**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 15689 of 2020**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE J.B.PARDIWALA** **Sd/-**
**and**
**HONOURABLE MR. JUSTICE ILESH J. VORA** **Sd/-**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | YES |
| 2 | To be referred to the Reporter or not ? | YES |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO |
| | Circulate this Judgment in the Subordinate Courts | |

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ABDUL HUSSAIN SAIFUDDIN HAMID
Versus
STATE OF GUJARAT

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Appearance:
SISTLA SHASHIDHER SHASTRY(8404) for the Petitioner(s) No. 1
for the Respondent(s) No. 1,2

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
**HONOURABLE MR. JUSTICE ILESH J. VORA**

**Date : 11/12/2020**

**ORAL JUDGMENT**
**(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs :

*"A. Admit and allow the appeal.*

*B. Quash and set aside*

*(i) the order in original no.81/JC-AK/SVPIA/O&A/2015 dated 14.5.2015 passed by the Ld. Adjudicating Authority (Annexure-C)*

*(ii) the Order in Appeal No.AHM-CUSTM-000-APP-252-15-16 dt. 08.12.2015 following the above OIO, passed by the Ld. Appellate Authority, (Annexure-D) and*

*(iii) the Order in Revision, vide File No.151/2020-CUS (WZ)/ASRA/MUMBAI dated 31.8.2020, issued vide F.No.371/17/B/16/RA 5760 dated 30.9.2020 passed by the Ld. Revisionary Authority on behalf of Government of India, in so far as penalty under section 112(b) of confiscation of Aluminum Coated Gold Wires allegedly seized vide Panchnama dated 27.4.2014, is confirmed (Annexure-E).*

*C. Drop the penalty imposed under section 112(b) of Customs Act, 1962, or alternatively, reduce the same to a reasonable amount,*

*D. Release and return back to the petitioner the impugned goods (Aluminum Coated Gold Wire) in terms of section 125(1) of Customs Act, 1962, allowing the same to be re-exported.*

*E. Grant any other relief/further reliefs as deemed in the interest of the justice, may please be granted."*

2. We may borrow the facts giving rise to this writ-application straightway from the facts recorded in the Order in Original passed by the Joint Commissioner, Customs, Ahmedabad. The noticee referred to herein under is the writ-applicant before us. We quote it as under :

*"A passenger namely Shri Abdul Husain Saifuddin Hamid (hereinafter referred to as "the noticee") holding Indian Passport No.Z2510189 and residing at 20/595 Hindu Mochi Mohalla, Paani Gram Chowk, Sadar Kotwali, Ajmer, Rajasthan, presently residing at 5264/14, Al-Samal State, Deira, Dubai arrived at the SVPIA, Ahmedabad by Air Arabia Flight No.G9-486 from Sharjah on 27.04.2014 at 04:35 hours. Scrutiny of his passport revealed that the date of last departure of the said passenger was 21.03.2014 from Mumbai Airport. The passenger had opted for green channel and handed over the Indian Customs Declaration Form to the Customs officers, wherein it was declared by him that he was not carrying/having any dutiable goods. On noticing suspicious movement/ behaviour of the said passenger, he was diverted to Red Channel for examination of his bags.*

*1.1 Thereafter, in the presence of panchas, the hand bags/ check-in bags of the noticee was put in the screening machine and there appeared an image of metal wire around one hand-bag and one check-in bag, resembling impression given by the machine in the case of gold. The Customs*

*officers once again asked the said passenger as to whether any dutiable goods are packed in the bags; however, he denied the presence of any dutiable goods or gold in the bags.*

*1.2 The Customs Officers asked the said passenger to go through Door Frame Metal Detector, but nothing objectionable was found. Thereafter, the Customs officers asked the said passenger to open the bag (bag no.-1) in the presence of panchas; the clothes and other items packed in the said bag were removed and after opening of the bottom cloth cover chain, a steel patti stitched around middle of the bag was seen. While removing the said steel patti, an aluminum coated wire was seen attached beneath the said steel patti. The aluminum coated wire was removed and the same was weighed in the weighing machine located in the Customs area which was found to weigh 701.70 grams. On scratching surface of the said aluminum coated wire, a yellow coloured metal which appeared to be gold, was seen.*

*1.3 Thereafter, in the same way the check-in baggage (bag No.2) was opened and the clothes and other items packed in the bag were removed and after opening bottom cloth cover chain, steel patti stitched around middle of the bag was seen. While removing the said steel patti, an aluminum coated wire attached beneath the said steel patti was noticed. The aluminum coated wire was removed and the same was weighed in the weighing machine located in the Custom area and its weight was found as 1051.84 grams. On scratching surface of the said aluminum coated wire, a yellow coloured metal which appeared to be gold, was seen.*

*1.4 All the Aluminium powder coated wires, appearing to be Gold wires totally weighing 1753.54 grams, were removed from the two bags of the noticee.*

*1.5 The Government Approved Valuer, Shri Soni Kartikey Vasantrai was called for examining the authenticity and valuation of the said goods, who tested the said Aluminium powder coated Gold Wires and confirmed that all the said wires were of pure Gold having purity of 995 and totally weighed 1753.540 grams, valued at Rs.52,60,620/- (Local Market Value) and Rs.45,95,116/- (Tariff Value).*

*1.6 The noticee vide his statement dated 27.04.2012 had confessed before the panchas that he had concealed Gold in his two bags i.e. one hand bag and another in check-in bag; that the bags were handed over to him by Shri Murtaza Merchant (his brother in-law); that a message received from Murtaza Merchant Mobile (No.+971503596077) on his mobile (No.09993122052) that "Jeetubhai's person coming from Baroda to receive the bags; that the two bags were to be handed over to Jeetubhai Soni having mobile No. 09407461148. During the Panchnama a phone call was received by the noticee from Jeetubhai Soni and intimated that the said two bags were to be delivered to the person namely KK who is from Vadodara. In between a call from mobile no.09879112276 from Kanubhai H. Soni was received and informed that he was waiting for delivery of the bags at Shambhu's Coffee Bar, Near Indira Bridge. The officers along with the panchas reached Shambhu's Coffee Bar with the noticee and after waiting for sometime a person*

*named Shri Kanubhai H. Soni reached at Shambhu's Coffee Bar and directly met the noticee to receive the bags. The Customs Officers waiting for the said person, asked Shri Kanubhai H. Soni to come along with them and they came back to SVPI Airport, Anmedabad. On being asked, Shri Kanubhai H. Soni stated that he was a job worker of Shri Jeetubhai Soni; as per Jeetubhai Soni's request he came to receive the bags; that the same were to be delivered to Shri Jeetubhai at Vadodara and he was not in position to give further details of Shri Jeetubhai Soni. The mobile IMEI No.353743053028864/01 (mobile No. 09879112276) of Shri Kanubhai H. Soni was withdrawn by the Customs Officers for investigation.*

*1.7 As per the Baggage Rules, 1998 (as amended), a male passenger who has been residing abroad for more than one year is allowed clearance of bonafide baggage to the extent up to an aggregate value of Rs.50,000/- if it is in the form of jewellery. However, no free allowance is applicable, if it is in raw form, for which the passenger has to declare in the disembarkation slip. On verification of his passport, it was observed that the noticee was a frequent visitor to India. The subject goods were not declared by him either verbally or in the disembarkation slip. Further, the said gold wire weighing 1753.54 grams concealed in the two bags, being in commercial quantity cannot be considered as a part of bonafide baggage.*

*1.8 In the light of above mentioned contravention of Customs Baggage Rules, 1998, as amended, the aforesaid items (aluminum Powder coated Gold Wires along with its packing*

*materials) recovered from the said passenger were placed under seizure under panchnama dated 27.04.2014 under the provisions of Customs Act, 1962.*

*1.9 The noticee was also arrested upon the authorization granted by the Commissioner, Customs, Ahmedabad under F.No.VIII/48-27/PI/HQ/2014 dated 27.04.2014 and produced before the Metropolitan Magistrate, Ahmedabad and sent to judicial custody at Sabarmati jail, Ahmedabad till 28.04.2014.*

*1.10 Statement of the noticee was recorded on 27.04.2014 under section 108 of Customs Act, 1962, wherein he stated that he did not know about the gold wires as he got empty bags, i.e., one hand bag and second Trolley Bag from his brother-in-law, Shri Murtaza Merchant residing at Deira Dubai; he had received a message from his brother-in-law, through mobile No. 97150596077 that Jeetubhai's person coming from Baroda to receive the bags; the said two bags i.e. one hand bag and another check-in bag were to be delivered to Jeetubhai Soni having Mobile No.9407461148; he had also received a phone call from Jeetubhai Soni to deliver the said 2 bags to the person namely KK, who was coming from Vadodara. In between a call from mobile no.09879112276 introducing himself as Kanubhai H.Soni was received who asked him where to receive the bags. He accepted that he has visited India six times, since 11.06.2013 to 21.03.2014, as shown in the panchnama. On being asked about the said gold wires he stated that he did not know about the said gold wires; that he was coming to Ahmedabad to participate in religious function i.e. "ORAS" at*

