

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

Judgment reserved on : 09.03.2018

Date of decision : 24.04.2019

+ Crl.M.C.No.4316/2016 and Crl. M.A. Nos. 17965/16,
20232/16, 12268/17, 16064/17 and 16066/17

DIRECTORATE OF REVENUE INTELLIGENCE. Petitioner

Through: Mr. Satish Aggarwala,
Advocate

versus

M/s PRK DIAMONDS PVT. LTD. & ANR. Respondents

Through: Mr. Dalip Singh, Advocate

&

+ Crl.M.C.No. 4767/2016 and Crl.M.A. No. 19836/2016

DIRECTORATE OF REVENUE INTELLIGENCE. Petitioner

Through: Mr. Satish Aggarwala,
Advocate

versus

INDER PRAKASH KOHLI @ BABOO KOHLI Respondents

Through: Mr. Dalip Singh, Advocate

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The petitioner, the Directorate of Revenue Intelligence, assails
vide these two petitions a common order dated 31.8.2016 of the

learned Chief Metropolitan Magistrate vide which a Mercedes car bearing No. DL-1CQ-7525 containing 8 Kg. of gold which was seized from it on 8.12.2015 qua which one Mr. Sunny Kakkar and one Ahadees K were arrested, for carrying smuggled gold registered in the name of M/s PRK Diamonds India Pvt. Ltd. of which Mr.Sunny Kakkar was its director, permitted the release of the said Mercedes car on superdari and vide the said order also permitted the release of a Honda City car bearing No. DL-4CAH 8319 which was alleged to have been utilized for carrying smuggled gold on superdari to Sh. Inder Prakash Kohli @ Baboo who had been arrested along with Mr.Vinod Khanna and Mr.Hari Sharan Khanna on 20.6.2014 for the alleged commission of offences punishable under Section 132/135 of the Customs Act, 1962 in connection with the recovery of gold bars weighing 5 Kgs valued at 1,24,22,475/- as per the tariff value as per the customs notification No. 46/14/NT/96/2014 with market value at Rs. 13,65,5000/- seized vide panchnama dated 29.6.2014. Both the vehicles referred to herein above were allowed to be released on superdari holding that in view of the verdict of this Court in the case of *Manjeet Singh v. State*, in Crl.M.C. No. 4485/2013 and Crl. M.A. No. 16055/2013, the vehicle seized during the investigation including those seized under the provisions of the Customs Act ought to be released to the registered owner of the vehicle on the undertaking that in the event of confiscation of the vehicle in adjudication proceedings, the registered owner would furnish a bond to the value of the vehicle to the department or as ordered by the department and it was observed by the learned Chief Metropolitan Magistrate to the effect that the

vehicles if not released, would deteriorate with time and if not released the upkeep thereof would drain the resources and the space and that the presumption of inconvenience has to be given due weightage and the accused ought not to be penalized indirectly.

2. On behalf of the petitioner, it has been contended that the presumption having been drawn under Section 110 of the Customs Act, 1962, the vehicles are liable to confiscation and that the learned Chief Metropolitan Magistrate, New Delhi, has no jurisdiction to release the same on any condition whatsoever. It was also contended on behalf of the petitioner that the vehicle having been produced before the Court could not have been released in terms of Section 451 of the Cr.P.C. and that the Customs Act, 1962 being a Special Act under which the vehicles used for receiving, carrying and transporting smuggled goods had been seized as per the provisions of the Customs Act, the provisions of the Special Act override the general provisions of the Code of Criminal Procedure and that there is no inherent power vested with the learned Chief Metropolitan Magistrate to release the said vehicles on superdari. It was also submitted on behalf of the petitioner that the vehicles were liable to confiscation under the Customs Act, 1962 and on confiscation, the ownership of the vehicle vests with the Central Government and that at the time of confiscation the vehicle has to be offered to the Central Government and that the Central Government cannot be relegated for institution of a civil suit for recovery or possession of the vehicle.

3. *Inter alia* it was submitted on behalf of the petitioner that the reliance placed in the impugned order on the verdict of this Court in

Manjeet Singh v. State (supra) is misplaced in as much as it does not deal with the aspect of the vehicle liable to be confiscated.

4. A catena of verdicts was relied upon on behalf of the petitioners to contend that there had been an erroneous exercise of jurisdiction by the learned Trial Court. The judgments relied upon by the petitioner are as under:

- i. ***Assistant Collector of Customs, Customs House, Indraprastha Estate, New Delhi v. Tilak Raj Shiv Dayal, Dehradun***: AIR 1969 Delhi 301
- ii. ***Tarlok Singh v. The Superintendent of Customs and Anr.***: MANU/DE/0231/1978
- iii. ***Randhir Singh v. Directorate of Revenue Intelligence***: 29(1986) DLT 2
- iv. ***Customs v. Rajesh Bhaskar***, Crl. Rev. P. 259/1999
- v. ***Superintendent Customs and Central Excise Vapi v. Raichand Lakhamsing Shah***, AIR 1970 Gujarat 223(V 57 C 37)
- vi. ***DRI v. Amit Kumar***: Crl. M.C. No. 5320/2013
- vii. ***Smt. Narender Kaur v. Arun Sheoran, Intelligence Officer, Narcotics Control Bureau***; 2000(2) JCC 512 (Delhi)
- viii. ***Kirta Ram v. State of Rajasthan***: 2008 Crl. L.J. 1438

5. On behalf of the respondents, the petition was vehemently opposed placing reliance on the following verdicts:

- I. ***Department of Customs v. M/s Eastern Carriers*** (1994 II AD (Delhi) 105)
- II. ***Department of Customs v. M/s Eastern Carriers***; SLP (Civil) No. 1566/94
- III. ***DRI v. Amarjeet Singh***: Crl. M. (M) No. 1564/2000
- IV. ***Jagdish Chander Sharma v. DRI***: Crl.M(M) No. 1774/1999

- V. ***Enforcement v. Braham Choudhary***:Crl. M(M) No. 680/1998
- VI. ***Smt. Narender Kaur v. Arun Sheoran***; Crl. M(M) No. 1026/1998; 2000(2) JCC 512 (Delhi)
- VII. ***Madan Lal v. State, National Capital***: 2002 IV AD Delhi 177
- VIII. ***Gurbinder Singh @Shinder vs. State of Punjab*** CRR No. 1765/2015
- IX. ***Hari Singh v. State of Haryana***; Crl.Rev.No. 903/1986
- X. ***Manjit Singh v. State***; Crl.M(M) No.4485/2013
- XI. ***Sangram Singh v. Election Tribunal***; 1995 AIR SC 425

submitting to the effect that in terms of the verdicts relied upon the interim release of the vehicles on superdari does not whittle the power of the department in final adjudication qua the order for confiscation of the vehicles and that there was no error in the order of the learned Trial Court directing the interim release of the vehicles.

