IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Reference No.1 of 2012
Arising out of
TAX CASE No. 12 of 2002

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Commissioner of Customs Preventive, Patna, Birchand Patel Path, P.S. Kotwali, District- Patna.

.... Petitioner/s

Versus

Smt. Nirmala Mitra, since deceased now represented by her daughter Smt. Esha Ghosh, C/o- Sri P.K. Ghosh, Flat No. A-01/07, Labony Estate, Salt Lake, Kolkata.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sanjay Kumar, Asst. Solicitor General.
For Central Excise
And Customs : Mr. Satya Prakash Tripathy, Sr. Standing Counsel, Excise & Custom.
For the Respondent/s : Mr. Prabhat Ranjan, Advocate.

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CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA
and
HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)

Date: 27-09-2016

The present is a reference to this Court under Section 130-A of the Customs Act, 1962 arising out of an order passed by Customs, Excise and Gold (Control) Appellate Tribunal, Eastern Bench, Kolkata (hereinafter referred to as "the Tribunal") on 19th of June, 2001 in Appeal No. C-416/99.

2. Earlier this Court in Tax Case No. 12 of 2002 directed the Tribunal to submit statement of facts after framing the following two questions of law:-

> "(a). Whether in the obtaining factual matrix the tribunal is justified in coming to hold that there

was no seizure of gold bars from the present respondent, who is the legal representative of Santo Kumar Mitra, on the ground that the concept of seizure in essentiality has not been satisfied by the Customs Department?

(b). Whether the tribunal is justified in holding that during the interregnum period, after the order of the Judicial Commissioner, the articles seized by the police never came to the physical or symbolic possession of Nirmala Mitra (wife of Santo Kumar Mitra), and whether such a finding recorded by the tribunal can be held to be perverse?"

3. The statement of facts based on the aforesaid order sent to this Court is to the effect that C.I.D. Branch of Bombay Police instituted a case against Late Santo Kumar Mitra for defalcation of Government money on 04.11.1950 when it seized amongst others foreign-marked gold bars from his residential premises in Bombay. The case of the police was that out of the defalcated money, Late Sri Mitra acquired movable and immovable properties. Sri Mitra was tried for the offences under Sections 409, 420, 467 and 120B of the Indian Penal Code. Though the statement of facts does not make mention about the result of the criminal trial but the order of the Adjudicating Authority dated 16th of August, 1999 mentions that Sri

Mitra was convicted and a fine of Rs. 15 lacs was imposed upon him and he was also awarded substantive sentence. After serving of the sentence of imprisonment, Sri Mitra died.

4. The Judicial Commissioner passed an order on 5th of January, 1993 after conclusion of trial to return valuables in the form of ornaments and gold of Indian and foreign origin to Smt. Nirmala Mitra after she deposited Rs. 17,95,375/- towards the fine and other awards. After such order was passed, the Assistant Collector, Central Excise filed a petition before Judicial Commissioner, after serving notice to the learned Advocate appearing on behalf of Smt. Nirmala Mitra, to the effect that the State Bank of India, Main Branch, Ranchi should give delivery of the valuables to Smt. Nirmala Mitra in the presence of the Central Excise and the representative of the Deputy Commissioner, Ranchi whereas foreign origin gold may be kept in the custody of the State Bank of India till necessary inquiry and investigation is made by the Central Excise. The Judicial Commissioner, *inter alia*, passed an order on 8th of January, 1993 to the following effect:-

> "The official of the Central Excise will also remain present in order to locate as to whether any gold of Foreign Origin is kept in the boxes. Smt. Nirmala Mitra will file a petition in this Court by 8.1.93 giving an undertaking supported with an affidavit to this effect that she will keep the gold of Foreign Origin in safe custody of the State Bank of India,

Main Branch, Ranchi and an intimation to this effect after doing so will be given to this Court by 12.1.93. The Central Excise will be at liberty to take legal steps with regard to the gold of Foreign origin after the same is deposited by Smt. Nirmala Mitra in safe custody with the Main Branch of the State Bank of India. The Central Excise will be at liberty to initiate necessary enquiry according to law after having learnt that so much quantity of gold of foreign origin has been kept by Smt. Nirmala Mitra in safe custody of the State bank of India, Main Branch, Ranchi after taking delivery of entire contents of the three boxes."