*Vohora's Roja, Saraspur, Ahmedabad. He voluntarily deposited his mobile No. 09993122082 and passport bearing No.Z2510189 for further investigation.*

*1.11 The Addl. Commissioner, Central Excise, Jaipur was requested vide letter F.No. VIII/48-27/PIU/HQ/2014 dated 02.05.2014 to carry out search of the residential address of the said passenger at 20/595, Hindu Mochi Mohalla, Panni Gram Chowk, Sadar Kotwali, Ajmer (Rajasthan) and recover incriminating documents and seize contraband goods, if any found. Accordingly, searches were carried out at the above mentioned address by the officers of the Customs Preventive Unit, Jodhpur, vide C.No. VIII (48)2/Addl/P&I/2013 dated 23.05.2014, it was reported that under Panchnama dated 23.05.2014 drawn by the Customs, (Prev.) Jodhpur, the said premises was found in locked condition. On being enquired from neighbours, it was informed that Shri Abdul Husain Saifuddin Hamid and his whole family are staying at Dubai; they had visited few days back to clean their house and left; no relative of him stays in Ajmer and they did not know about their Dubai's residence.*

*1.12 On application of the noticee before the Court of the Hon'ble Additional Chief Metropolitan Magistrate, Anmedabad, wherein, the noticee had made a request for release of original Passport bearing No.Z2510189 for six months; he be permitted to leave India for 6 months and be exempt to mark his presence for the period of six months. The Assistant Superintendent, Additional Chief Metropolitan Magistrate Court, Ahmedabad vide its order dated 26.05.2014 had ordered to return the passport to the said*

*passenger for six months with conditions. As per the Metropolitan Court's Order, the original passport was returned to the said passenger on 27.05.2014. The said passenger had also submitted his latest address as Shri Abdul Husain Saifuddin Hamid, C/o. Saifuddin abde-Ali Hamid (Ajmerwala), C-3, Jasmin Flat, Khanpur, Ahmedabad on 26.05.2014.*

*1.13 Statement of Shri Kanubhai H. Soni (original name Shri Kanaiyalal Hiralal Soni) was recorded on 27.04.2014 under section 108 of the Customs Act, 1962, wherein he stated that he was engaged in the business of jewellery/ ornaments making as per the order of customers since last 25 years and run business from Ghadiyali Pole, Karoliya Pole, M.G. Road, Vadodara; his main customers are sonis (goldsmiths) located at nearby villages of Vadodara city; his three sons are also engaged in the business. He was shown panchnama dated 27.04.2014 and he agreed with its contents. He further stated that on 27.04.2014 about 07.30 hrs he came to Ahmedabad for social work and thereafter about 09.00 hrs reached Shambu's Coffee Bar near Indira Bridge, Ahmedabad to receive two bags from Shri Abdul Hussain Saifuddin Hamid after contacting him on his cell phone No.09993122052. Upon being asked whether he knew Shri Abdul Hussain Saifuddin Hamid he stated that he did not know him or never come in touch with him in the past; he came to take delivery of the two bags from him on the direction given by Shri Jeetubhai Soni from his cell phone No.09407461148. Regarding Shri Jeetubhai Soni, he stated that he was residing at Ali Rajpur, Near Gujarat Border, Madhya Pradesh and looking after two jewellery*

*shops at Ali Rajpur, viz. Payal Jewellers, etc. since the last four years whose owner was Shri Chandubhai Soni, and was presently at Australia on tourist visa for two months; he came to know Shri Jeetubhai Soni since last one year through his relative whose name he did not remember at present; he met him last before one week at his Vadodara shop. On being asked as to why Shri Jeetubhai Soni asked him to receive the bags from Shri Abdul Hussain Saifuddin Hamid at Shambu's Coffee Bar at Indira Bridge, he stated that during the course of routine telephonic conversation Shri Jeetubhai came to know that he was going to Ahmedabad for social work on 27.04.2014 and therefore he requested him to receive the two bags from Shri Abdul Hussain Saifuddin Hamid who was arriving from Dubai and accordingly, Shri Abdul Hussain Saifuddin Hamid contacted him at about 8.45 hrs from his Cell Phone No.09993122052 and asked him to reach at Shambu's Coffee Bar and collect the said two bags from him. Upon being asked as to whether he was having information that the said two bags were concealed with aluminum powder coated gold wire weighing 1753.54 grams, he stated that he did not know about the said concealment in the bags and he came to receive the bags on being requested by Shri Jeetubhai Soni as he had full faith or trust on him; that in return he had no deal with Shri Jeetubhai Soni or Shri Abdul Hussain Saifuddin Hamid and he would have received the bags on mutual trust only. He also stated that he did not know the person namely Shri Murtaza Merchant.*

*1.14 Baggage (Amendment) Rules, 2006 (Baggage Rule, 1998) provides that Gold or silver, in any form, other than*

*ornaments is not allowed free of duty. In the instant case, the stay of the noticee was for a short period and gold weighing 1753.54 grams recovered from his bags totally valued at Rs.52,60,620/- (Local Market Value) and Rs.45,95,116/- (Tariff Value) was more than the permissible limit and therefore, the baggage of the said passenger, cannot be considered as bonafide baggage under the Customs Baggage Rules 1998, as amended.*

*1.15 According to Section 77 of the Customs Act, 1962 the owner of any baggage, for the purpose of clearing it, is required to make a declaration of its contents to the proper officer. In the instant case, the noticee had not declared that he was carrying Aluminum coated gold wires totally weighing 1753.54 grams, duly concealed in the baggages, having value of Rs.52,60,620/- (Local Market Value) and Rs.45,95,116/- (Tariff Value), thereby contravened the provisions of Section 77 of the Customs Act, 1962. It therefore, appeared that said goods were attempted to be smuggled into India without declaring and without discharging duty payable thereon.*

*1.16 From the facts and circumstances discussed herein above, it appeared that the noticee was involved in the smuggling of Gold from Dubai into India, with a malafide intention to evade the payment of Customs duty. It further appeared that the said Gold totally weighing 1753.54 grams was brought for commercial purpose. Thus, the Gold brought in by the noticee cannot be construed as "bonafide baggage" within the meaning of section 79 of the Customs Act, 1962 read with para 2.20 of Foreign Trade Policy (2004-2009). As*

*per para 2.20 of the Foreign Trade policy, formulated under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, "a passenger is allowed to import bonafide household goods and personal effect only, as his bonafide baggage. Import of goods in commercial quantity with intent to earn profit is not covered under the ambit of bonafide baggage and hence the import of such goods is not permitted through baggage mode", Therefore, it appeared that the noticee attempted to smuggle the above said goods without declaring it in the dis-embarkation slip in contravention of the provisions of Baggage Rules 1998, as amended.*

*1.17 The aforesaid act of the noticee, importing the Aluminum coated gold wire totally weighing 1753.54 gms, valued at Rs.52,60,20/- (Local Market Value) Rs.45,95,116/- (Tariff Value) duly concealed in his baggages, for commercial purpose, with an intention to evade duty payment, in contravention of the provisions of Section 77 and Section 79 of the Customs Act, 1962 amounts to "smuggling" within the meaning of Section 2(39) of Customs Act, 1962. The above acts and omissions on the part of the noticee appeared to have rendered the said goods liable for confiscation under section 111(l) and 111(m) of the Customs Act, 1962. Further, his action of importing Gold in commercial quantity is contrary to the prohibition imposed by Section 7 of the Foreign Trade (Development and Regulation) Act, 1992. Further, the noticee has contravened the provision of Rule 11 of Foreign Trade (Regulation) Rules, by not declaring the value, quantity and description of the goods imported by him. The noticee has also acted contrary*

*to the prohibition imposed by para 2.20 of the Foreign Trade Policy 2008-2009, by importing non-bonafide baggage which has rendered the aforesaid goods, viz. aluminum powder coated gold wires liable for confiscation under Section 111(l) and 111(m) of the Customs Act, 1962.*

*Further, it also appeared that the packing material used in the concealment of the aforesaid gold wire is also liable for confiscation under Section 118(a) and 119 of the Customs Act, 1962.*

*1.18 It further appeared that the noticee attempted smuggling of the said goods viz. Gold by concealing the same without payment of Customs Duty. Such act on the part of the noticee has rendered the aforesaid goods liable for confiscation under section 111(l) and 111(m) of the Customs Act, 1962. By acting in the above mariner, i.e. the noticee was concerned with the carrying, removing, depositing, harbouring, keeping and concealing of the said imported gold and as such, has made himself liable for penalty under Section 112 (b) of the Customs Act, 1962.*