6. The verdict of this Court in ***Manjeet Singh v. State*** (supra) a verdict dated 10.9.2014 was on facts in which a vehicle which was stolen had been seized and an FIR bearing No. 56/2009 was registered at Police Station Defence Colony on 20.2.2009 and the car was recovered by the police on 20.7.2009 and was released to the petitioner on 4.8.2009 whereafter on 5.6.2013, the petitioner moved an application under Section 451 of the Cr.P.C. for permission to sell the vehicle on the ground that it was more than five years later and that it required a lot of maintenance and repair and its market value had depreciated when vide order dated 19.9.2013, the learned ASJ allowed the petitioner to sell the vehicle in question subject to the condition that the prospective/intending purchaser executed a superdarinama bond to produce the vehicle as and when required which was assailed by the petitioner in Manjeet Singh's case

submitting to the effect that he had sought permission to sell the vehicle unconditionally in view of the verdict of the Hon'ble Supreme Court in ***Sunderbhai Ambalal Desai & Ors. v. State of Gujarat*** ; (2002) 10 SCC 283 and ***Sunderbhai Ambalal Desai & Ors. v. State of Gujarat***(2002) 10 SCC 290 and ***General Insurance Council and Ors. v. State of Andhra Pradesh and Ors.*** (2010) 6 SCC 768 wherein, the Hon'ble High Court had laid down that the photograph of the vehicle can be utilized as secondary evidence at the time of trial and it was not necessary to produce the vehicle at the time of trial, on a consideration of the response of the Delhi Police, the Delhi High Court Rules (Part-E) on Chapter 11 of Volume 3 which deals with the custody or the disposal of property sent by the police and the provisions of Section 451 of the Cr.P.C. which provided to the effect:

“451. Order for custody and disposal of property pending trial in certain cases.—When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.- For the purposes of this section, "property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

452. Order for disposal of property at conclusion of trial.—

(1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a

bond has been executed in pursuance of subsection (2), an order made under sub- section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term" property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

.....

.....

.....

....

457. Procedure by police upon seizure of property.—(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the

Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

458. Procedure where no claimant appears within six months.—(1) *If no person within such period establish his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, the Magistrate may, by order direct that such property shall be at the disposal of the State Government, and may be sold by that Government and the proceeds of such sale shall be dealt with in such manner as may be prescribed.*

(2) *An appeal shall lie against any such order to the Court to which appeals ordinarily lie from convictions by the Magistrate.*

459. Power to sell perishable property.—*If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than five hundred rupees, the Magistrate may at any time direct it to be sold; and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.*”

and on a consideration of the judgments in *Basava Kom Dyamogouda Patil v. State of Mysore*: 1977 4 SCC 358, *Sunderbhai Ambalal Desai & Ors. v. State of Gujarat* ; (2002) 10 SCC 283 *K.W. Ganpati v. State of Karnataka*: ILR 2002 KAR 3751, *Sunderam Finances Limited v. State of Tamil Nadu* (2011) 1 MWN (CRI) 437, it was held vide paragraphs No. 94 to 100 of the verdict of this Court in *Manjeet Singh* (supra) to the effect:

94. In compliance with the directions of the Supreme Court in *Basavva Kom Dyamangouda Patil v. State of Mysore* (supra), *Sunderbhai Ambalal Desai v. State of Gujarat* (supra 1), *Sunderbhai Ambalal Desai v. State of Gujarat* (supra 2) and *General Insurance Council v. State of A.P.* (supra), the SHO/IO shall file applications and produce the case properties presently in custody of Delhi Police before the concerned Court within one week whereupon the concerned Court shall pass appropriate order within one month thereafter.

95. With respect to fresh seizure of properties, the SHO/IO shall produce the case properties before the concerned Court within one week of the seizure whereupon the Court shall pass appropriate order within one month thereafter.

96. Since the Supreme Court has fixed responsibility of the Registry of the High Court to ensure the compliance of its directions, the Delhi Police shall submit a quarterly compliance report before the Registrar General of this Court. The first compliance report for the period 1st October,

2014 to 31st December, 2014 be filed by 15th January, 2015. The quarterly reports thereafter, be filed after every three months. The compliance report shall contain the particulars of the applications for disposal of the properties filed and the orders passed thereon by the concerned Courts. The compliance report shall also contain the list of cases in which the applications could not be filed within the prescribed period along with the explanation thereof. The Registrar General shall consider the reports and ensure the compliance of the directions issued by the Supreme Court. The compliance reports be filed by the police officers made responsible by the Supreme Court in para 14 of General Insurance Council v. State of A.P.(supra).

97. The Courts below shall also file a quarterly report through their District & Sessions Judge before the Registrar General containing the particulars of the cases in which the appropriate order has been passed within one month of the application. If any case could not be disposed of within 30 days, particulars thereof along with the reasons be also submitted. The first compliance report for the period 1st October, 2014 to 31st December, 2014 be filed by 15th January, 2015.

98. With respect to the submission of Delhi Police that the District Nazir is not equipped to deal with the order with respect to the sale/auction of the case properties and therefore, Provisioning & Logistics Department of Delhi Police be allowed to deal with the sale/auction of the case properties,

it would be appropriate for the Delhi Police to take up the matter with the High Court on the administrative side and no orders are warranted in this petition.

Present case

99. In the present case, the petitioner is registered owner of the car in question and the accused has no objection to the petitioner being permitted to sell the vehicle and in that view of the matter, the learned Sessions Court should have permitted the petitioner to sell the vehicle after taking photographs of the same. The Supreme Court in Sunderbhai Ambalal Desai v. State of Gujarat (supra 1), Sunderbhai Ambalal Desai v. State of Gujarat (supra 2) and General Insurance Council v. State of A.P. (supra) has clearly held that the production of the vehicle during trial is not necessary and the photographs of the vehicle would be sufficient to be proved in evidence. The Committee appointed by the Chief Justice of this Court in their Report which was circulated to all the judicial officers also clearly approved the said procedure. However, in utter violation of the Supreme Court judgments as well as the Report of the Committee of this Court, the learned Sessions Court held that the vehicle would be required during evidence. The Sessions Court further gravely erred in recording that the accused may stake a claim on the vehicle without even asking him. When the accused appeared before this Court on 13th December, 2013, he clearly staked no claim on the vehicle and had no objection for the

sale of the vehicle. The least expected from the learned Sessions Court was to have asked the accused whether he had any claim or objection to the sale of the vehicle. The petitioner being a registered owner of the vehicle which was stolen and recovered from the possession of the accused, the view taken by the learned Sessions Court (without even asking the accused) that the accused, the alleged thief, would stake a claim is clearly perverse. The learned Sessions Court also did not appreciate the petitioner's contention that the petitioner would not get a fair price if the vehicle is sold with a bond and further that the value of the vehicle is already depreciated and it is expensive to maintain the same.

100. For the reasons stated above, the petition is allowed and the condition imposed by the learned Trial Court requiring the prospective/intending purchaser to execute the superdari bond is set aside. The petitioner has already been permitted to unconditionally sell the vehicle after taking photographs of the said vehicle and furnishing them to the Investigating Officer concerned. The pending application is disposed of."

7. Written submissions have been submitted on behalf of the petitioner and the respondents.

8. Vide order dated 18/11/2016 in CrI.M.C. No. 4316/2016 and vide order dated 21.12.2016 in CrI.M.C. No. 4767/2016, the operation of the common order dated 31.8.2016 of the learned Trial Court had been stayed which interim restraint is still in existence. In CrI.M.C.