5. In terms of the liberty granted by the Judicial Commissioner, the Assistant Collector, Central Excise & Customs passed a detention order on 18th of January, 1993 as there is reason to believe that this gold of foreign origin is illegally imported in India. After giving notice to State Bank of India to produce the foreign origin gold on 4th of March, 1993, and to the respondent, a seizure-memo was prepared on 4th of March, 1993. The seizure-memo mentions that the goods have been seized from Smt. Nirmala Mitra. She is signatory to such seizure-memo.

6. The Assistant Collector of Central Excise & Customs served a notice on 12th of April, 1993 to Mrs. Nirmala Mitra as to why the gold seized on 4th of March, 1993 bearing foreign marking should not be confiscated under Sections 111(d) and 111(p) of the Customs Act, 1962 and why penalty under Section 112(b) of the Customs Act, 1962 should not be imposed on her for

contravention of the provisions of Section 11 of the Customs Act, 1962 read with Section 3(1) of the Import & Export (Control) Act, 1947.

7. The learned Commissioner as an Adjudicating Authority reproduced the reply submitted by the respondent dated 25th of March, 1994 in its order dated 9th of August, 1999. The relevant extract from the reply reads as under:-

> "(2) That the gold with foreign markings had been purchased by Shri S.K. Mitra during the period from 1941 to September, 1949 and the Customs Act, 1962 at the time was not in force. At that period of time, Sea Customs Act, 1878 was in operation. Section 178 A of the Sea Customs Act, 1878 which was/is parallel to the Section 123 of the Customs Act, 1962 was first incorporated vide Sea Customs (Amendment) Act, 1955. Thus Section 178A of the Sea Customs Act, 1878 was also not operative during the period of purchasing of foreign gold by Shri S.K. Mitra. Hence, the onus of providing the ingredient that the goods were illegally imported into the country is with the department.
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> xxx xxx xxx
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> (5) That the onus to prove that the gold is smuggled, is with the department and the department has failed to establish that the impugned gold was smuggled into the country. No inquiry has been made to substantiate the smuggled nature of gold in question. Even no inquiry has been made with the gold dealer M/S Choksi Manilal Chimanlal & Company of Bombay whose bag was seized alongwith gold by the Bombay police during 1950.
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> (6) That in his deposition before the Judicial Commissioner, Ranchi Shri S.K. Mitra had also told that he had purchased and imported the gold through Reserve Bank of India

had hence a false allegation has been made in the show cause notice that the impugned gold was smuggled into India. No evidence in support of the aforesaid allegation has also been cited in the show cause notice."

8. The respondent appeared for personal hearing and reiterated her stand which was submitted in the written reply. The Adjudicating Authority recorded the following findings while discussing the reasonable belief in the mind of the seizing officers at the time of seizure of the impugned gold:-

"(1) The gold, seized in this case, clearly bore foreign markings. The same could be segregated in three different forms (a) 289 pcs. of foreign marked gold biscuits in square shape weighing 16855.925 gms. were in the form of 24 gold biscuits which bore the inscription of N.M. Rothschild & Sons 996-Fine-London. (b) The second category of 24 Gold Biscuits were in rectangular shape which weighed 2799.600 gms, this also bore the inscriptions of N.M. Rothschild & Sons 996-Fine-London. This clearly suggests that both the category of Gold Biscuits were of foreign origin. (c) Half Sovereign of 22 carrot of foreign origin weighing 3.750 gms. The foreign markings thereon clearly suggested that the impugned gold have been brought into India from abroad.

(2) The second factor which led to the reasonable belief in the mind of the officers was non possession and consequent non production of any documentary evidences to suggest lawful import of the impugned gold by Smt. Nirmala Mitra, the alleged owner of the foreign marked gold in question at the time of seizure of impugned gold.