*1.19 Further, the noticee had handed over the Indian Customs Declaration Form (dis-embarkation slip) declaring that he was not carrying/having any dutiable articles to the Customs Officer on duty. The Customs Officer also inquired verbally from him whether he was carrying any dutiable goods to which he replied in negative. However, he concealed the said goods totally weighing 1753.54 gms and did not disclose the same in the Indian Customs Declaration Form submitted by him. From the above, it is evident that the noticee had intentionally signed wrong declaration in*

*order to evade the payment of customs duty and hence also made himself liable for penalty under Section 114AA of the Customs Act, 1962.*

3. The aforesaid led to issue a show-cause notice under Section 124 of the Customs Act, 1961, calling upon the writ-applicant to show-cause as to why :

"*(i) The 1753.54 grams Aluminum Coated Gold Wire valued at Rs.52,60,620/- (Market Value) & Rs.45,95,116/- (Tariff Value}, placed under seizure under panchnama dated 27.04.2014, should not be confiscated under Section 111(l) and 111(m) of the Customs Act, 1962;*

*(ii) The packing material, viz. 2 nos. of broken bags used for concealment of the said goods, having no commercial value, placed under seizure under panchnama dated 27.04.2014 should not be confiscated under Section 118(a) and 119 of the Customs Act, 1962;*

*(iii) Penalty should not be imposed on him under Section 112(b) of the Customs Act, 1962 for the omissions and commissions mentioned herein above;*

*(iv) Penalty should not be imposed upon him under Section 114AA of the Customs Act, 1962 for false declaration."*

4. The Joint Commissioner, Customs, Ahmedabad, ultimately passed the final order of confiscation. The operative part of the order reads thus :

*"(i) I order to confiscate absolutely the Gold totalling weighing 1753.54 grams Aluminum Coated Gold Wire valued at Rs.52,60,620/- (Market Value) & Rs.45,95,116/- (Tariff Value), placed under seizure under panchnama dated 27.04.2014, under Section 111(l) and Section 111(m) of the Customs Act, 1962.*

*(ii) I also order to confiscate absolutely the packing material, viz. 2 nos. of broken bags used for concealment of the said goods, having no commercial value, placed under seizure under panchnama dated 27.04.2014 under Section 118(a) and 119 of the Customs Act, 1962.*

*(iii) I impose a penalty of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand Only) on Shri Abdul Husain Saifuddin Hamid under Section 112(b) of the Customs Act, 1962.*

*(iv) I also impose a penalty of Rs.5,00,000/- (Rupees Five Lakh Only) on Shri Abdul Husain Saifuddin Hamid under Section 114AA of the Customs Act, 1962."*

5. The writ-applicant, being dissatisfied with the Order in Original referred to above, went in appeal before the Commissioner of Customs (Appeals). The appellate authority, vide order dated 8th December 2015, dismissed the appeal, holding as under :

*"7. I find that the appellant had not declared any dutiable goods, even during verbal enquiry, he replied in negative, which is in contravention of Section 77 of the Customs Act, 1962. Thus the appellant has attempted to smuggle the aluminum coated gold wires by concealing the same in hand*

*bag and check-in bag in violation to the provisions of the Baggage Rules, 1998 and the Customs Act, 1962. By this act of omission and commission, the seized goods under panchnama dated 27.04.2014 are liable for absolute confiscation under Section 111(1) read with Section 111(m) of the Customs Act, 1962 and the packing materials i.e. the said bags are liable for confiscation under Section 118(a) and 119 of the Customs Act, 1962. As the appellant involved himself in carrying, keeping and concealing the goods which he knows or has reason to believe are liable to confiscation under Section 111, he is liable for penalty under Section 112(b) of the Customs Act, 1962. Also by the act of furnishing the disembarkation slip without declaring the dutiable goods under his possession, the appellant made himself liable for penalty under Section 114AA of the Customs Act, 1962.*

*8. The appellant contended that since the gold wires in question are not prohibited item for the purpose of import, the same could not have been absolutely confiscated; gold is not a prohibited item for import as evident from perusal of list of prohibited items for import, therefore the gold in question may be released. I find that in this case the appellant returned to India within thirty seven days (approx.), hence he did not qualify as an eligible person to import gold and therefore the seized items are liable for absolute confiscation. I also find that as per the judgment of Hon'ble High Court in the case of Samynathen Murugesan [2009 (247) ELT 21 (Mad.)] when gold is attempted to be brought by way of concealment the same is liable for absolute confiscation. I also find that even though the gold*

*as such is not a prohibited item and can be imported, but such import is subject to the restrictions, including the RBI regulations. Hence, the order of absolute confiscation is correct and justified.*

*9. The appellant contended that he did not want to sell the gold into India after the same is handed over to him. He requested to release the gold so that the same could be exported out of India and handed over to the brother-in-law of the appellant. On the other hand the appellant in his statement dated 27.04.2014 stated that he got the said two empty bags from his brother-in-law and as per message of his brother-in-law, a person is coming to receive the said bags. There is no logic to give bags packed with his own personal goods to a person not known to him. Thus the appellant has made contradictory statements which seem afterthought.*

*10. The appellant contended that vide Order-in-Appeal No.AHM-CUSTM-000-APP-267 to 268/14-15 dated 01.09.2014, in a similar situation, the appeals were allowed by setting aside the order in so far as absolute confiscation of gold is concerned. They requested to release the gold accordingly and hand over to them. I find that in the said case, the concerned appellants have filed appeals by aggrieving the order of confiscation of gold jewellery, charging duty and imposing redemption as well as personal penalties on them. The jewellery was worn by the appellants in the said case and in the said Order-in-Appeal. I have ordered for re-export of said gold as well as reduction of redemption fine and penalties. In the said case no*

*absolute confiscation of the gold was ordered, whereas in the present case, there is concealment of gold and absolute confiscation ordered by the adjudicating authority. Thus the said case cited by the appellant is not similar to present case."*

6. Being dissatisfied with the aforesaid order passed by the appellate authority, the writ-applicant preferred a revision application before the Government of India, Ministry of Finance, under Section 129DD of the Act, 1962, which came to be rejected vide order dated 31st August 2020. The order reads thus :

*"7. Government has gone through the facts of the case, it is observed that the gold brought by the Applicant was ingeniously concealed as wires in below a steel plate in the bottom of the hand and checked in baggage. The concealment was planned so as to avoid detection and evade Customs duty and smuggle the gold into India. A blatant attempt was made to smuggle the gold into India in contravention of the provisions of the Customs Act, 1962. The said offence was committed in a premeditated and clever manner and clearly indicates mens rea, and that there was no intention of declaring the gold to the authorities and if he was not intercepted before the exit, the Applicant would have taken out the gold without payment of customs duty. The applicant on one hand claims that he is a victim of a smuggling racket and on the other hand pleaded for re-export. Having accepted that he is a victim of a smuggling racket he is not the owner of the impugned gold.*

*8. The Government therefore holds that the Original Adjudicating Authority has rightly confiscated the gold absolutely and imposed a penalty. The Government also holds that Commissioner (Appeals) has rightly upheld the absolute confiscation by the original adjudicating authority. Government however, notes that when penalty is imposed under section 112 no penalty is required to be imposed under section 114AA of the Customs Act, 1962 for the same offence. The penalty imposed under section 114AA of the Customs Act, 1962 therefore is required to be set aside.*

*9. (The Government therefore finds no reason to interfere with the impugned Order-in-Appeal. The Appellate order is upheld as legal and proper. The penalty of Rs.5,00,000/- (Rupees Five lakhs) imposed under section 114AA of the Customs Act,1962 is set aside."*

7. Being dissatisfied with the aforesaid, the writ-applicant has come up before this Court with the present writ-application.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

8. Mr.Shastry, the learned counsel appearing for the writ-applicant, at the outset submitted that he would like to canvass three-fold submissions: first, with respect to Section 110 of the Act, 1962; secondly, with respect to Section 112 of the Act, 1962 and thirdly, with respect to Section 125 of the Act, 1962.

9. Mr.Shastry, the learned counsel vehemently submitted that the entire action on the part of the authorities could be said

to be vitiated on account of illegal seizure of the goods in question. Mr.Shastry would submit that the Customs Officers failed to prepare any seizure report at the time of the seizure of the goods upon the reasonable belief that those were liable to be confiscated under the Act, 1962. According to Mr.Shastry, all that was done at the time of the seizure was to prepare a panchnama duly signed by two panch-witnesses in presence of the officers of the Customs department. He would argue that Section 110(1) of the Act, 1962 is mandatory and the failure on the part of the officers at the relevant point of time to prepare a separate seizure report vitiated the entire proceedings of the seizure under Section 110 of the Act.

