a self-contained code and it is not permissible to encroach upon the powers, rights

and claims of the Customs Department, which are regulated by the said Act. It is submitted that by virtue of Section 12 of the said Act, upon import of goods, duties of customs are payable at the specified rates under the Customs Tariff Act, 1975, except as otherwise provided in the said Act. However, since the payment of customs duty was exempted by the aforesaid notifications, no customs duty was paid by the MMTC at the time of import. However, the exemption from payment of customs duty was conditional upon fulfilment of the export obligation which, admittedly, was not met in respect of 19 kgs. gold. He referred to section 46 of the said Act to say that it was the responsibility and obligation of the MMTC to ensure the export of the gold jewellery, and on account of failure of the said obligation/condition under the exemption notification, the liability to pay the duty and all other charges fell upon MMTC by virtue of section 46(3) of the said Act. He submits that the Customs Department has power to recover its dues as arrears of land revenue, which cannot be adjudicated or defeated in separate proceedings by the virtue of Section 142 of the said Act.

11. It was also contended by the Customs Department that the claim of MMTC is not sustainable as it was for MMTC to take due care by securing the same before giving the gold on loan. They ought to have been aware that duty free imported gold would be liable for confiscation under the said Act in case the finished products are not exported.

12. The submission of learned counsel for the MMTC is that the only consequence of the failure of Sh.S.S. Kanda to export the gold jewellery of 19 Kgs., so far as the Customs Department is concerned, is that the said Department becomes entitled to recover the customs duty, penalty imposed

by it and interest. It is argued that the confiscation of the goods, i.e., the imported gold can only be for the purpose of recovering the aforesaid amounts. Confiscation of the goods does not mean that the Customs Department can appropriate the property in the imported goods, even after recovering the entire duty, penalty and interest. It is submitted that the goods imported were not contraband items, whose import was prohibited under the law at the relevant time. The import of the gold was valid and legal. It was only on account of the then prevalent governmental scheme vide the aforesaid exemption notification that duty free import was permitted on the condition that the manufactured goods would be exported. The consequence of failure to export the goods would only be that the Customs Department would recover the customs duty, penalty and interest. It is submitted by Mr. Chhabra that the Customs Department has already recovered the aforesaid amounts, amounting to Rs.2.27 Crores towards the component of customs duty, penalty and interest and, consequently, they have no justification for staking claim over the recovered gold.

13. Mr. Chhabra points out that the Customs Department did not even bother to contest the proceedings before the DRT despite them being a party. They did not stake any claim over the said recovered gold before the DRT. Since the present proceedings arise out of the original proceedings before the DRT, the Customs Department cannot be permitted to stake a claim on the said recovered gold, either at the appellate stage or in these proceedings.

14. Mr. Chhabra further points out that the prayer of the Customs Department in their writ petition is only to seek the setting aside of the order of the DRT and the DRAT. There is no prayer made to seek a declaration to

the effect that the Customs Department have the right to appropriate the said recovered gold. It is argued that the said prayer made by the Customs Department is vague and inconsequential.

15. The MMTC has also sought to assail the validity of the order dated 20.06.2000 passed by the Commissioner of Customs under Section 124 of the Customs Act confiscating the goods in question. However, the said order has attained finality and the same cannot be assailed before us in the first instance, as it is an appealable order. We are, therefore, not proceeding to examine this submission of the MMTC. Even otherwise, for the reasons indicated hereinafter we think that the issue whether the confiscation of the goods by the Commissioner of Customs was valid, or not, is inconsequential.

16. Mr. Chhabra further submits that so far as the Indian Bank is concerned, the said bank did not act in good faith and with due care and diligence while granting loan to Sh.S.S. Kanda, on the basis of security of the imported gold. He submits that the Indian Bank should have required Sh.S.S. Kanda to produce documents of title to the said imported gold. Since that was not done, the said bank cannot claim any charge or lien over the imported gold. It is argued that the MMTC, while acting as a canalizing agency, had loaned the gold to Sh.S.S. Kanda with the condition that the same would not be sold or hypothecated by him. He further submits that the Indian Bank did not put the MMTC to notice before granting credit facilities to Sh.S.S. Kanda against the gold loaned by MMTC.

17. Learned counsel for the Indian Bank has sought to support the impugned order passed by the DRAT by placing reliance on the decisions referred to in the said order. It is argued that the MMTC should have obtained independent and solvent security from Sh.S.S. Kanda before granting the gold on loan. It is further submitted that the Indian Bank acted *bona fide* in granting loans & facilities against, *inter alia*, the gold at the factory premises of Sh.S.S. Kanda as the said bank had no reason to believe that Sh.S.S. Kanda did not have ownership over the said gold.

18. Having considered the rival submissions and perused the impugned order, we are of the view that the said order cannot be sustained and the finding returned by the DRAT that the first charge over the recovered gold is that of the Indian Bank, is liable to be set aside. We are also of the view that the finding returned by the DRT that the first charge over the said gold is that of the MMTC is a correct finding and, accordingly, we restore the same.

19. So far as the claim of the Customs Department is concerned, we fail to appreciate as to how the Customs Department can seek to pursue their writ petition. Not only the prayers made by them in their writ petition are vague, the submissions of the learned ASG are equally meritless considering the fact that the entire customs duty, penalty and interest in respect of the said gold already stands fully recovered.