Smt. Nirmala Mitra appeared before the Assistant Collector of Customs & Central Excise, Ranchi on 19.01.1993 alongwith her daughter Smt. Ela Ghosh who failed to submit any documents in support of lawful import of the foreign marked gold in question. They were again directed to come with necessary documents on 25.01.1993 to satisfy the authorities regarding lawful import of the impugned gold but they failed to turn-up on the date. They were again directed to appear on 08.02.1993 alongwith necessary evidences but they failed to turn-up even on this date.

Accordingly, the Customs authorities had no option except to seize the aforesaid gold on 04.03.1993 under a regular panchnama. Section 3 of Imports & Exports (Control) Act, 1947 restricts/prohibits the import and export of foreign marked gold into India except under the authority of a valid export/import license of permit. The Act came into force during the year 1947. The impugned gold was detected and initially seized by the officers of C.I.D. Branch of Bombay Police in the year 1950 when Imports & Exports (Control) Act, 1947 and Section 19 of Sea Customs Act, 1878 were already in force. A prohibition/restriction in respect of import of any class or category of goods imposed under Section 3(1&2) of Imports & Exports (Control) Act was also deemed to be prohibited under Section 19 of the Sea Customs Act, 1878 which was not repealed but re-enacted as Section 11 of the Customs Act, 1962."

9. The Adjudicating Authority also recorded a finding that late Sri Mitra stated before the Bombay Police that he was doing business in gold and had acquired the foreign marked gold in question from Reserve Bank of India, Bombay through bankers/brokers. This version of late Sri S.K. Mitra was said to be incorrect as Late Sri Mitra was a State Government employee and during course of his service at Namkum Vaccination Institute, Ranchi (a State Government

department), he defalcated huge amount of Government money and that no documents were produced in support of his purchase of gold from Reserve Bank of India.

10. The Adjudicating Authority also recorded that the impugned gold bars detected and initially seized by the officers of C.I.D. Branch in the year 1950 when Imports & Exports (Control) Act, 1947 and Section 19 of the Sea Customs Act, 1878 were in force. A probation/restriction in respect of import of any gold or category of goods under Section 3 of Imports & Exports (Control) Act, 1947 was also deemed to be prohibition under Section 19 of the Sea Customs Act, 1878.

11. It was on the said basis, the Adjudicating Authority confiscated the foreign marked gold weighing 19831.805 gms. under Section 111(d) of the Customs Act, 1962 and also imposed a penalty of Rs. 1,00,000/- under Section 112(b) of the Customs Act, 1962 upon the respondent herein.

12. In an appeal against the said order, the Tribunal, examined the contentions by framing two issues which reads as under:-

> (1). Whether the gold in question having been seized by the police, and subsequently transferred to the customs cannot be held to be a seizure under the Customs Act so as to invoke the provisions of Section 178A of Sea Customs Act, 1878 or the provisions of Section 123 of the Customs Act 1962?

> (2). Even if the seizure is held to be by the custom authorities, whether the provisions of the said two sections will not apply inasmuch as they were not in existence at the time of original seizure by the police?

13. In respect of first issue, the Tribunal referred to Supreme Court judgment in Gian Chand & Ors. Vs. State of Punjab, A.I.R. 1962 SC 496=1983 ELT 1365 (SC) and held as follows:-

> "7. By applying the ratio of the above decision of the Hon'ble Supreme Court which is more or less akin to the facts and circumstances of the present case we hold that there was no seizure by the customs authorities under the Customs Act so as to invoke the provisions of section 178A of the Sea Customs Act, 1878 or section 123 of the Customs Act, 1962 against the appellants for placing the onus upon them as regards the non-smuggled nature of the gold in question. We also draw support from the decision of the Tribunal in the case of Shri K. Deeman v. CC, Madras-1987 (11) ECR 333 (CEGAT-SRB) and in the case of Shri R. Ramesh v. CC, Madras- 1987 (10) ECR 614 (CEGAT-SRB)."