10. To fortify his submission as regards Section 110 of the Act, Mr.Shastry has placed significant reliance on a decision of the Delhi High Court in the case of Worldline Tradex Private Limited v. The Commissioner of Customs [Writ Petition (C) No.5939 of 2016, decided on 25th July 2016]. Mr.Shastry pointed out that the Delhi High Court, in its judgment, has referred to a Division Bench decision of this High Court in the case of Baboo Ram Hari Chand v. Union of India, 2014 (304) ELT 371 (Guj) taking the view that seizure and confiscation are not one and the same thing and a separate seizure memo has to be drawn in accordance with the provisions of Section 110 of the Act. In other words, the seizure order dated 13th October 2014 could be termed as illegal as the same is a panchnama-cum-seizure order. According to Mr.Shastry, the view taken by this High Court in Baboo Ram Hari Chand (supra) is that such composite order is unheard of. The authority is empowered to exercise such drastic powers to seize the goods only in cases where it has reason to believe that the goods are liable to be confiscated.

11. The aforesaid takes us now to record the second submission of Mr.Shastry. Mr.Shastry would argue that while the show-cause notice under Section 124 of the Act clearly stated that the offence was one relatable to Section 112(b) of the Act, the adjudicating authority went on to discuss Section 112(a) of the Act. According to Mr.Shastry, the reading of the two sub-sections of Section 112 of the Act make it clear that in sub-section (a) the element of *mens rea* is not there, whereas in sub-section (b) the *mens rea* is an essential part and this is one of the exceptions to the general rule that in the Financial Acts, the requisite *mens rea* is presumed. In short, the argument of Mr.Shastry is that when the Customs Department has alleged violation of Section 112(a) of the Act, the onus would be upon them to establish the presence of the element of *mens rea*, which they have miserably failed to even prima facie indicate. He would argue that the department has failed to adduce any evidence to even remotely suggest that the gold in question was concealed with a dishonest intention.

12. According to Mr.Shastry, the penalty could have been imposed only under Section 112(b)(ii) of the Act. According to Mr.Shastry, the goods in question were not prohibited goods and, therefore, there was no scope to impose penalty under sub-clauses (i), (iii), (iv) and (v) of sub-section (b) of Section 112 of the Act.

13. The third and the last contention of Mr.Shastry is with respect to Section 125 of the Act, 1962. According to Mr.Shastry, Section 125 of the Act makes it abundantly clear that where the goods are “prohibited”, the adjudicating authority may, and where they are not so, the adjudicating authority shall give an option to the owner, or where the owner is not known, the

person from whom the goods are seized, to pay in lieu of confiscation such fine as the said officer may deem fit. He would argue that the appellate authority, in its order dated 8th December 2015, has, in so many words, held that the gold as such is not a "prohibited" item and can be imported, but such import is subject to certain restrictions, and if an attempt is made to conceal the same without valid disclosure of the same at the airport, the same would be liable for absolute confiscation. According to Mr.Shastry, such finding as recorded by the appellate authority cannot be said to be in accordance with law.

14. Except the three submissions noted above, no other submissions were raised by the learned counsel appearing for the writ-applicant.

ANALYSIS :

15. We shall first deal with the submission as regards Section 110 of the Act. It appears from the materials on record that the writ-applicant, upon arrival at the airport at Ahmedabad, had opted for the green channel. He had filled up the Indian Customs Declaration Form (Form-1), declaring that he is not carrying/ in possession of any dutiable goods. As the movements of the writ-applicant were found to be suspicious, he was diverted to the red channel for the examination of his bags. While he was diverted, the Customs Officers thought fit to draw a detailed panchnama of the entire proceedings in presence of the two independent panch-witnesses. When the handbags/ check-in bags were put in a screening machine, an image of metal wire around one handbag and one check-in bag appeared on the screening machine, resembling the impression that there was gold in the bags. From that point of time, whatever transpired till

the end has been duly recorded in the panchnama duly signed by the two panch-witnesses as well as the Air Customs Officers on duty at the SVPIA, Ahmedabad. We may quote the relevant part of the panchnama as under :

> *"The goods are placed under seizure by the officers of customs under the reasonable belief that the subject Aluminum Powder coated Gold Wires are not a part of the permissible Baggage and are liable for confiscation. Consequently, in light of above mentioned contravention of Rules and Regulations of the Customs Baggage Rules 1998, as amended, the aforesaid items (Aluminum Powder coated Gold Wires along with its packing materials) recovered from the passenger as described in the panchnama, are placed under Seizure under the provisions of Customs Act, 1962 under the reasonable belief that the same are liable for confiscation under the provisions of the Customs Act, 1962 as the said goods were attempted to be smuggled by not declaring the same before the Customs.*
>
> *The items mentioned in Annexure-A and bags are placed under seizure for further investigation and other items such as clothes, food and other miscellaneous items after scrutiny are returned to Shri Abdul Husain Saifuddin Hamid in presence of we independent panchas.*
>
> *The said Aluminum Powder coated Gold Wires are packed in one plastic container in presence of us the independent panchas as well as in the presence of the said passenger which is duly sealed with the Customs lak Seal and the Packing slips are duly pasted on the said box. We the*

*panchas and Shri Abdul Husain Saifuddin Hamid are satisfied with the sealing of the said Plastic Box containing the said goods.*

*Before concluding the panchnama proceedings, the Customs officers, in our presence, once again offer their personal search to Shri Abdul Husain Saifuddin Hamid which he denies.*

*The panchnama started at 05.15 hrs of 27.04.2014 and concluded at 12.00 hrs. of 27.04.2014. This panchnama is recorded on the computer installed in the office of the customs located at S.V.P.I. Airport, Anmedabad to which we panchas have given our consent. We have read the panchnama and found it to be true and as per our version/observation. In token of our presence throughout the proceedings of the panchnama, as well as in token of correctness of this panchnama, we the panchas put our dated signature on every page of the panchnama."*

16. We may also quote the two packing lists, i.e. Bag No.1 and Bag No.2, prepared by the Customs Officers :

"PACKING LIST

BOX-01

| | |
|---|---|
| NAME OF PAX : | HAMID ABDUL HUSAIN SAIFUDDIN |
| ADDRESS OF PAX | 20/595 HINDU MOCHI MOHALLA<br>PANNI GRAM CHOWK<br>SADAR KOTWALI<br>AJMER, RAJASTHAN |

| | |
|---|---|
| PASSPORT NO. | Z2510189 |
| DESCRIPTION OF GOODS | ALUMINIUM POWDER COATED GOLD WIRE (1753.54 GRAMS) |
| VALUE OF GOODS | MARKET VALUE – Rs.52,60,620/-<br>TARIFF VALUE – Rs.45,95,116/- |
| REASONS FOR DETENTION | SEIZURE UNDER PANCHNAMA DATED 27.04.2014 |
| LAST DATE OF DEPARTURE | 21 MARCH 2014 |
| FLIGHT NO. | G9-483 |
| WAREHOUSE ENTRY NO & DATE | 971/27-04-2014 |

PACKING LIST

BOX-02

| | |
|---|---|
| NAME OF PAX : | HAMID ABDUL HUSAIN SAIFUDDIN |
| ADDRESS OF PAX | 20/595 HINDU MOCHI MOHALLA<br>PANNI GRAM CHOWK<br>SADAR KOTWALI<br>AJMER, RAJASTHAN |
| PASSPORT NO. | Z2510189 |
| DESCRIPTION OF GOODS | 1. SAMSUNG MOBILE<br>IMEI No.-353824050798111<br>Mob No.-9993122052<br><br>2. SAMSUNG MOBILE<br>IMEI No.-353743053028864/01<br>Mob No.-9879112276<br><br>3. Passport No.-Z2510189<br><br>4. 2 Nos of broken bags in which gold wires were concealed. |

| | |
|---|---|
| VALUE OF GOODS | MARKET VALUE – Rs.52,60,620/-<br>TARIFF VALUE – Rs.45,95,116/- |
| REASONS FOR DETENTION | SEIZURE UNDER PANCHNAMA DATED 27.04.2014 |
| LAST DATE OF DEPARTURE | 21 MARCH 2014 |
| FLIGHT NO. | G9-483 |
| WAREHOUSE ENTRY NO & DATE | 971/27-04-2014 |

17. It is true to a certain extent that no separate seizure memo was prepared. The subjective satisfaction that the goods is liable to be confiscated under the Act has been specifically recorded in the panchnama. The moot question is, whether the omission or failure on the part of the concerned officer to draw a separate seizure memo along with the panchnama would render the seizure illegal and thereby vitiate all the subsequent proceedings right upto the confiscation of the goods seized.

*"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.*

*(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:*

*Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months.*

*(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.*

*(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extract therefrom in the presence of a officer of customs."*

18. Section 110 deals with seizure of goods [sub-section (1)] and documents or things [sub-section (3)].

19. Under sub-section (1), the proper officer has the power to seize such goods which he has reason to believe are liable to confiscation under Chapter XIV of the Act.

20. Sub-section (2) requires service of notice under clause (a) of Section 124 within six months of the date of the seizure of the goods and provides that if no such notice is served within the specified period the goods shall be returned to the person from whose possession they were seized.

21. Under the proviso to sub-section (2), the aforesaid period of six months may, on sufficient cause being shown, be extended for a period not exceeding six months by the Collector of Customs.