No. 4316/16 in the case titled *Directorate of Revenue Intelligence v. P.R.K. Diamonds Pvt. Ltd. and Sunny Kakkar*, has been submitted on record an order dated 1.12.2017 bearing No. DLI Customs/PRE/PR-CMOR/19/17 of the Pre-Commissioner Customs Preventive which brings forth that the vehicle Mercedes bearing Registration No. DL1CQ 7525 seized from the possession of Mr.Sunny Kakkar, the director of the company M/s PRK Diamonds Pvt. Ltd. has been confiscated under Section 115 (2) of the Customs Act, 1962, though an option had been given to Sunny Kakkar to pay a fine of Rs.10,00,000/- in lieu of the confiscation. Apparently in view of the said confiscation order qua which it was submitted on behalf of the respondents on 9.3.2018 that the order has been assailed in appeal and taking into account that vide the impugned order it had been directed to the effect that because the Registered Owner of the vehicle shall give an undertaking to the effect that in the event of the adjudication proceedings, the vehicle which was released to him on superdari as confiscated, he would furnish the value of the vehicle to the department, it is apparent that the interim release of the said vehicle granted vide the impugned order dated 13.8.2016 qua the said vehicle does not survive any more. However in view of the proceedings dated 9.3.2018 and the pendency of the petition and taking into account the factum that the impugned order is a common order even in relation to the accused Inder Prakash Kohli qua the vehicle Honda city car bearing No.DL-4C-AH-8319, it is considered essential to determine the question of law involved in the matter which relates to the aspect of the applicability of Section 451 of the Cr.P.C. to articles

confiscated under the Customs Act, 1962, and their seizure under the Customs Act, 1962, and qua which notices to show cause for confiscation have been issued.

9. The respondents have submitted that they are suffering unnecessarily in as much as their vehicles worth lakhs of rupees are lying with the department as a junk and that the DRI did not choose to challenge the release of the third vehicle allowed to be released by the impugned order.

10. The verdict of this Court in *Assistant Collector of Customs, Customs House, Indraprastha Estate, New Delhi v. Tilak Raj Shiv Dayal, Dehradun*: AIR 1969 DELHI 301 decided on 14.2.1969, lays down categorically that a Customs Officer under the Customs Act, is not a police officer within the meaning of the expression as used in Section 523 of the Cr.P.C. as it then existed which is the precursor to Section 451 of the Code of Criminal Procedure, 1973, and it has been laid down therein that the provision of Section 451 Code of Criminal Procedure, 1973 is not applicable to the properties seized by the Customs Officer under the Customs Act, 1962 at least before criminal proceedings are launched with respect to the property seized. In that case the criminal proceedings had not been launched and it was thus held that the SDM had no jurisdiction to order the return of the car seized under the provisions of the Customs Act, which car had been seized believing in as much as it was alleged that 13 bars of gold had been smuggled therein.

11. Reliance was placed on behalf of the petitioner on the verdict of this Court in *Tarlok Singh v. The Superintendent of Customs and*

Anr.: 15(1979) DLT 183 decided on 6.4.1978 qua the prayer made by the owner of the intercepted vehicle for release of the vehicle on superdari was declined holding to the effect that the customs authorities are under a legal obligation to take proceedings qua confiscation within six months failing which the seized goods have to be returned to the person from whose possession they were seized. The vehicle here also had been seized under Section 110 of the Customs Act, 1962.

12. Reliance was placed on behalf of the petitioner on the verdict of this Court in **Randhir Singh v. Directorate of Revenue Intelligence**, 1986 CrI. LJ 1208 in which the vehicles seized under Section 110 of the Customs Act, 1962 with textiles of foreign import without any document of lawful import and acquisition and possession and it was held to the effect that the vehicles, having been seized by the customs authorities in exercise of statutory powers conferred on them by the Customs Act, 1962, the mere filing of a complaint in the Court does not deprive the Customs Authority of their control and the control would continue to vest with the Customs Authority and the Criminal Court in terms of Section 451 of the Cr.P.C. cannot permit its release unless the property is produced before the Court during the inquiry or trial and that thus merely because the vehicles would become a junk and the loss could result to insignificance thereof due to lack of care and proper upkeep was no ground to release the vehicles, though it was categorically observed vide para 10 of the said verdict which is to the effect:

“10. In this view of the matter, therefore, the argument of Shri Harjinder Singh that the trucks in question may become a mere junk and total loss in case they are permitted to remain the control and custody of the Customs authorities for lack of proper up-keep and care dwindles to insignificance. Obviously the intention of the legislature is that the Customs authorities must bestow proper care and attention to the goods like the present seized by them so long as they remain in their custody and control. It may be, however, made clear that it shall be open to the persons having any right and interest in the trucks in question as registered owners thereof or otherwise to apply afresh for interim custody, if and when these trucks are produced in the course of inquiry or trial.”,

holding thus to the effect that the persons having any right and interest in question in that case as registered owner thereof or otherwise could apply afresh for an interim custody if and when those trucks were produced in the course of inquiry or trial. Vide order dated 12.8.2004 in Crl.Rev. Petition No. 25/1999 and Crl. M.A. 6515/99 the order of the ACMM, Delhi releasing the vehicle seized by the Cargo Preventive Unit at New Delhi, containing smuggled watches was vacated.

13. Reliance was placed on behalf of the petitioner on the verdict of the Hon'ble High Court of Gujarat in ***Superintendent Customs and Central Excise Vapi v. Raichand Lakhamsing Shah***; AIR 1970 Gujarat 223 vide which it was held to the effect that a Customs

Officer as laid down by the Hon'ble Division Bench of the High Court of Bombay in ***Vasant Lal v. Union of India***; AIR 1967 Bom 138 had laid down that the Customs Officer under the Customs Act, 1962 has power to seize the goods if he has reason to believe that those are articles liable to confiscation under the said enactment even though the goods may have been seized by the Customs Officer and that thus as the Customs Officer who is entitled to seize the articles or goods has wide power under the Customs Act, 1962 itself without a search warrant obtained from the Magistrate, the direction to release the vehicle on conditions cannot be ordered by the Magistrate in relation to the seizure of a truck which in that case alleged to have had been used for transporting or carrying smuggled goods. The observation in para 22 of the verdict read to the effect:

"22. Section 111 of the Act, which falls in Chapter XIV deals with, "confiscation of improperly imported goods, etc." Section 112 of the Act deals with, "penalty for improper importation of goods, etc.", and Section 113 of the Act deals with 'confiscation of goods attempted to be improperly exported goods, etc.' Section 115 of the Act deals with, "confiscation of conveyances". Sub-section (2) of it, which is material for our purposes, reads:-

"(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so

used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal and that each of them had taken all such precautions against such use as are for the time being specified in the rules."

That section indicates that such a conveyance can also be confiscated if it is used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods. Section 110 of the Act does not indicate that such seizure can be made by a proper officer if the goods liable to confiscation under the Act are in the custody of the owner himself . There is general power vested in him to seize the goods wherever they may be if he has reason to believe that the goods are liable to confiscation under this Act. In the instant case, this power has been exercised by the Customs Officer and the goods had come to be seized on the very day. The goods were initially seized by the Police Officer. Admittedly when the application came to be made by the petitioner to the Magistrate under Section 523 of the Code, these goods were already seized by the Customs Authorities in exercise of power under Section 110 of the Act."