14. In respect of second ground, the Tribunal held that onus to prove non-smuggled nature of gold was not on the appellant (the respondent herein) as when the gold in question was seized by the police in the year 1950, the provisions of Section 178A of the Sea Customs Act, 1878 or the provisions of Section 123 of the Customs Act, 1962 were not in operation. Referring to Supreme Court judgment in Amba Lal vs. UOI & Ors., AIR 1961 SC 264 = 1983 ELT 1321 (SC), it was held that the provisions of the Sea Customs

Act, 1878 or the Customs Act, 1962 were prospective in operation and will not apply in respect of the seizures made prior thereto. The Tribunal recorded the following finding:-

> "8. The appellant also succeeds on the second ground. Admittedly the gold in question was seized by the police in the year 1950, when the provisions of section 178A of the Sea Customs Act, 1878 or the provisions of Section 123 of the Customs Act, 1962 were not in operation. The question arises as to whether the said provisions can be made retrospective in operation and burden to prove can still be placed upon the accused. We find that the Hon'ble Supreme Court in the case of Amba Lal v. UOI & Ors.- 1983 ELT 1321 (SC) has held that the said provisions of the Sea Customs Act or the Customs Act, 1962 were prospective in operation and will not apply in respect of the seizures made prior to that. Admittedly the gold in question was in India in the year 1950 whereas section 178A of the Sea Customs Act was inserted in 1955 without retrospective operation. We also find that in the case of Jal Hormusji Khajotia v. TC Set- 2000 (125) ELT 425 (Bom), the provisions of section 178 of Sea Customs Act, 1878 were not made applicable to the seizure made before the date of insertion of the said section. As such by following the earlier decisions we hold that the section 178 of Sea Customs Act, 1978 or section 123 of Customs Act, 1962 were not applicable to the facts and circumstances of the case."

15. After returning such finding, the Tribunal returned a finding that the Commissioner has not referred to any positive evidence on record to show that the gold found from the possession of Sri Mitra was illegally smuggled into the Country, as the Revenue

could not produce any evidence as regards the illegal character of the gold in question. Therefore, the same cannot be presumed to be smuggled one. The Tribunal referred to the statement of Sri Mitra recorded at the time of seizure and during investigation that gold in question was purchased by him from Reserve Bank of India through brokers. Since the prosecution case before the Criminal Court was that the gold was acquired by Sri Mitra by defalcation of money during the period 1941 to 1949, therefore, there is no evidence produced by the Revenue to show that the gold was smuggled and acquired illegally in the year 1950. Consequently, the appeal was allowed and confiscation and penalty imposed were set aside.

16. Before this Court, learned counsel for the parties agreed that since seizure of the gold was in the year 1950, it was Sea Customs Act, 1878 (for short "the Act") which will be relevant to determine the violation of the provisions of the Act and the right of the Revenue to confiscate such alleged smuggled goods. It is argued by the Revenue that Section 178A of the Act as inserted by the Sea Customs (Amendment) Act, 1955 (Act No. 21 of 1955 on 7th of May, 1955) will be applicable to the goods in question for the reason that it lays down procedure of evidence which would be applicable when the question of proof arises whereas, the counsel for the assessee argued that it cannot be taken into consideration as it has no retrospective

operation.

17. Learned counsel for the Revenue argued that Section 3 of the Import and Export (Control) Act, 1947 (hereinafter referred to as "the Control Act") empowers the Central Government to make provision for prohibiting, restricting or otherwise controlling in all cases or in specified class of cases, the import/export of goods of any specified description. It is pointed out that such Control Act came into force on 25th of March, 1947 and on the same day, the Foreign Exchange Regulation Act, 1947 was also enacted. The three Statutes i.e. Sea Customs Act, 1878, Import and Export (Control) Act, 1947 and the Foreign Exchange Regulation Act, 1947 have to be read in tandem. The relevant provisions of the three Statutes reads as under:-

> "<u>Sea Customs Act, 1878</u>
>
> 19. The Governor General in Council may from time to time, by notification in the Gazette of India, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of British India or any specified part of British India.
>
> 178. Any thing liable to confiscation under this Act may be seized in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling.
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> 179. All things seized on the ground that they are liable to confiscation under this Act shall, as soon as conveniently may be, be delivered into the care of any Customs-officer authorized to receive the same.

If there be no such officer at hand, all such things shall be carried to and deposited at the Custom-house nearest to the place of seizure.