22. Sub-section (3) empowers the proper officer to seize any documents or things which, in his opinion, will be useful or relevant to any proceeding under the Act.

23. For seizure of goods under sub-section (1) the proper officer should have reason to believe that the goods proposed to be seized are liable to confiscation.

24. For seizure of goods, the concerned officer must have reason to believe that the said goods are improperly imported and there should also be materials relevant or germane upon which the concerned authority could have formed such belief [M.A. Rasheed v. State of Kerala, AIR 1974 SC 2249; see also AIR 1967 SC 295]

25. There is no justification for the acceptance of the contention that omission or failure to draw a separate seizure memo under Section 110 of the Act is *sine qua non* for taking action under Section 124 of the Act. These two sections are entirely independent to each other. There is no substance in the contention that if no separate seizure memo under Section 110 of the Act is prepared, the same will render the seizure of the goods by itself illegal and the authority under Section 124 of the Act will also have no jurisdiction thereafter to proceed with the confiscation proceedings or with the imposition of penalty. The words used in Section 112 and Section 124 respectively of the Act are “any goods” and “any person”. These words are of the

widest import and they cannot be given a restricted meaning. There is nothing in these provisions to indicate that the goods in respect of which an order of confiscation or penalty can be passed under Section 111 and Section 112 respectively must be the goods seized under the provisions of Section 110 of the Act. It would be too much for this Court to take the view that in the absence of a separate seizure memo the authorities could not have proceeded further or assumed jurisdiction for the purpose of confiscation of the goods. "To confiscate" would mean to adjudge goods or property to be forfeited to the public domain and to deprive the owner of the right of ownership of the same. It cannot be gainsaid that adjudication of confiscation of goods can be recorded even without seizure of the goods. Similarly, personal penalty can be imposed even when the goods have not been seized. Such a situation is contemplated by clause (b) of Section 112 of the Act.

26. In the aforesaid context, we may refer to and rely upon a Division Bench decision of this High Court in the case of J.K.Bardolia Mills v. M.L.Khunger, Deputy Collector of Central Excise and Customs, reported in (1975)16 GLR 119. In the said case, the principal contention on behalf of the petitioner was that the goods in dispute were seized by the Customs authorities on May 29, 1969, whereas the notice as contemplated by Section 124(1)(a) read with Section 110 of the Act was given on December 19, 1969, i.e. after a period of six months as provided in Section 110 and, therefore, it was argued that the said notice was invalid and illegal. It was sought to be argued before the court that the consequences of the same would be two-fold; (i) that a right vested in the petitioner to be entitled to the return of goods seized under the provisions of Section 110(2) of the Act, and (ii) the respondents (Customs authorities) were debarred

from holding any inquiry in respect of such goods. It was also argued before the court that no order of confiscation or levy of penalty under Sections 111 or 112 of the Act could have been passed in respect of the goods in dispute because the petitioner was entitled to restoration of the goods under the provisions of Section 110 of the Act. The Division Bench of this Court, while negativing all the above noted submissions, held as under :

> *"In order to appreciate those contentions, it is necessary to refer to the relevant provisions of Sections 110, 112 and 124 of the Act which are as follows:*
>
> > *110(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.*
> >
> > *(2) Where any goods are seized under Sub-section (1) and no notice in respect thereof is given under Clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:*
> >
> > *Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the*

*Collector of Customs for a period not exceeding six months.*

*112. Penalty for improper importation of goods, etc.*

*Any person,-*

*(a) who, in relation to any goods, does or omits to do any act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act, or*

*(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods, which he known or has reason to believe are liable to confiscation under Section 111 shall be liable,-*

*(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding five times the value of the goods or one thousand rupees, whichever is the greater;*

*(ii) in the case of dutiable goods, other than prohibited goods, to penalty not exceeding five times the duty sought to be evaded on such goods or one thousand rupees, whichever is the greater.*

*124. Issue of show-cause notice before confiscation of goods, etc.*

*No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-*

*(a) in given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;*

*(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and*

*(c) is given a reasonable opportunity of being heard in the matter:*

*Provided that the notice referred to in Clause (a) and the representation referred in Clause (b)) may, at the request of the person concerned be oral.*

*The aforesaid provisions have been interpreted by the Supreme Court in the case of the Assistant Collector of Customs v. Charon Das Malhotra, AIR 1972 SC 689, and the view taken by the Supreme Court is that the person from whom goods are seized is entitled to restoration of goods if*

*no show cause notice as contemplated under Section 124 read with Section 110 is issued within the prescribed time limit of six month. It was further held by the Court that the time limit can be extended by further period not exceeding six month in exercise of the powers under the proviso to Sub-section (2) of Section 110 only if the person from whom the goods are seized is offered an opportunity to show cause against such an extension. If such an opportunity has been offered and the Collector of Customs comes to the conclusion on the basis of the material placed before him that it is a fit case for extension of time and sufficient cause has been shown for granting the time, the Collector may extend the time. But in a case where the Collector extends time ex parts without offering any opportunity to show cause against such an extension to the person from whom the goods are seized, the order of extension is illegal, ultra vires and a nullity. In the present case the goods in dispute were seized on May 26, 1969 and show cause notice under Section 110 read with Section 124 was issued on December 19, 1969. In between those two dates, the Collector of Customs and Central Excise passed order No.VIII/10-272/Cus/69 on November 27, 1969, extending the period for the issue of the show cause notice prescribed under Section 110 of the Act without notice to the petitioner. The consequence is that the order passed by the Collector of Customs and Central Excise dated November 27, 1969 extending the period of six month provided in Section 110 by two month from November 26, 1969 is bad and illegal in view of the provisions of Section 110(2) of the Act. But the question then arises is whether the petitioner is entitled to return of the goods seized, once the order of confiscation is passed under Section 110 of the Act.*

*So far as Section 110 is concerned it deals with the seizure of the goods and the return thereof. In other words if the said provisions are not satisfied the goods seized have to be returned. Section 110 of the Act deals with the seizure of the goods. Section 124 of the Act deals with the confiscation and imposition of the penalty. The provisions relating to the seizure of the goods and those relating to the confiscation of the goods or imposition of penalty stand on different footing. Section 124 of the Act does not lay down any period within which the notice required by it has to be given. The period laid down in Section 110(2) affects only the seizure of the goods and not the validity of notice. In the present case after proceeding of seizure the proceedings for confiscation and imposition of penalty were proceeded with and the proceedings ended in the order of confiscation and imposition of penalty vide order Ex. "D". As the goods have already been ordered to be confiscated the question of return of goods after the period of six month as mentioned in Section 110 of the Act cannot survive. In Special Civil Application No. 555 of 1971 decided by a Bench consisting of our brother Mr. M.P. Thakker and myself decided on April 10, 1973 (Vasa Bhaja v. B. Tawde) the question arose about the return of 2 silver bars which were seized by the custom authority on June 10, 1968 from one Vasa Bhoja. The claim for return of 2 silver bars was rejected by the Court on two grounds, namely, (1) that the question that Vasa Bhoja was entitled to return of goods depended upon the disputed question whether 2 silver bars belonged to or owned by Vasa Bhoja, and (2) that an order of confiscation thereof had already been passed. This decision, therefore, supports our conclusion that once the order of confiscation of the goods is*

*passed under the provisions of Section 111 of the Act the question of return of goods after expiry of the period mentioned in Section 110 of the Act cannot survive.*

*2. It was then contended by the learned advocate for the petitioner that no order of confiscation or levy of penalty under Sections 111 or 112 could have been passed in respect of the goods in dispute because the petitioner was entitled to restoration of the goods under the provisions of Section 110 of the Act. It was contended that Section 110 is contained in Chapter XIII of the Act which chapter contains provisions for searches, seizure and arrest. The provisions contained in Chapter XIV which follow the provisions of Chapter XIII provide for confiscation of goods, conveyances and imposition of penalty. It was therefore, contended that an order under Sections 111, 112 and 124 for confiscation or imposition of penalty can be passed only in respect of the goods which are seized under Section 110 of the Act. It was further argued that if a right of restoration of goods vested by efflux of time in the person from whom the goods are confiscated, such person should again be served with an order of seizure under Section 110 of the Act, and unless the goods are so seized, no order of confiscation or imposition of penalty can be passed under Sections 111 & 112 of the Act. The aforesaid arguments advanced on behalf of the petitioner cannot be accepted. The first reason is that the provisions of Chapter XIII deal with the procedural matters. The provisions enacted therein are for securing goods suspected to be illegally imported. The provisions contained therein invest powers on certain officers to prevent disposal*