14. Reliance was also placed on behalf of the petitioner on the verdict of this Court in ***Directorate of Revenue Intelligence v. Amit Kumar***: Criminal M.C. No. 5320/2013, a verdict dated 22.11.2016 wherein the release directed on superdari of a vehicle a Toyota

Fortuner from which 95.350 Kg. of a contraband substance were recovered by the Directorate of Revenue Intelligence Officers was held to be erroneous observing to the effect that the matter related to commission of an offence punishable under the NDPS Act, 1985 which was a special law and the offence committed had to be dealt with in accordance with the provisions of the Special law and the directions were thus made vide the judgment dated 22.11.2016 for surrender of the vehicle make Toyota Fortuner which had been allowed to be released.

15. Reliance was also placed on behalf of the petitioner on the verdict of this Court in ***Smt. Narender Kaur v. Arun Sheoran, Intelligence Officer, Narcotics Control Bureau***: 87 (2000) DLT 155, which related to the seizure made by the Narcotics Control Bureau in which the car utilized for conveyance of the contraband liable to be confiscated under Section 60 of the NDPS Act, 1985 had not been allowed to be released by the Trial Court and it was observed to the effect that the said seizure had been effected in terms of Section 43 of this NDPS Act, 1985, and that Section 60 and 63 thereof provided for disposal of the conveyance used in the case of committing of the offence and that it was held that the discretion exercised by the Trial Court in disallowing the request for the return of the car primarily on the ground that it was liable to be confiscated under the NDPS Act, 1985 did not warrant any interference. Reference was also made in this judgment to the verdict of the Hon'ble High Court of Bombay in ***B.S. Rawat V. Shaikh Abdul Karim &Anr.***: 1989 Cri.LJ 1998 wherein it had been observed to the effect that the purpose of the

NDPS Act was to see that the vehicle which was used for the conveyance of the contraband was not made available to the persons indulging in those activities and confiscation of the vehicle was an additional safeguard to discourage this crime.

16. Reliance was also placed on behalf of the petitioner on the verdict of the Hon'ble High Court of Rajasthan in ***Kirta Ram v. State of Rajasthan***: 2008 CrL.L.J.1438, which was also one under the NDPS Act, 1985 in which the vehicle transporting poppy straw which had been intercepted by the police was not allowed to be so released, and it was held that it could not be released on superdari in terms of Section 60 of the NDPS Act, 1985 and it was also held that no interim custody of the vehicle could be granted.

17. On behalf of the respondents through their written submissions it has been submitted that against the order dated 18.11.2016 in CrL. M. C. No. 4316/16 vide which the operation of the impugned order dated 31.8.2016 in the case of Sunny Kakkar was stayed, LPA 91/17 had been preferred by Sunny Kakkar, Respondent No.2, the director of M/s PRK Diamonds Pvt. Limited, the respondent No.1, decided on 15.3.2017 and the said LPA, was held to be not maintainable observing to the effect that order dated 18.11.2016 of this Court had been made in exercise of criminal jurisdiction and that the respondents filed three SLPs against the orders dated 18.11.2016 and 23.12.2016 (there appears to be a typographical error and the order dated 23.12.2016 be read as order dated 20.11.2016 in CrL.M.C. No. 4767/2016 in ***Directorate of Revenue Intelligence v. Inder Prakash Kohli @ Baboo***) in which the operation of the impugned order of the

learned Trial Court permitting the release of the vehicle to Inder Prakash Kohli had been stayed and also assailed the order dated 15.3.2017 of the Division Bench of this Court in LPA 91/17 and submitted that the Hon'ble Supreme Court observed that it was not inclined to interfere in the order dated 15.3.2017 of the Division Bench of the High Court of Delhi, i.e., of this Court, but that it would be open for the petitioner that the respondents to appear before the Court for vacation of the stay order passed by the learned Single Judge on 18.11.2016.

18. Reliance was placed on behalf of the respondents on the verdict of this Court in *Department of Customs v. M/s Eastern Carriers*; (1994 II AD (Delhi) 105) to contend that in that case confiscated toothpaste which had been utilized, which was a perishable article and which had been utilized in concealing the smuggled goods which were ball bearings worth Rs.40,95,600/- which were concealed in 450 boxes of Close Up toothpaste which were recovered from two trucks bearing No. DIG-4706 and DL-1L-A 3252 which seizure had been made by the customs authorities, the toothpaste was allowed to be released on furnishing an indemnity bond of Rs.12 lakhs and it was submitted on behalf of the petitioner that the said judgment dated 25.3.1994 in Crl. M.(M) No. 679/1994 was upheld by dismissal of the Crl. M.A. no. 2902/94 against the said judgment by the Hon'ble Supreme Court on 5.8.1994, though it was observed to the effect that if the order was not complied, it was open to the authority to sell the goods in an appropriate manner.

19. Reliance was also placed on behalf of the respondents on the order dated 9.8.1999 of this Court in Crl. M(M) No. 1774/99 whereby the order of the learned ACMM dated 5.6.1999 permitting the release of a truck seized by the customs authorities was not set aside. Reliance was also placed on behalf of the respondents on the order dated 13.7.2000 of this Court in Crl. M.(M) No. 564/2000 in which a truck was allowed to be released on superdari in which case the respondents arrayed therein in the case titled ***Jagdish Chander Sharma V. Directorate of Revenue Intelligence***; Crl.M(M) No. 1564/2000, was the Intelligence Officer of the Directorate of the Revenue Intelligence and the order dated 13.7.2000 indicates that the truck had been directed to be maintained including the cavities from which the contraband articles were recovered by the petitioner who sought the release of the vehicle on superdari in the same condition as it was on 13.7.2000. Reliance was also placed on behalf of the respondents on the order dated 22.4.1999 of this Court in Crl.M(M) 688/98 in the case ***Enforcement V. Braham Choudhary***; Crl.M(M) No. 680/1998 in which a Maruti car was allowed to be released on superdari though it had been contended that the car had been purchased from foreign currency illegally brought by the brother of the respondent and it was observed that there was no reason to interfere with the exercise of jurisdiction under Section 451 of the CPC.

20. Reliance was also placed on behalf of the respondents on the verdict of this Court in ***Smt. Narender Kaur v. Arun Sheoran*** (supra), which had also been relied upon on behalf of the petitioner contending

to the effect that in that case, the vehicle was not released during the pendency of the case in as much as it was not certain that the vehicle belonged to the petitioner. Reliance was also placed on behalf of the respondents on the verdict of this Court in *Madan Lal v State, National Capital*: 2002 IV AD (Delhi) 177 which was a case in which 400 gms smack was recovered from inside the cabin of the seat of the driver of a Tempo and in terms of Section 63 of the NDPS Act, 1985, the said vehicle was liable to confiscation and it was thus held that in terms of Section 60(3) and Section 63 of the NDPS Act, 1985, neither Section 60(3) nor Section 63 of the NDPS Act, 1985 empowered the Trial Court to make an order for proper custody of a conveyance during the pendency of trial but that by virtue of Section 51, the provisions of the Code of Criminal Procedure, 1973 had been made applicable in order that they are not inconsistent with the provisions of the Customs Act and thus it was observed that the petitioner therein being the undisputed registered owner of the vehicle, the vehicle was nevertheless not allowed to be released on superdari to the petitioner in as much as it was held that the trial was to conclude in the near future and that if the tempo was not released, it would get further damaged because of its disuse and for proper custody during pending the trial and the order was needed to be made and the order of the Trial Court whereby no reasons were given for declining the release of the vehicle was set aside and the vehicle was allowed to be released to be produced on superdari on conditions with it having been directed to be produced before the learned Trial Court as and when required.