If there be no Custom-house within a convenient distance, such things shall be deposited at the nearest place appointed by the Chief Customs-Authority for the deposit of things so seized.

183. Whenever confiscation is authorized by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

Foreign Exchange Regulation Act, 1947

8. Restrictions on import and export of certain currency and bullion.-(1) The Central Government may, by notification in the Official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed bring or send into the States any gold or silver or any currency notes or bank notes or coin whether Indian or foreign.

Explanation.- The bringing or sending into any port or place in the States of any such article as aforesaid intended to be taken out of the States without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing, or as the case may be sending, into the States of that article for the purposes of this section.

(2) No person shall, except with the general or special permission of the Reserve Bank or the written permission of a person authorized in this behalf by the Reserve Bank, take or send out of the States any gold, jewellery or precious stones, or India currency notes, bank notes or coin or foreign exchange other than foreign exchange obtained from an authorised dealer.

Import and Exports (Control) Act, 1947

3. Powers to prohibit or restrict imports and exports.- (1) The Central Government may by order published in the Official Gazette, make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order,-

(a) the import, export, carriage coastwise or shipment as ships' stores of goods of any specified description;

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under Section 19 of the Sea Customs Act, 1878 (8 of 1878), and all the provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted.

<u>Notification No. 12(II)-F.1/48 published in the Gazette of India, Extraordinary, New Delhi on August 25, 1948.</u>

In exercise of the powers conferred by Sub-section (1) of Section 8 of Foreign Exchange Regulation Act, 1947 and in super session of the notification of the Government of India in the late Finance Department No. 12(11)-F.1/47, dated 27-3-1947, the Central Government is pleased to direct that, except with the general or special permission of the Reserve Bank, no person shall bring or send into the Provinces of India from any place outside the Sub-continent of India or from any place in French or Portuguese territories in India,

(a) any gold coin, gold bullion, gold sheets or gold ingot whether refined or not, or

(b) any silver bullion, any silver sheets or plates which have undergone no process of manufacture subsequent to rolling or any uncurrent silver coin."

18. Learned counsel for the Revenue argued that Section 8 of the Foreign Exchange Regulation Act, 1947 prohibited to bring or send into States any gold or silver or any currency notes or bank notes or coin whether Indian or foreign. The relevant provisions of the Act as was in force in the year 1950 and the notification issued on 25th of August, 1948 prohibited import of gold except with the general or special permission of the Reserve Bank.

19. It is, thus, contended that the notification dated 25th August 1948 though issued under sub-section (1) of Section 8 of the Foreign Exchange Regulation Act, 1947 but it is operative under the Act as well in terms of Section 19 of the Act, which contemplates that the Central Government may prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of British India or any specified part of British India. It is also pointed out that the show-cause notice mentioned violation of the Control Act but the notification issued under the Foreign Exchange Regulation Act, 1947 has to be read under the Control Act as well as under the Act.

20. It is, thus, contended that foreign marking gold having recovered by the Bombay police in the year 1950 is liable to be confiscated in terms of Section 182 of the Act as the explanation as to time of import and its source of purchase was required to be adduced by the person from whose custody the foreign marking gold was recovered. The appellant has discharged the initial onus of the goods being smuggled as they were bearing foreign marking. Then the onus shifted to the assessee to prove that it was purchased with the permission of the Reserve Bank of India. Therefore, the contravention of the provisions of the Act and that of Foreign Exchange Regulation Act, 1947 is established. Thus, the Revenue has discharged the onus of recovery of smuggled goods justifying confiscation of goods. It is also argued that taking over of the goods was not from police custody in terms of the order of the Judicial Commissioner but in fact from the respondent, after conclusion of trial and on deposit of the fine etc. The goods were free from any encumbrance or control of police on that day. It is thus not seizure of the goods from the police but from the respondent as the Court has ordered delivery of goods to Smt. Nirmala Mitra. The Revenue has taken physical possession after the detention order was passed. Therefore, the finding recorded by the learned Tribunal that the goods have been seized from the police is not correct finding in law. In the year 1993 the Customs Authorities

have seized the goods so as to proceed under the Act after having control of the seized goods from the Court after conclusion of the criminal case so as to initiate confiscation proceedings under the Act. Such seizure was to initiate proceedings under the Act and it cannot be said to be seizure of goods from the police.