*of goods in respect of which the proper person entertains a reasonable belief that the goods are smuggled goods. In Chapter XIV substantive provisions are enacted. In order that the substantive provisions may not be rendered ineffective the provisions are enacted in Chapter XIII so that suspected smuggled goods may not be disposed of taking at the same time abundant caution that individuals may not be put to more inconvenience than what is necessary. It is necessary to consider the provisions contained in Chapter XIV of the Act. Section 111 of the Act describes the goods which can be confiscated. Section 112 provides for penalty for improper importation of goods. Section 113 provides for confiscation of goods attempted to be improperly exported. Section 114 provides for penalty for attempt to export goods improperly. Section 115 provides for confiscation of conveyances and Section 116 provides penalty for not accounting the goods. Section 117 is a general provision providing for penalty for contravention which is not expressly provided. Section 118 provides for confiscation of packages and their contents. Section 121 provides that where any smuggled goods sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale proceeds thereof shall be liable to confiscation. Section 125 provides for option to pay fine in lieu of confiscation. Section 122 contains procedural provisions and Section 129 provides for rules relating to burden of proof. Section 124 requires that no order confiscating any goods or imposing any penalty on any person shall be made under Chapter XIV unless owner of the goods is given notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to*

*impose a penalty and is given an opportunity of making a representation in writing against the grounds of confiscation or imposition of penalty, and is given a reasonable opportunity of being heard in the matter. If the intention of the legislature was to restrict confiscation of goods or imposition of penalty only in respect of the goods which are seized under Section 110 of the Act, the legislature would have used the language qualifying the word. "Goods" used in Sections 111, 112 and 124 of the Act. The words used in Sections 112 and 124 are "any goods" and "any person". These words are of widest import and they cannot be given a restricted meaning as is sought to be given by the learned advocate for the petitioner. There is nothing in these provisions to indicate that the goods in respect of which an order of confiscation or penalty can be passed under Sections 111 and 112 of the Act must be goods seized under the provisions of Section 110 of the Act. The power to seize the goods under Section 110 is distinct and separate from the power of confiscation and imposition of penalty as provided in Sections 111 and 112 of the Act. The later provisions are not absolutely dependent on the provisions of Section 110 of the Act."*

27. In the aforesaid context, we shall now look into the Delhi High Court judgment in the case of Worldline Tradex Private Limited (supra) relied upon by Mr.Shastry, the learned counsel appearing for the writ-applicant. We may quote the relevant observations made therein thus :

*"22. In Om Udyog v. Union of India (supra), in similar circumstances, the Court directed immediate release of the*

*goods since "the Department had not shown prima facie case for exercise of powers of confiscation and has only relied upon existence of power". The Gujarat High Court in Baboo Ram Hari Chand v. Union of India (supra) negatived the plea of the Department that seizure and confiscation were one and same thing. In that case the panchnama was projected as the seizure order. The Court observed that "such composite order is unheard of". It further observed:*

*"27. Technically, asking the party to submit fresh PD Bonds for a period of six months on one hand and proceeding to seize the goods on the other hand may not perhaps be faulted with, however, burden lies on the authority to explain rationale to rush into seizure/ confiscation of the goods in such circumstances, the reason is the 'proper officer' cannot proceed to seize the goods under Section 110 of the Act unless he has reason to believe. The authority would exercise drastic powers to seize the goods only in case wherein it has reason to believe that the goods is liable to be confiscated. The powers to seize and the power to confiscate are quite drastic powers. Little elaboration would show apparent inconsistency in the conduct of the respondent, from which it can be said that formation of belief for seizure by the respondent is vitiated...."*

*23. The power of seizure under Section 110 of the Act has to obviously be exercised for valid reasons. The proper officer has to record his reasons to believe that the goods that he proposes to seize are liable to confiscation. The said reasons for exercise of the power have to be recorded prior to the*

*seizure. In the present case, as already noticed, apart from the panchnama, there is no separate order passed under Section 110(1) of the Act by the proper officer recording the reasons to believe that the goods are liable for confiscation. Since till date no other order exists and no such order has been communicated to the Petitioner, it is not possible to accept the plea of Mr. Agarwala, learned counsel for the DRI, that the 'detention' of the goods by the DRI was with the authority of law and in any event should be treated as a seizure in terms of Section 110(1) of the Act.*

*24. The net result is that the detention by the DRI of the goods imported by the Petitioner under the aforementioned B/E from 13th May, 2016 onwards is entirely without the authority of law."*

28. We are of the view that neither the Delhi High Court decision in the case of Worldline Tradex Private Limited (supra) nor the decision of this High Court in the case of Baboo Ram Hari Chand (supra) is helpful to the writ-applicant. In both the cases, petitions were filed before the respective High Courts at a point of time when no final order of confiscation and imposition of penalty was passed. It appears that in both the cases the respective petitioners came before the respective High Courts for getting their goods released on the ground that the seizure was not in accordance with law, more particularly, the show-cause notice under Section 124 of the Act was not issued within the statutory time period as provided under the provisions.

29. At the cost of repetition, we state that it would be too much to say that the omission or failure to draw or prepare a separate

seizure memo along with the panchnama would render all subsequent proceedings bad in law. Thus, we reject the first contention of Mr.Shastry as regards Section 110 of the Act.

30. The aforesaid now takes us to consider the contention as regards Section 112 of the Act.

Section 112 of the Act reads thus :

"*112. Penalty for improper importation of goods, etc.*

*Any person,-*

*(a) who, in relation to any goods, does or omits to do any act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act, or*

*(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods, which he knows or has reason to believe are liable to confiscation under Section 111 shall be liable,-*

*(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding five times the value of the goods or one thousand rupees, whichever is the greater;*

*(ii) in the case of dutiable goods, other than prohibited goods, to penalty not exceeding five times the duty sought to be evaded on such goods or one thousand rupees, whichever is the greater."*

31. It is argued that if the penal action is proposed to be taken and proceedings are initiated, which are likely to culminate in the imposition of penalty, then the authorities must be clear in their mind as to whether clause (a) or clause (b) of Section 112 would apply or both, failing which the proceedings would be liable to be quashed.

32. It would be appropriate for us to quote a part of the averments of the show-cause notice issued to the writ-applicant dated 13th October 2014 :

*"19. From the above, it appears that the said passenger attempted smuggling of the said goods viz. Gold by concealing the same without payment of Customs Duty. Such act on the part of the said passenger has rendered the aforesaid goods liable for confiscation under section 111(l) and 111(m) of the Customs Act, 1962. By acting in the above manner, i.e. the said passenger was concerned with the carrying, removing, depositing, harbouring, keeping and concealing of the said imported gold and as such, has made himself liable for penalty under Section 112 (b) of the Customs Act, 1962.*

*20. Further, the said passenger had handed over the Indian Customs Declaration Form (dis-embarkation slip) declaring that he was not carrying/having any dutiable*

*articles to the Customs Officer on duty. The Customs Officer also inquired verbally from him whether he was carrying any dutiable goods to which he replied in negative. However, he concealed the said goods totally weighing 1753.54 gms and did not disclose the same in the Indian Customs Declaration Form submitted by him. From the above, it is evident that the said passenger has intentionally signed wrong declaration in order to evade the payment of customs duty and hence also made himself liable for penalty under Section 114AA of the Customs Act, 1962.*

*21. Now therefore, Shri Abdul Husain Saifuddin Hamid, residing at 20/595, Hindu Mochi, Mohalla, Panigram Chowk, Sadar Kotwali, Ajmer, Rajsthan, (furnished latest addres as C/o Saifuddin Abde-Ali Hamid (Ajmerwala), C-3, Jasmin Flat, Khanpur, Ahmedabad) is hereby called upon to show cause in writing to the Additional/Joint Commissioner of Customs, Custom House, Navrangpura, Ahmedabad within thirty days from the receipt of this notice as to why :*

*(i) The 1753.54 grams Aluminum Coated Gold Wire valued at Rs.52,60,620/- (Market Value) & Rs.45,95,116/- (Tariff Value), placed under seizure under panchnama dated 27.04.2014, should not be confiscated under Section 111(l) read with 111(m) of the Customs Act, 1962;*

*(ii) The packing material, viz. 2 nos. of broken bags used for concealment of the said goods, having no commercial value, placed under seizure under panchnama dated 27.04.2014 should not be confiscated under Section 118(a) and 119 of the Customs Act, 1962;*

*(iii) Penalty should not be imposed on him under Section 112 (b) and 114AA of the Customs Act, 1962 for the omissions and commissions mentioned herein above.*

*22. The said Noticee must state in his written reply as to whether he desires to be heard in person, if no reply to this notice is received within 30 (thirty) days from the date of receipt of this notice or if he fails to appear for the personal hearing on the date and time intimated to him, the case is liable to be decided on merits on the basis of evidences available, without any further reference to him."*

33. The show-cause notice referred to above explicitly talks about Section 112(b) of the Act, 1962. It has been specifically stated in the show-cause notice while calling upon the writ-applicant to show-cause as to why penalty should not be imposed on him under Section 112(b) of the Act having regard to the mode and method attempted by the writ-applicant to smuggle the gold by clandestinely concealing the same without payment of the customs duty. The writ-applicant has invoked the writ jurisdiction of this High Court under Article 226 of the Constitution of India, and in such circumstances, it would be too much for this Court to go into the issue of '*mens rea*' for the purpose of Section 112 of the Act. Even otherwise, *mens rea* is a state of mind. In our opinion, there is nothing in Section 112 which requires that *means rea* must be proved before penalty can be levied under that provision. If on facts, it is found that the assessee had made a false representation, Section 112 is with regard to penalty for improper importation of goods. It is the blameworthy and suspicious conduct which is, indeed, the *sine qua non* for invoking the provision of Section 112 of the Act.