21. Reliance was also placed on behalf of the respondents on the verdict of the Hon'ble Division Bench of the High Court of Punjab & Haryana in the case of ***Gurbinder Singh @ Shinder v. State of Punjab***: CRR No. 1765/2015 in which the vehicles seized under the NDPS Act were allowed to be released on interim custody observing to the effect that there was no provision under the NDPS Act debarring the release of the vehicle for interim custody and that the provisions of Section 451 of the Cr.P.C. were found to be not inconsistent to the provisions of the NDPS Act.

22. Vide this judgment, the Hon'ble Division Bench of the High Court of Punjab & Haryana also observed to the effect that in view of the law laid down by the Hon'ble Supreme Court in ***Sunderbhai Ambalal Desai's*** (supra) case would also apply to the seizure of vehicles under the NDPS Act and any contrary view taken by the Courts of law would be against the interest of the owner of the vehicles, the public at large and the State.

23. Reliance was also placed on behalf of the respondents on the verdict of the Hon'ble High Court of Punjab & Haryana in ***Hari Singh v. State of Haryana***: Volume 16 1987-I PLR 413, in the case in which it was held that merely that a vehicle was liable to be confiscated under the NDPS Act, 1985, the same is no ground to assume that it would be confiscated merely because the release of the property would be regulated in accordance with the well settled judicial ways and not because that there was a stringent law applicable at the time of the punishment.

24. Reliance was also placed on behalf of the respondents on the verdict of this Court in **Manjit Singh v. State**; (supra) the verdict dated 10.9.2014 which made reference to the verdict of the Hon'ble Supreme Court in **Sunderbhai Ambalal Desai** (Supra) and in **General Insurance Company v. State of U.P.** (supra) to contend that the ratio of the said verdict in relation to release of vehicles seized by the police would apply to seizures effected under the Customs Act, 1962. It has also been held by the learned Trial Court and that the precautions and observations mentioned in the judgment in **Manjeet Singh** (Supra) were only limited to the release of the vehicle, and that the guidelines laid down in Manjit Singh (Supra) to the effect:

“Vehicles

68. Vehicles involved in an offence may be released to the rightful owner after preparing detailed panchnama; taking photographs of the vehicle; valuation report; and a security bond.

69. The photographs of the vehicle should be attested and countersigned by the complainant, accused as well as by the person to whom the custody is handed over.

70. The production of the vehicle should not be insisted upon during the trial. The panchnama and photographs along with the valuation report should suffice for the purposes of evidence.

71. Return of vehicles and permission for sale thereof should be the general norm rather than the exception.

72. If the vehicle is insured, the Court shall issue notice to the owner and the insurance company for disposal of the vehicle. If there is no response or the owner declines to take the vehicle or informs that it has claimed insurance/released its right in the vehicle to the insurance company and the insurance company fails to take possession of the vehicle, the vehicle may be ordered to be sold in auction.

73. If a vehicle is not claimed by the accused, owner, or the Insurance company or by a third person, it may be ordered to be sold by auction.”,

with also reference to the general guidelines therein which read to the effect:

“General

86. The Court may impose any other condition which may be necessary in the facts of each case.

87. The Court shall hear all the concerned parties including the accused, complainant, Public Prosecutor and/or any third party concerned before passing the order. The Court shall also take into consideration the objections, if any, of the accused.

88. When the property has any evidentiary value, it is to be kept intact and the condition of non-alienation is imposed to ensure its production during the course of evidence for the purpose of marking as a material object. However, when the property has no evidentiary value and only the value of the property is to be properly secured for passing of final order under Section 452 Cr. P.C., the necessity of keeping such properties intact by

imposing onerous conditions, prohibiting its alienation or transfer would not be necessary in law.

89. The production of property which has evidentiary value during evidence is a part of a fair trial. With the advanced technology, it is not necessary that the original of the property inevitably has to be preserved for the purpose of evidence in the changed context of times. The reception of secondary evidence is permitted in law. The techniques of photography and photo copying are far advanced and fully developed. Movable property of any nature can be a subject matter of photography and taking necessary photographs of all the features of the property clearly is not a impossible task in photography and photo copying. Besides, the mahazar could be drawn clearly describing the features and dimensions of the movable properties which are subject matters of criminal trial.

90. Irrespective of the fact whether the properties have evidentiary value or not, it is not necessary that the original of the property has to be kept intact without alienation. As suggested above, the photography or photostat copy of the property can be taken and made a part of the record duly certified by the Magistrate at the time when the interim custody of the property is handed over to the claimant. In the event of the original of the property not produced in the evidence, photograph could be used as secondary evidence during the course of evidence. Ultimately, while passing final orders, it is only the value of the property that becomes a prime concern for the Court. If a person to whom the interim custody is granted, is not entitled to the property or its value and if some other person is held to be entitled to have the property or its value by taking necessary bonds and security from the person to whom interim custody is

granted, the value could be recovered and made payable to the person entitled to.

91....

92....

93...

Conclusion

94. In compliance with the directions of the Supreme Court in Basavva Kom Dyamangouda Patil v. State of Mysore (supra), Sunderbhai Ambalal Desai v. State of Gujarat (supra 1), Sunderbhai Ambalal Desai v. State of Gujarat (supra 2) and General Insurance Council v. State of A.P. (supra), the SHO/IO shall file applications and produce the case properties presently in custody of Delhi Police before the concerned Court within one week whereupon the concerned Court shall pass appropriate order within one month thereafter.

95. With respect to fresh seizure of properties, the SHO/IO shall produce the case properties before the concerned Court within one week of the seizure whereupon the Court shall pass appropriate order within one month thereafter.

96. Since the Supreme Court has fixed responsibility of the Registry of the High Court to ensure the compliance of its directions, the Delhi Police shall submit a quarterly compliance report before the Registrar General of this Court. The first compliance report for the period 1st October, 2014 to 31st December, 2014 be filed by 15th January, 2015. The quarterly reports thereafter, be filed after every three months. The compliance report shall contain the particulars of the applications for disposal of the properties filed and the orders passed thereon by the concerned Courts. The compliance report shall also contain the list of cases in which the applications could

not be filed within the prescribed period along with the explanation thereof. The Registrar General shall consider the reports and ensure the compliance of the directions issued by the Supreme Court. The compliance reports be filed by the police officers made responsible by the Supreme Court in para 14 of General Insurance Council v. State of A.P.(supra).

97. The Courts below shall also file a quarterly report through their District & Sessions Judge before the Registrar General containing the particulars of the cases in which the appropriate order has been passed within one month of the application. If any case could not be disposed of within 30 days, particulars thereof along with the reasons be also submitted. The first compliance report for the period 1st October, 2014 to 31st December, 2014 be filed by 15th January, 2015.

98. With respect to the submission of Delhi Police that the District Nazir is not equipped to deal with the order with respect to the sale/auction of the case properties and therefore, Provisioning & Logistics Department of Delhi Police be allowed to deal with the sale/auction of the case properties, it would be appropriate for the Delhi Police to take up the matter with the High Court on the administrative side and no orders are warranted in this petition.

Present case.