21. The stand of the respondent is that Sri Mitra has purchased the gold from Reserve Bank of India. Learned counsel for the assessee supported the order passed by the Tribunal and submitted that the seizure of the foreign marked gold bars was not from the custody of Sri Mitra or after his death from his wife but from the police, therefore, in view of the judgment in Gian Chand's case (supra), the goods have not been seized under the Act in respect of which proceedings can be taken against the respondent. It is also argued that the goods were taken in possession by the police in the year 1950 when Section 178-A was not in force. Therefore, the Custom Authorities have to prove that the gold seized by the police was a foreign gold brought to India in contravention of the statutory prohibition. It is argued that the prohibition for importing gold came into force only on 25th of August, 1948 whereas, the stand of Sri Mitra was that the gold was purchased between the years 1941 to 1949. Therefore, the onus was on the Revenue to prove the import of gold when the prohibition was in force. Since the Revenue has not proved

any such fact, therefore, the order of the Tribunal cannot be said to be giving rise to any substantial question of law for the opinion of this Court.

22. We have heard learned counsel for the parties and find that the second question needs to be taken up first for decision.

23. A perusal of the order passed by the Judicial Commissioner on 5th of January, 1993 shows that the ornaments were ordered to be released to her after conclusion of trial and on payment of fine of Rs. 15,00,000/- and other expenses but before the physical delivery could be given to Smt. Nirmala Mitra, the Custom Authorities invoked the jurisdiction of the Judicial Commissioner in terms of the liberty granted by Ranchi Bench of the Patna High Court. The order passed by the Judicial Commissioner on 8th of January, 1993 as reproduced in Paragraph 4 of the order is that Smt. Nirmala Mitra shall give an undertaking to the effect that she will keep the gold of foreign origin in safe custody of the State Bank of India and Central Excise would be at liberty to take legal steps with regard to gold of foreign origin after the same is deposited by Smt. Nirmala Mitra in safe custody. Thus, the goods came in symbolic possession of Smt. Nirmala Mitra and were in actual custody of the State Bank of India. It is thereafter; the Custom Authorities have called upon the Bank to produce the goods including foreign marked gold bars and

taken control of such goods after notice to the respondent on 4th of March, 1993. Therefore, the seizure of the goods is not from the police but after the goods were symbolically returned to Smt. Nirmala Mitra but kept in joint custody by virtue of an order passed by the Judicial Commissioner. Since there is no challenge to the order passed by the Judicial Commissioner, the physical possession of the foreign gold bars shifted from the police to Smt. Nirmala Mitra though there was restraint on physical delivery of goods to her. It is thereafter, the goods were actually seized by the Custom Authorities when a notice was served on the Bank and to Smt. Nirmala Mitra for seizure of such goods. Thus, the goods came into symbolic possession of Smt. Nirmala Mitra and the finding recorded by the Tribunal to the contrary is not tenable in law.

24. The judgment in Gian Chand's case (supra) deals with a situation where delivery of goods to the Custom Authorities under later part of Section 180 of the Act was not found to be seizure under the Act as the delivery of goods to the Custom Authorities by the Magistrate are not taken from the possession of the person accused in the criminal case. But in the present case, the order of the Judicial Commissioner on 5th of January, 1993 orders the delivery of the goods to Smt. Nirmala Mitra but circumscribed it when another order was passed on 8th of January, 1993. Some of the relevant extracts have

been reproduced above. Therefore, the judgment in Gian Chand's case (supra) cannot be extended to the facts of the present case.

25. Therefore, in respect of the second substantial question of law, it is held that symbolic possession of the articles initially seized by the police was that of Smt. Nirmala Mitra on the date of detention of goods by the Custom and that finding recorded by the Tribunal is contrary to the facts on record and, therefore, not sustainable.