Once a finding is recorded by the competent authority that the writ-applicant herein attempted smuggling of gold by concealing the same without payment of the Customs duty, coupled with the fact that the writ-applicant had handed over the Indian Customs Declaration Form (Disembarkation Slip) declaring that he was not carrying/ having any dutiable articles before the Customs Officer on duty, that would clearly attract the provisions of Section 112 of the Act and, in our opinion, no further finding is required that the assessee had also the *mens rea*.

34. Under the criminal law, *mens rea* is considered as the "guilty intention", but when it is relatable to tax delinquency, which is a civil obligation, it implies a "blameworthy conduct". Therefore, unlike in criminal cases, where it is essential for the prosecution to establish that the accused had a guilty intention or, in other words, the requisite *mens rea* before recording the conviction, the obligation on the part of the Revenue, in cases of tax delinquency, could be discharged were it can be shown that the "blameworthy conduct" of the assessee was established, like by recording a finding that the assessee had made a "false representations" and the like. The recording of such a finding by itself shows the establishment of the blameworthy conduct, which would be the establishment of the *mens rea* to a limited extent applicable to the civil obligations. *Mens rea* can be established either by direct evidence or by drawing inferences from the established facts and circumstances of a given case. The application of the doctrine of *mens rea* in cases of tax delinquency has been nicely summed up in "*Corpus Juris Secundum*", Volume 85, at page 580 in paragraph 1023, where it is stated thus :

*"A penalty imposed for a tax delinquency is a civil obligation remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws. We are in agreement with the above statement. Therefore, we hold, to the limited extent that mens rea has application in tax default cases, it would stand established, if the conduct to the assessee is found to be blameworthy, within the meaning of the particular provision of the given tax statute. Where a finding is recorded on facts about the existence of the blameworthy conduct, which the Legislature has treated as an offence or a default on the part of the assessee, like the making of a "false representation", it would attract the provisions of Section 10(b) of the Act and no further finding would be required to be recorded about the existence of mens rea on the part of the assessee, as it would be inherently included in the earlier finding. We, therefore, cannot accept the proposition that even if a finding has been recorded on facts by the competent authorities that an assessee has made a "false representation", as contemplated by Section 10(b) of the Act, in the absence of an additional finding that the assessee also had the requisite mens rea, he cannot be penalised under Section 10(b) of the Act. The argument has no basis and is absolutely far-fetched."*

35. In the aforesaid context, we may refer to a Division Bench decision of the Madras High Court in the case of Comex Co. v. Collector of Customs, Madras-I, reported in 1997 (96) ELT 526 (Mad), wherein the observations made in paragraphs 11 and 12

respectively are relevant, which read thus :

> *"11. On a careful reading of the provisions contained in Section 111 or 112(a), we are unable to come to the conclusion that there was hardly any scope or need to import into adjudicatory proceedings for breach of civil obligations, the principle of mens rea in the conventional sense of common law usage, as having been inbuilt as an ingredient to be established as a condition precedent before indicating any violator under any of those provisions with personal penalty. The establishment of blameworthy conduct, which stands proved from the very proof of contravention of the civil obligation, would in our view, suffice to justify the imposition of personal penalty in adjudicatory proceedings before the statutory departmental Authorities. The need for insisting upon further proof of the mental attitude of the violator concerned, may assume some significance in any prosecution initiated before the Criminal Court for the very contravention or violation concerned. But, in our view, as held by the Apex Court in M/s. M.CT.M. Corporation Private Ltd. case (supra); Gujarat Travancore Agency's case (supra) and the two Division Bench judgments of this Court in Vijaya Electrical's case (82 STC 268) (supra) and Lakshmi & Co.'s case (87 STC 345) (supra), the penalty contemplated under Section 112(a) of the Act for the violation in question is of a civil obligation, remedial and corrective in its nature and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the criminal or penal laws. The regulation which is sought to be provided for, and the violation of which is to be dealt with under Sections 111 and 112 of the Act, are in respect of the*

*laws of great and serious importance in conserving the economy of the Nation and have to be, therefore, viewed in their proper perspective so as not to result in abnegation or abrogation of the avowed object and purpose of the Legislation, which is not only regulatory, but prohibitory in nature, the mandate contained therein being in the larger interests and general welfare of the Nation.*

*12. The learned Senior Counsel for the applicant repeatedly urged that if the element of mens rea is held to be irrelevant for purposes of Sections 111 and 112 of the Act, the Authorities enforcing law are likely to act arbitrarily and unreasonably exposing even innocent persons to severe penalties. We are unable to appreciate the reason of it. The Adjudication proceedings are quasi judicial in nature with forums higher in the hierarchy including a Judicial Tribunal, expected to act judiciously and the Courts of Justice at the State and National level and cases of any such arbitrary exercise of power could be effectively contained and remedied, but the taking of the other view, in our opinion, will make the country full and flooded with smuggling spree activities undermining the economy of the Nation and render ineffective the enforcement of the laws in question. This reasoning of ours is even de hors the interpretation we were obliged to place on the scope of Sections 111 and 112 of the Act, in tune with the law declared by the Apex Court."*

36. The aforesaid takes us to deal with the last submission canvassed on behalf of the writ-applicant as regards Section 125 of the Act.

37. Section 125 of the Act reads thus :

*"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 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) For the removal of doubts it is hereby declared that any fine in lieu of confiscation of goods imposed under sub-section (1) shall be in addition to any duty and charges payable in respect of such goods."*

38. The argument of the learned counsel appearing for the writ-applicant is that his client should have been given an option to pay fine in lieu of confiscation, more particularly, when the appellate authority in the appeal filed by the writ-applicant against the Order in Original has recorded a finding that the contraband gold seized from the possession of the writ-applicant as such is not a prohibited item and can be imported but such import is subject to the restrictions including the RBI regulations. However, at the same time, the view taken by the

appellate authority is that the writ-applicant returned to India within 37 days from the date of his departure to Sharjah and he could not be said to be qualified as an eligible person to import gold and, therefore, the gold is liable for absolute confiscation. In other words, the view taken is that when an attempt is made to conceal the contraband clandestinely, the same is liable for absolute confiscation and there is no question of giving an option to pay the fine in lieu of the confiscation. In this regard, the appellate authority seems to have relied on a decision of the Madras High Court in the case of Commissioner of Customs (Air) v/s. Samynathan Murugesan. In the said case, it was the Commissioner of Customs (Air), Customs House, Chennai, who was the petitioner before the High Court. The question before the High Court was, "whether in the facts and circumstances of the case, the Tribunal was right in remanding the matter with a direction to the Commissioner to invoke the power under Section 125 of the Customs Act for redemption of the goods on payment of fine ? The facts of the said case are almost identical to the facts of the case in hand. We quote the relevant observations thus :

> *"3. The learned Senior Central Government Standing Counsel submitted that a person working abroad is eligible to import gold weighing upto 7.075 kgs as per the Explanation to notification 31/2003-Cus.dated 01-03-2003. An eligible passenger is one who has coming to India after a period of not less than 6 months of staying abroad and short visits upto a total of 30 days shall be ignored. The learned Senior Central Government Standing Counsel submitted that the respondent herein gone to Singapore on 19-04-2005 and returned to India on 12-07-2005, that is, he*

*had stayed only for about 2 months and prior to 19-04-2005 had visited abroad was during 2004. There were no short visits. Therefore, the respondent was not an eligible passenger to bring gold.*

*4. The next submission that he made was that the respondent was in fact walking through the green channel at the time of interception and he specifically denied that he was carrying gold. In the customs declaration form, he had not declared the gold ornaments carried by him. But when the gold jewellery was found, he said in his statement that the TV in which the gold ornaments were recovered do not belong to him and that they were given by his uncles friend at Singapore Airport. The second version is that he had converted his hard earnings to gold chains and jewellery ornaments and gifts which he received from relatives and friends were also converted to gold chains. There was no evidence to support this statement. The learned counsel submitted that it would not be possible for a labourer/driver to have earned 40 lakhs to purchase so much gold. It was clearly a false statement. He had attempted to smuggle 7.075 kgs by ingenious concealment in the TV set without declaring to customs in violation of provisions under section 11 and 77 of the Customs Act and therefore, the learned Senior Central Government Standing Counsel submitted that this was a case where the goods were prohibited since he did not belong to the category of persons who could bring in gold at concessional rate of duty. So far as the respondent was concerned, he was prohibited from bringing the gold since he did not satisfy the relevant conditions. Therefore,*