20. We repeatedly called upon the learned ASG to point out to us any provision in the Customs Act, which entitles the Customs Department to appropriate the property in the imported goods-the import of which is not prohibited in law in the aforesaid factual background. Merely because the

Customs Department has the right to recover the customs duty, penalty & interest in respect of the balance 19 kg of gold which was not converted into jewellery for export, the confiscation of the imported gold- the import whereof is not prohibited in law, can only be for the purpose of recovering the customs duty, penalty & interest, as is evident from section 125 of the said Act which provides:

“125. Option to pay fine in lieu of confiscation.

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force and shall in the case of any other goods, give to the owner of the goods [or, where such owner is not known the person from whose possession or custody such goods have been seized,"] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the provision to sub- section (2) of section 115, such fine shall not exceed the price of the goods confiscated, less in the case of imported goods duty chargeable thereon.

(2) [Where any fine in lieu of confiscation of goods is imposed under sub- section (1), the owner of such goods or the person referred to in sub- section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods."] ”

(emphasis supplied)

21. Confiscation of the imported goods under the said Act (which we are treating as valid in the present case) does not vest unconditional right, title and interest in such confiscated goods in the Customs Department as, if the importer avails of the right vested under section 125 of the said Act, the confiscation order would not take effect. Only in the eventuality of the

importer, or from whose possession or custody the goods have been ceased, failing to exercise the option to pay fine, duty and other charges payable in respect of the imported goods, the customs department would get the right to deal with the goods as its own.

22. No doubt, section 126 of the said Act provides that:

“126. On confiscation, property to vest in Central Government.

(1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods.”

However, the said provision cannot be read in isolation and has to be read in conjunction with section 125 of the said Act, as aforesaid. Confiscation of imported goods (import whereof is not prohibited in law) is done only as a means to recover its dues by the Customs Department. It does not mean that the Department can appropriate the said goods forever, even when the penalty, duty and other charges are paid by the importer. Admittedly, the Customs Department has already recovered its entire customs duty, penalty & interest amounting to Rs.2.27 Crores from the MMTC in respect of the 19 Kgs. of gold which was not utilized by Shri S.S.Kanda for export of jewellery.

23. That being the position, no further claim of the Customs Department in respect of the said gold can survive. Moreover, the Customs Department did not even bother to appear before the DRT to stake their claim on the recovered gold and they were proceeded ex-parte. Not having put up their claim before the original adjudicating authority, it was not open to the

Customs Department to straightaway stake their claim before the DRAT and thereafter before us. Consequently, we find no merit in the writ petition preferred by the Customs Department and dismiss the same. Though the claim made by the Customs Department appears to be frivolous, we refrain from subjecting them to Costs.

24. We now turn to consider the claims made by the MMTC and the Indian Bank over the said recovered gold. As seen from the order passed by the DRT, the said gold had been loaned by the MMTC to Sh.S.S. Kanda, who was a manufacturer and exporter of gold and was registered by the NEPZ. The said gold had been loaned to Sh.S.S. Kanda on the recommendations of the Development Commissioner, NEPZ, Noida. Sh.S.S. Kanda had signed and executed letters of undertaking on each occasion when gold was loaned to him. Copies of the undertakings given by Sh.S.S. Kanda were placed before the DRT as Exhibits AW-1/1 to AW-1/10. The gold issued by MMTC was the property of the foreign supplier, which was given on loan basis. Since the property in the said gold did not vest in Sh.S.S. Kanda, he could not create any charge or lien over the said gold in favour of any third party. Sh.S.S. Kanda had undertaken to keep the gold free from encumbrances/appropriation. The Indian Bank, it is clear, acted with gross negligence and at their own peril by advancing loans & facilities against the hypothecation of the said gold, as the said bank did not verify the title of Sh.S.S. Kanda in the said gold. The purchase invoice and payment receipt/sale certificate should have been sought by Indian Bank from Shri S.S.Kanda to establish the title of Shri S.S. Kanda in the hypothecated gold. Admittedly, that was not done. To be able to effectually

and validly create hypothecation over an article, the person creating the charge should have legal and valid title over the article. The Indian Bank ought to have done its due diligence to find out that the title in the gold vests with Sh.S.S. Kanda before accepting the same as a security for grant of loans & facilities to Sh.S.S. Kanda. Having not done that, in our view, the Indian Bank cannot claim any right, title or interest over the said gold.

25. So far as the MMTC is concerned, there was nothing further that they could have done while giving the gold on loan, apart from requiring Sh.S.S. Kanda to furnish an undertaking that he shall not encumber or create any charge over the loaned gold.

26. Reliance placed by the DRAT on the aforesaid decisions appears to be wholly misplaced. *Central Bank of India* (supra) and *UTI Bank Ltd.* (supra) are both decisions, which proceed on the basis that the borrower has the ownership in the goods which are pawned/charged with the creditor bank. In these circumstances, the Courts examined the issue of priority of rights of the bank vis-à-vis the other creditors and held that the bank had the first charge over even crown debts. However, that principle cannot be applied in the present case as Sh.S.S. Kanda did not have ownership rights in the gold and did not create a valid pledge/hypothecation over the said gold in favour of the Indian Bank.

27. Since the only issue considered by us is with regard to the right over the said gold, we have not been called upon to adjudicate the rights of the Auction Purchaser in respect of the other assets of Sh.S.S. Kanda and his three firms.

28. Accordingly, we set aside the impugned order passed by the DRAT dated 04.02.2011 and restore the order of the DRT dated 22.02.2005 insofar as it holds that the MMTC has the first charge over the recovered gold. The writ petition filed by the MMTC, accordingly, stands allowed while the writ petition of the Customs Department stands dismissed, leaving the parties to bear their own respective Costs.

(VIPIN SANGHI)
JUDGE

(SANJAY KISHAN KAUL)
JUDGE

DECEMBER 18, 2012
'BSR'