26. In respect of the first substantial question of law, it may be noticed that the seizure of foreign marked gold bars by the Customs was from Smt. Nirmala Mitra after the death of her husband Santo Kumar Mitra from whose possession the police has initially taken control of not only the foreign marked gold bars but the ornaments as well. Under Section 178 of the Act, any officer of the Custom can seize anything liable to confiscation with the object of bringing by smuggling. The goods were seized by the Custom Authorities on 4^{th} of March, 1993 on the reasonable belief that they are liable to confiscation that they have been imported into India illegally. The violation is of the prohibition contained by Notification dated 25^{th} of August, 1948. The goods were seized by the Bombay police in the year 1950. Though, the seizure under the Act was on 4^{th} of March, 1993 but the relevant time to consider the legality of import

is the year 1950 or prior thereto.

27. The stand of the respondent before the police as well as in written reply to the Custom Authorities is that Sri Mitra purchased the foreign marked gold bars from the Reserve Bank of India through brokers. The stand of the respondents that it was purchased between the years 1941 to 1949 is not made out. The requirement of permission from Reserve Bank of India came to be introduced only by notification dated 25th of August, 1948. Prior thereto, there was no prohibition of import of gold. Therefore, once Sri Mitra has taken a stand of purchase of foreign marked gold bars from the Reserve Bank of India, it shows that the time of import was after 25th August 1948. It is for him or for his legal heirs to prove the purchase of gold from Reserve Bank of India any time.

28. Though Section 178-A puts the onus of proof with the person from whom recovery was effected but even prior thereto, the Custom Authorities could prove such facts to shift the burden on the respondent to show that the goods were not smuggled unauthorizedly or were purchased through the authorized sources. Since undisputedly the gold bars are of foreign marking, therefore, they have been proved to be imported. The stand of Sri Mitra and later of his wife is that they have purchased the gold bars through brokers from Reserve Bank of India but in the absence of any proof of

purchase from Reserve Bank of India, the initial burden which was on the Customs shifted to the respondent and the respondent having failed to prove the purchase, the Tribunal erred in law in holding that Sri Mitra or his wife discharged the onus only by the assertions that they have purchased it from the brokers. It may be noticed that neither any name of broker has come on record or the date of purchase or any other evidence of purchase that is invoices etc. Therefore, mere stand of the respondent in reply is no proof of purchase of foreign marked gold bars from the Reserve Bank of India as mandated in the notification dated 25th of August, 1948.

29. The Supreme Court in a judgment reported as Issardas Daulat Ram and othes Vs. Union of India and others, A.I.R. 1966 SC 1867 was examining a situation where an argument was raised that the department has not led any evidence that the gold has been imported after restrictions were imposed in March, 1947. The Court found that if the gold had been imported earlier, it would be extremely improbable that the gold will remain in the same shape of bars and with the same fitness as when imported after the passage of this length of time. In the aforesaid case, the assessee in fact denied that the gold is of foreign origin. Considering the conduct of the appellants, it was found that it was illicit import.

30. In the case reported as Collector of Customs,

Madras and others Vs. D. Bhoormall, (1974) 2 SCC 544 the Court examined the question that the fundamental rules relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary is on the department but while appreciating the scope and nature of the onus cast by it, the department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth and the law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. The Court observed as under:-

> "**30.** It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and — as Prof. Brett felicitously puts it — "all exactness is a fake". El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a

degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered — to use the words of Lord Mansfield in *Blatch* v. *Archer (1774) 1 Cowp 63, 65 —* "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the persons concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and, if he fails to establish or explain those facts, an adverse inference of fact may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result, prove him guilty. As pointed out by Best (in '*Law of Evidence'* 12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, *presumptio juris*; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumptions of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden, to discharge which, very slight evidence may suffice.

33. Another point to be noted is that the incidence, extent and nature of the burden of proof in proceedings for confiscation under the first part of the entry in the 3rd column of clause (8) of Section 167, may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty *in rem* which is enforced against the goods and the second kind of penalty is one *in personam* which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was *concerned in the smuggling.* *(Emphasis supplied)*

34. The propriety and legality of the Collector's impugned order had to be judged in the light of the above principles.

35. It is not correct to say that this is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of Baboothmull and Bhoormull, could reasonably lead to the conclusion drawn by the Collector, that they were smuggled goods. These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them."