99. In the present case, the petitioner is registered owner of the car in question and the accused has no objection to the petitioner being permitted to sell the vehicle and in that view of the matter, the learned Sessions Court should have permitted the petitioner to sell the vehicle after taking photographs of the same. The Supreme Court in Sunderbhai Ambalal Desai v. State of Gujarat (supra

1), *Sunderbhai Ambalal Desai v. State of Gujarat* (supra 2) and *General Insurance Council v. State of A.P.* (supra) has clearly held that the production of the vehicle during trial is not necessary and the photographs of the vehicle would be sufficient to be proved in evidence. The Committee appointed by the Chief Justice of this Court in their Report which was circulated to all the judicial officers also clearly approved the said procedure. However, in utter violation of the Supreme Court judgments as well as the Report of the Committee of this Court, the learned Sessions Court held that the vehicle would be required during evidence. The Sessions Court further gravely erred in recording that the accused may stake a claim on the vehicle without even asking him. When the accused appeared before this Court on 13th December, 2013, he clearly staked no claim on the vehicle and had no objection for the sale of the vehicle. The least expected from the learned Sessions Court was to have asked the accused whether he had any claim or objection to the sale of the vehicle. The petitioner being a registered owner of the vehicle which was stolen and recovered from the possession of the accused, the view taken by the learned Sessions Court (without even asking the accused) that the accused, the alleged thief, would stake a claim is clearly perverse. The learned Sessions Court also did not appreciate the petitioner's contention that the petitioner would not get a fair price if the vehicle is sold with a bond and further that the value of the vehicle is already depreciated and it is expensive to maintain the same.

100. For the reasons stated above, the petition is allowed and the condition imposed by the learned Trial Court requiring the prospective/intending purchaser to execute

the superdari bond is set aside. The petitioner has already been permitted to unconditionally sell the vehicle after taking photographs of the said vehicle and furnishing them to the Investigating Officer concerned. The pending application is disposed of.”

25. Reliance was also placed on behalf of the respondents on the verdict of the Hon’ble Supreme Court in ***Sangram Singh v. Election Tribunal***, 1955 AIR 425 to contend that the respondents herein had rightly invoked the jurisdiction of the Hon’ble Supreme Court by filing the LPA against the order dated 18.11.2016 in exercise of criminal jurisdiction.

26. Chapter XXXIV of the Cr.P.C., 1973 deals with the disposal of the property. In terms of Section 451 thereof an order for custody and disposal of property can be made. Section 451 of the Cr. PC, 1973 reads to the effect:

“451. Order for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.”

Thus, for the applicability of Section 451 of the Cr.PC, 1973 an inquiry or trial has essentially to be in progress.

27. The inquiry in terms of Section 2(g) of the Cr.PC, 1973 is defined as meaning “every inquiry other than a trial, conducted under this Code by a Magistrate or a Court”.

28. As laid down by the Hon’ble Supreme Court in *Hardeep Singh and Ors. vs. State of Punjab and Ors. AIR 2014 SC 1400*, the word ‘inquiry’ therefore is not an inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the Court on the filing of the charge-sheet, whereafter the Court can proceed to make enquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial.

29. **The word ‘trial’ is not defined in Section 2 of the Cr.P.C., 1973 and finds a mention in Chapters-18, 19, 20, 21, 23 24 & 25 of the Cr.P.C., 1973.**

30. Thus, as the matter was still at the stage of investigation when the seizure in terms of the of the Customs Act, 1962 was conducted by the Customs Authorities, it is apparent that Section 451 of the Cr.PC, 1973 would not apply to the facts and circumstances of the instant case, where there was no inquiry or trial in progress at the time of seizure.

31. On a consideration of the rival submissions made on behalf of the either side, it is apparent that in terms of Chapter 14 of the Customs Act, 1962, confiscation of improperly imported goods is permissible, which confiscation is pursuant to seizure of the improperly imported goods allegedly in terms of Section 110 of the Customs Act, 1962. Section 110 (1A) of the said enactment provides

for provisional release of the goods, documents or thing seized pending adjudication and provides as follows:

“(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.”

32. Thus the statute itself provides for the disposal of the seized goods, documents and things by the appropriate officer in such a manner as the Central Government may from time to time determine after following the procedure prescribed under the Customs Act, 1962 in cases where the goods are of perishable or dangerous nature and taking into account the depreciation in the value of the goods with the passage of time, constrained storage space for the goods or any other relevant consideration by notification in the official gazette which notification is also to satisfy the goods or classes of goods through which the disposal may be ordered under Sub-section (1) of Section 110 of the Customs Act, 1962. Consequently, Section 110(1) of the said Act provides as follows:

*“110. Seizure of goods, documents and things.—
(1) If the proper officer has reason to believe that any goods are liable to confiscation under this*

Act, he may seize such goods: Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.”

33. In terms of Section 110(2) of the Customs Act, 1962, it has been specifically laid down that where any goods are seized under Sub-section (1) of Section 110 and no notice in respect thereof is given under clause (a) of Section 124 in the Act of the seizure of the goods, the goods shall be returned to the persons from whose possession they were seized though the Principal Commissioner of Customs or Commissioner of Customs may for the reasons to be recorded in writing extend such period to a further period not exceeding six months and inform the person from whom such goods are seized before the expiry of the period so specified.

34. It is thus apparent that in terms of Section 111 of the Customs Act, 1962, all the goods or documents seized under Section 110A may pending adjudication be released to the owner on taking a bond from him in the proper form as the adjudicating authority may require.

35. In terms of Section 111, it has already been observed herein above that the improperly brought imported goods from a place outside India can be confiscated and penalty for improper importation of goods is imposable under Section 112 of the said enactment. In terms of Section 113 of the Customs Act, 1962, improperly exported goods specified therein are liable to confiscation and Section 114 of

the Customs Act, 1962, provides for penalty for attempt to export goods improperly.

36. Under Section 115(2) any conveyance used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods is liable to confiscation, unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself and the proviso to Section 115(2) provides for the imposition of a fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods as the case may be in lieu of the confiscation of the conveyance.

37. In terms of Section 122 of the said enactment where goods are liable to confiscation in terms of Chapter XIV of the Customs Act, 1962, any person liable to a penalty thereon, the confiscation of the penalty may be adjudged without limit by the Principal Commissioner of Customs or Deputy Commissioner of Customs and upto such limit by such officer as the notification specify Section 122A lays down the adjudication procedure.

38. In terms of Section 124 of the Customs Act, 1962, a notice is required to be given to the person from whom the goods are seized and proposed to be confiscated which notice has to be given in writing with the proper approval of the officer of Customs not below the rank of a Deputy Commissioner of Customs informing the person from whom the seizure has been made on the grounds on which it is proposed to confiscate the goods or to impose a penalty. In terms of Section 125 of the said enactment it has been specifically laid down that the officer adjudging at the time of confiscation of the goods may

impose a fine in lieu of confiscation as the officer thinks fit. Section 125 of the Customs Act, 1962 provides as follows:

“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 1[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 proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon. 2[(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.]

39. Further more, in terms of Section 126 of the said enactment, goods once confiscated are the property vested in the Central Government and the officer adjudging the confiscation has to take hold the possession of the confiscated goods.

40. In terms of Section 127 of the said enactment, the award of any confiscation or penalty under the Customs Act, 1962 by an officer of Customs shall not prevent the infliction of any punishment to which

the person affected is liable under Chapter XVI of the Act or any other law.