31. The proceedings of confiscation of goods are proceedings in rem. The department is to prove of the goods being smuggled goods alone. The confiscation proceedings are not the penal proceedings as penal proceedings are contained in Section 167 of the Act. It is at best quasi-judicial proceedings which are required to be carried out in accordance with the principles of natural justice and as per the principles of onus of proof as laid down in D. Bhoormall's case (supra).

32. In a judgment reported as Sarbananda Sonowal Vs. Union of India and another, (2005) 5 SCC 665, the Court was examining the burden of proof in a criminal case and also the situation where any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. The Court said to the following effect:

> "**27.** Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In *Shambhu Nath Mehra* v. *State of Ajmer A.I.R. 1956 SC 404* it was held as follows: (SCR p. 203)
>
> > Section 106 is an exception to Section 101. The latter with its Illustration (*a*) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to

> relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.

28. In *Collector of Customs* v. *D. Bhoormal (1974) 2 SCC 544* proceedings were initiated under Section 167(8)(*c*) of the Customs Act for confiscation of contraband or smuggled goods and it was observed: (SCC p. 553, paras 31-32)

> "Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.
>
> … On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and, if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result, prove him guilty."

29. In *State of W.B.* v. *Mir Mohd. Omar (2000) 8 SCC 382* it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in *Sanjay* v. *State (NCT of Delhi) (2001) 3 SCC 190* and *Ezhil* v. *State of T.N. (2002) 9 SCC 189.*

30. In *R.* v. *Oliver (1943) 2 All ER 800* the accused was charged with having sold sugar as a wholesale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In *R.* v. *Turner (1816) 5 M&S 206* the learned Judge observed as follows: (All ER p. 715 D)

> "I have always understood it to be a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it and not he who avers the negative."

31. In *Williams* v. *Russel (1993) 149 LT 190* the learned Judge held as under:

> "On the principle laid down in *R.* v. *Turner (1816) 5 M&S 206* and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

32. Section 9 of the Foreigners Act regarding burden of proof is basically on the same lines as the corresponding provision is in UK and some other Western nations and is based upon sound legal principle that the facts which are peculiarly within the knowledge of a person should prove it and not the party who avers the negative."

33. In view of the aforesaid judgments, we arrive at a conclusion that though the initial onus was on Revenue to prove the illegal import of gold and that such illegal import stand established when almost 20 Kg. of gold with foreign marking was confiscated in the year 1950. Since the gold was seized in the year 1950, it would be believed to have been imported soon before that as such gold imported would not be kept as such for a long period as alleged by the deceased Sri Mitra that it was imported between the years 1941 to 1949. In fact, the prohibition of import of gold came into force on 25th of August, 1948. Therefore, for more than two years, it is unbelievable that imported gold will be retained as such. Such stand of the Revenue has to be examined keeping in view the stand taken by the assessee that he purchased the gold when there was no prohibition and also stated that he purchased it from Reserve Bank of India through brokers. The assessee has failed to discharge the special fact within his knowledge as to when the gold was purchased and through whom the purchase of the gold was made. To avoid the rigour of prohibition, the onus was on the respondent being a fact within his special knowledge, thus, in terms of Section 106 of the Evidence Act, the onus was on Sri Mitra and thereafter his wife to prove that the

gold imported is prior to prohibition vide notification dated 25th of August, 1948 and or has been purchased from the Reserve Bank of India. Since there is no proof of any of these facts, therefore, the learned Tribunal has erred in law in holding that mere assertion that gold has been purchased by Sri Mitra cannot partake the character of proof of legal purchase.

34. Consequently, we find that the seizure and confiscation of the foreign marked gold bars is legal and proper as such gold bars were proved to be brought into India after the prohibition on 25th of August, 1948 and, thus, the order of the Tribunal holding otherwise is not sustainable.

35. Consequently, the questions of law are answered in favour of the Revenue and against the assessee. The order passed by the Adjudicatory Authority is restored.

(Hemant Gupta, J)

Ahsanuddin Amanullah, J **I agree.**

(Ahsanuddin Amanullah, J)

P.K.P.
A.F.R.

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