41. Under Section 128 of the Customs Act, 1962, which falls under Chapter XVI which deals with appeals against order or decision passed under the Act by an officer of Customs lower than the Principal Commissioner of Customs or Commissioner of Customs provides for an appeal to the Commissioner (Appeals) within 60 days of the day of the communication to him.

42. Thus it is apparent that the Customs Act, 1962 provides for a complete code in itself in relation to search, seizure, confiscation and release of goods seized in alleged violation of the Customs Act, 1962.

43. Though after confiscation ordered by the adjudicating authority, the confiscated goods become vested in the Central Government in terms of Section 126(1) of the Customs Act, 1962 coupled with the factum that Section 127 of the said enactment provides that the award of any confiscation of penalty under the Customs Act, 1962 by an officer of the Customs shall not prevent the infliction of any punishment to which the person affected there is liable under the provisions of Chapter XVI of the Act and under any other law, makes it apparent that the search, seizure, confiscation and adjudication in relation to the confiscation is *de hors* the infliction of punishment that may be imposed in terms of the Customs Act, 1962.

44. The factum that the Customs Act, 1962, provides even for an appeal against an order of the adjudicating authority under Chapter XV of the Customs Act, 1962 in terms of Section 129A(a) and provides for an Appellate Tribunal in relation thereto, is significant.

45. Significantly, the Hon'ble Supreme Court in the *State of Madhya Pradesh v. Uday Singh*: Criminal Appeal 524/2019 by a verdict dated 26.3.2019 has *inter alia* observed to the effect that vide the Indian Forest Act, 1927, specific provisions have been made for the seizure and confiscation of forest produce and tools and weapons and articles used in the commission of offences punishable under the Indian Forest Act, 1927, which had been infused with a salutary public purpose and that the order of confiscation under the said enactment is subject to an appeal provided under Section 52A and a revision vide Section 52B.

46. *It was reiterated vide this judgment that a criminal prosecution and a proceeding for confiscation are distinct and are two parallel proceedings and that criminal prosecution is not an alternate to confiscation proceedings, and that the mere fact that there was an acquittal in a criminal trial before a Magistrate due to paucity of evidence would not necessary result in nullifying the order of confiscation passed by an authorized officer based on a satisfaction that a forest offence had been committed.*

47. Undoubtedly, in terms of the Customs Act, 1962, against orders of the Commissioner (Appeals) under Section 128 of the Customs Act, 1962, appeals can be filed to the Appellate Tribunal against the order of the adjudicating authority passed under Section 128A. In terms of Section 128A(3), the orders that may be passed by the Commissioner (Appeals) are as under:-

“128A Procedure in appeal:
(1) ...

(2) ...

(3) *The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against:] Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of the greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order: Provided further that where the²⁸⁶ [Commissioner (Appeals)] is of opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 28 to show cause against the proposed order.”*

48. Taking the same into account it is apparent that the Customs Act, 1962 as observed herein above provides a complete code in relation to the searches, seizures and confiscation of contraband in terms of the Customs Act, 1962 and also provides for the adjudication in relation to the release thereof.

49. It is apparent thus at the stage of investigation being conducted by the Customs Officers that the provision of Section 451 of the Cr.P.C., 1973 thus do not operate.

50. As regards the judgment under the Customs Act, 1962 referred to by the learned Trial Court in the impugned order i.e. in ***Department of Customs V. M/s Eastern Carriers***: 1944 II AD Delhi 105, a verdict dated 25.3.1994, brings out a distinction from the case of ***Tarlok***

Singh v. The Superintendent of Customs and Anr. (supra) observing to the effect that in ***M/s Eastern Carrier*** (supra), the case was not the release of the car as in ***Tarlok Singh*** (Supra) which was used for transporting the smuggled goods and it was held that the appropriate authority was to take steps for conducting of investigation within six months which had expired and there was no prayer made by the Customs Department permitting disposal and that in the case of ***M/s Eastern Carriers*** (Supra) the department itself made an application for permission to dispose of the Toothpastes which were perishable in nature and thus it is apparent that the facts of the two cases were not in *pari materia* with each other and thus apparently the facts of the instant case are not in *pari materia* to that of the case in Eastern Carrier (Supra) as allegedly contended on behalf of the petitioner.

51. Further more the reliance placed on behalf of the respondents on the verdicts of this Court in ***Manjeet Singh*** (Supra) and the verdict of the Hon'ble Supreme Court in ***Sunderbhai Ambalal Desai &Ors. v. State of Gujarat*** (Supra) is misplaced as they relate to cases where the provision of Section 451 of the Code of Civil Procedure, 1908, 1973 was applicable, which is not so in the instant case, in as much as the seizure of the two vehicles in the instant case was not subject matter of any '*inquiry*' or '*trial*' before the learned Trial Court when it passed the impugned common order dated 31.8.2016.

52. Furthermore, in the case of M/s PRK Diamonds Private Limited; Crl.M.C. No. 4316/2016, the order dated 1.12.2017 of the Principal Commissioner, Customs (Preventive) ordering confiscation of the Mercedes Car bearing No. DL-1CQ-7525 seized from the

possession of Mr.Sunny Kakkar has already been passed in terms of Section 115(2) of the Customs Act 1962 is as under:-

“I order under Section 115(2) of the Customs Act, 1962 confiscation of the Mercedes Car bearing Reg. no. DL 1CQ 7525, seized from the possession of Shri Sunny Kakkar. However, in terms of the section 125 of the Act, I give an option to Shri Sunny Kakkar, who is also a Director of the Company M/s PRK Diamonds Pvt. Ltd. owner of the said car to pay a fine of Rs.10,00,000/- (Rs.Ten lakhs only) in lieu of the confiscation.”

53. In the case in relation to Inder Prakash Kohli qua Crl.M.C. No. 4767/16 vide order dated 26.4.2018 C No.VIII(AP)10/ADJ./674/2014, it has been observed as under:

“ 44.1 Though I have confiscated the seized goods, holding that the same are prohibited goods, I observe that sec 125 of the Customs Act 1962 allows providing the option of redemption of such goods. In case of non prohibited goods such offer of redemption is mandatory while in prohibited goods the discretion is vested upon the adjudication authority. This is supported by the following judgments:

(a) 2009 (242) E.L.T. 334 (Bom.) COMMISSIONER OF CUSTOMS (AP), MUMBAI VERSUS ALFRED MENEZES it was ruled that-Discretion of officer to release prohibited goods under redemption fine – Section 125(1) of Customs Act, 1962 deals with two situations i.e. import & export of

prohibited goods and import & export of any other goods – Expression used in case of prohibited goods is “ may” and for any other goods it is “ shall” - Discretion on officer to release confiscated prohibited goods – Officer however bound to release “ other goods” - Officer in present case exercised discretion which was upheld by Tribunal – no merit in question whether discretion vests with adjudicating authority to give option to redeem goods absolutely confiscates as prohibited for import- Section 125(I) ibid. [paras 4,5]

(b) 2003 (151) E.L.T. 265 (Mad.) NINE STAR EXPORTS Versus COMMISSIONER OF CUSTOMS (PORTS), CHENNAI – In case of prohibited goods, adjudicating authority has discretion whether or not to give option to pay fine in lieu of confiscation, but in case of other goods, such option has necessarily to be given – Section 125 of Customs Act, 1962.[paras 13,16] Writ jurisdiction – Redemption fine – Prohibited goods- Adjudicating authority is not obliged to give option to pay fine in lieu of confiscation in case of prohibited goods – If such option is not given, no writ of mandamus would lie- Section 125 of Customs Act, 1962. [paras 13, 14]

44.2 Further, it appears that gold stands out on a different pedestal than other goods. It is

prohibited no doubt and thus liable for confiscation. To release it, it must comply with statutory conditions. Moreover the circumstances of the case also need to be factored in, especially the form in which the gold was attempted to be smuggled. A guilty mind is evident from the circumstances that the seized gold found to be concealed in baggage wrapped with black colour adhesive tape and if not subjected to customs check would have escaped detection. It means that they intentionally made plan to smuggle the gold and took all steps to conceal them and tried for swift exit from Green Channel instead of Red Channel. Goods so brought are prohibitory goods, as there is clear violation of statutory provisions for normal import of gold. In the present circumstances the incentive to smuggle gold started with the efforts of the Government to contain the CAD and thus reduce the import of gold. The tariffs were increased and also the policy regarding the import of gold was changed. The policy of 80:20 was introduced by RBI which made the availability of gold limited. The policy has been designed to safeguard and conserve foreign exchange which is essential to economic life of a developing country.

45. To decide whether such redemption is to be granted, I observe that Sec. 11 of the Customs Act 1962 vests the power to notify any goods as prohibited. The criteria/purpose for the same are also detailed therein namely 11(2)(a) to 11(2)(v). I observe that the detained goods appeared to be imported to add the country's gold in circulation

and hence would be detrimental to the stated policy of the government. It is a well-established view that when a statute or policy does not contain the express definition of an act i.e. absolutely prohibitory or otherwise, in such situation, the objects and terms of the statute and relevant government policy along with nature and character of act, should be taken into consideration and it is pertinent to enquire whether putting the offender in strict liability will assist in the enforcement of the regulations or otherwise. I find that in most of the referred cases where gold have been allowed to be released on payment of redemption fine, the plea has been taken regarding the liberalized policy of the government and the same may be true at that point of time. But at present as discussed above, government is trying to discourage the import of gold to safeguard the national economic interest and in such circumstances, when attempts are being made to smuggle the gold in a large scale to derail the Indian economy, if the seized smuggled gold are ordered to be released on payment of fine, such order will not be in conformity with the government policy and it will not assist in the enforcement of the regulations. The object and end of the policy will be frustrated. The public interest will irreparably suffer if release of such smuggled gold in current situation is permitted. In view of above and above stated case laws, I am not inclined to offer any redemption to the seized gold.

46. I find that in the instant case, the Noticees failed to satisfy the customs authorities regarding purpose and intention of the importing gold in India by supporting evidences. Further, the Noticees could not produce the documentary evidence in support of the licit possession of the recovered gold. Hence, the ownership of the

Noticees is in dispute. Further, as per Section 123 of the Customs Act, 1962, the burden of proof regarding ownership of the seized goods lies upon the Noticees, but they failed to prove the same therefore they cannot escape from the penal actions for their omission and commission.

47. I find that the Noticees had an intention to evade payment of the Customs Duty leviable on the goods, due to which they tried to import and clear clandestinely. The Noticee was intercepted with dutiable goods and the value of dutiable goods carried by him was not deliberately filled up in Indian Customs Declaration Slip and knowingly & intentionally did not make true and proper declaration before Customs officer as required under Section 77 of the Customs Act, 1962. The Noticees attempted to smuggle the goods with intent to evade Customs Duty by (a) avoiding the proper Channel of Customs clearance and (b) walking through the Green Channel with the goods and not declaring anything in respect of the seized items, which were non-bonafide baggage and were concealed by the Noticees. Further, noticees were actively involved in planning of smuggling activities by ensuring all logistical arrangements, financing, purchasing, arranging carrier, harbouring for effective execution of smuggling for monetary consideration. Thus, the noticees were executing smuggling activities in an organized manner. Hence, I find that they are liable for penal action under Sec.112 and Sec.114AA of the Customs Act, 1962.

48. As the free allowance is allowed only on the bonafide baggage as per Rule 3 of Baggage Rules, 1998, I find that the benefit of free allowance is not available to the Noticees as discussed above. The same is also upheld in case of In RE M.D.Hussain [2001 (138) ELT 943 (G.O.I), Free Allowance-

Grant of free allowance not admissible if the goods do not constitute bona fide baggage – Section 79 of Customs Act, 1962. – Grant of free allowance will be a reward for bringing the goods for trade purpose and would be construed as a matter of right. In the light of the discussion, government views the grant of free allowance in the instant case as improper and sets aside the same.

49. I have already discussed the acts of omission and commission of the Noticees and accordingly I find that they have made themselves liable for penal action under Sec. 112(a) & (b) and 114AA of Customs Act, 1962. The quantum of penalty is being considered keeping in consideration the mens rea i.e. intent of smuggling and evasion of duty; the actus rea of crossing the green channel and non-declaration of the gold in prescribed form to customs officer.

50....

i) I order absolute confiscation of five numbers of gold bars totally weighing 5000 Grams valued to Rs. 1,36,55,000/- (Rupees One Crores Thirty Six Lakhs Fifty Five Thousand only) seized on 20.06.2014 under Section 111(d), 111(i), 111(j), 111(l) & 111(m) of the Customs Act, 1962.

ii) I also impose a penalty of Rs.27,31,000/- (Rupees Twenty Seven Lakhs Thirty One Thousand only) each upon Vinod Khanna, Inder Prakash Kohli @ Babbu Kohli, Nagesh Chaddha, Prem Chand Gupta and Syed Zainul Hassan under Section 112(a) and (b) and 114AA of the Customs Act, 1962.

iii) I also impose a penalty of Rs.13,70,000/- (Rupees Thirteen Lakhs Seventy Thousand only) each upon Anju Kumar and Hari Sharan Khanna

***under Section 112 (a) and (b) of the Customs Act,
1962.”***

54. Thus, it is apparent that despite the non-existence of a specific bar to the jurisdiction of Courts in the Customs Act, 1962 to release of the seized goods during investigation by the Customs Authority, the Trial Court could not have invoked the provisions of Section 451 of the Code of Civil Procedure, 1973 for release of the vehicles in question on superdari in as much as the seizure of the two vehicles in question was not subject matter of any ‘*inquiry*’ or ‘*trial*’ before the learned CMM at the time of consideration of the prayer for release of the vehicles on superdari. The impugned orders of the learned Trial Court are thus set aside. The petition Nos. CrI.M.C. Nos. 4316/2016 and 4767/2016 are thus allowed.

55. It is however open to the respondents to seeks redressal in accordance with law against the order dated 1.12.2017 of confiscation qua the Mercedes Car No. DL-1CQ-7525 and likewise qua the confiscation and imposition of the penalty/fine as a proposed redemption qua the Honda City Car No. DL-4CAH 8319 as imposed vide order dated 26.4.2018 of the Additional Commissioner of Customs.

The petitions and all the accompanying applications are thus disposed of accordingly.

ANU MALHOTRA, J.

APRIL 24, 2019/SV