*under Section 112, the officer had the discretion to decide whether he should allow the gold to be redeemed. The officer had considered the mode of concealment and the fact that he was not an eligible passenger and had rightly held that absolute confiscation is warranted. The learned Central Government Standing Counsel referred to the following decisions:*

*Shaik Jamal Basha Vs. Government of India (1997 (91) ELT 277 (AP));*

*Garg Woollen Mills (P) Ltd. Vs. Addl.Collr. of Customs, New Delhi (1998 (104) ELT 306 (SC));*

*A. Shaud Ali Vs. Additional Collector of Customs, Madurai 2001 (133) ELT 554 (Mad);*

*Nine Star Exports Vs. Commissioner of Customs (Ports) Chennai (2003(151) ELT 265 (Mad));*

*Gurucharansingh Vs. Directorate of Revenue Intelligence in Crl. Appeal No.576 of 2008 dated 01-04-2008;*

*Commissioner of Central Excise, Bangalore Vs. Srikumar Agencies (2008 TIOL-220-sc-cx-lb);*

*M.K.S. Mohammed Rafi Vs. Joint Commissioner of Customs in W.P.No.15146 of 2001 dated 03-12-2004;*

*Prince Anthony Sagayam Vs. The Deputy Commissioner of Customs in W.A.No.758 and 563 of 2006 dated 25-01-2008.*

*5. Mr. A. Thiagarajan, learned Senior Counsel appearing for the respondent submitted that the goods were only restricted goods. Gold was not a prohibited item. Therefore, the officer was under a mandatory duty to give option to the person found guilty to pay in lieu of confiscation. He relied on 1997 (91) E.L.T. 227 (A.P.) (Shaik Jamal Basha Vs. Government of India).*

*6. Section 2(33) of the Customs Act defines prohibited goods. It reads as follows:*

> *"(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;"*

*7. Section 11 empowers the Central Government to prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance the import or export of the goods of any specified direction by issuing a notification in this behalf. The effect of interpretation of the words prohibited goods was considered in Om Prakash Bhatia Vs. Commissioner of Customs (2003(6) SCC 161) and in*

*paragraph No.10 of the said judgment the Supreme Court held as follows:*

*"10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in Sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Ors. AIR 1971 SC 293 wherein it was contended that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by Clause (3) of the Import Control Order, 1955. The Court negatived the said contention and held thus:--*

*"...What Clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "Any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues." Therefore, if we apply this judgment to the notification, the notification contemplates import of gold subject to certain conditions. The relevant paragraphs of Import trade control order are extracted as follows:*

*"Import of Gold permitted as Baggage.*

*Import of gold in any form, including ornaments but excluding ornaments studded with stones or pearls, is allowed to be imported as part of baggage by passengers of Indian origin or a passenger holding a valid passport issued under the Passport Act subject to the following conditions:*

*that the passenger importing the gold is coming to India after a period of not less than six months of stay abroad;*

*the quantity of gold imported shall not exceed 10 Kg, per passenger import duty on gold shall be paid in convertible foreign currency;*

*there will be no restriction on sale of such imported gold.*

*A person shall be deemed to be of Indian origin, if he held an Indian passport at any time, or he or either of his parents or any of his grand parents, was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); provided that the national of Pakistan or Bangladesh shall be deemed to be not of Indian origin.*

*A spouse (not being a national of Pakistan or Bangladesh) of a person of Indian origin shall also be deemed to be of Indian origin.*

*8. Relevant portion of The Exemption Notification 31/2003 under Section 25 of the Customs Act reads thus:*

*G.S.R.(E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the erstwhile Ministry of Finance (Department of Revenue) No.171/94-Customs, dated the 30th September, 1994, published in the Gazette of India, vide number G.S.R.733(E),*

*dated the 30th September, 1994, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description specified in column (2) of the Table below and falling under Chapter 71 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India by an eligible passenger, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, as is in excess of the amount calculated at the rate as specified in the corresponding entry in column (3) of the said Table and from the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act.*

*(2) The exemption is subject to the following conditions, namely:-*

*the duty shall be paid in convertible foreign currency;*

*the quantity of gold imported in any form shall not exceed ten kilograms per eligible passenger, and the gold is either carried by the eligible passenger at the time of his arrival in India or is imported by him within fifteen days of his arrival in India. Explanation : For the purpose of this notification, eligible passenger means a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the eligible passenger during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed*

*thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits.  Therefore, the gold brought in could be cleared on payment of a concessional rate of duty if the respondent is an eligible passenger. The respondent is not a eligible passenger. The learned Senior Counsel appearing for the respondents submitted that the respondent had been in Singapore from 1993. We are not concerned with the date on which he first went to Singapore. For the purpose of this exemption or this concession, he should have come to India after a period of not less than six months stay in Singapore and short visits made by the eligible passenger during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days. He had gone to Singapore on 19-04-2005 was coming to India on 12-07-2005 i.e., after a period of less than six months. So he was not an eligible passenger. The previous periods where he had stayed for longer duration are not relevant now. The liberalisation policy and the repeal of the Gold Control Order had weighed with the Tribunal. The Tribunal ought to have considered whether he could have carried the gold as part of his baggage as an eligible passenger.*

*9. In view of meaning of the word prohibition as construed laid down by the Supreme Court in Om Prakash Bhatia case we have to hold that the imported gold was prohibited goods since the respondent is not an eligible passenger who did not satisfy the conditions. The impugned order deserves to be set aside.*

*10. In 1992 (61) ELT 372 (cited supra), the Supreme Court directed the Collector to consider the exercise of discretion. In this case, the Collector had rightly considered it and refused to give the option.*

*11. In 1997 (91) ELT 277 (cited supra), the High Court held that the goods were not prohibited since they were ornaments. The words used in the Rules including ornaments but excluding ornaments studded with stones.  We are unable to follow this judgment.*

*12. In 1998 (104) ELT 306 (SC), the Supreme Court held,*

> *"5. Another contention that was urged by Shri Mahabir Singh was that the Additional Collector, as also the Tribunal, have failed to take into consideration the provisions contained in Section 125 of the Act which prescribes that whenever confiscation of any goods is authorised by the Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit. We do not find any merit in this contention of Mr. Mahabir Singh. Under Section 125 a discretion has been conferred on the officer to give the option to pay fine in lieu of*

*confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option. In the present case, having regard to the facts and circumstances in which the goods were said to be imported and the patent fraud committed in importing the goods, the Additional Collector has found that the goods had been imported in violation of the provisions of Import (Control) Order, 1955 read with Section 3(i) of the Import and Export (Control) Act, 1947. In the circumstances he considered it appropriate to direct absolute confiscation of the goods which indicates that he did not consider it a fit case for exercise of his discretion to give an option to pay the redemption fine under Section 125 of the Act. The Tribunal also felt that since this was a case in which fraud was involved, the order of the Additional Collector directing absolute confiscation of the goods did not call for any interference. We do not find any reason to take a different view. In the present case too, the concealment had weighed with the Commissioner to order absolute confiscation. He was right, the Tribunal erred."*

*13. In the result, the substantial question of law is answered in favour of the appellant. Appeal allowed and the order of the Tribunal is set aside. However, there will be no order as to costs."*

39. The aforesaid decision in Samynathan Murugesan (supra) has been affirmed by the Supreme Court in Samynathan Murugesan v/s. Commissioner of Customs (Air), reported in (2010)254 ELT A15 (SC).

40. In Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) ELT 423 (SC), the Supreme Court considered a case of over-invoicing goods and consequently, a claim of fraudulent drawback. According to Mr.A.P.Srinivas, learned counsel for the respondents 2 and 3, Om Prakash Bhatia's case (supra), is the Bible, wherein, the Supreme Court defined what is meant by prohibited goods. Rejecting the contention of the appellant therein that Section 113(D) of the Customs Act, would be applicable, as the goods were not prohibited goods and agreeing with the contention of the revenue, that over-invoicing is not permitted under the Act and therefore, it is in violation of the statutory provisions and in that context, Section 113(D) of the Act would be attracted, which states that, 'any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.' and with reference to the word, 'prohibition' imposed by or under the Act or any other law for the time being in force and also taking note of Section 2(33) of the Act, which defines 'prohibited goods', with the opening sentence of Section, starts that, 'any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force', the Supreme Court, at Paragraph 9, held as follows:

> *“9. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under*

*the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in Sheikh Mohd. Omer v. Collector of Customs, Calcutta and others [(1970) 2 SCC 728], wherein it was contended that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negatived the said contention and held thus:--*

> *"... What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That*

*prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues.""*

41. In Commissioner of Customs (AIR), Chennai-I v. Samynathan Murugesan reported in 2009 (247) ELT 21 (Mad.), about 7.075 Kgs gold ornaments were recovered from a T.V. Set. Goods were claimed to be prohibited, as the petitioner therein did not belong to the category of persons, who could bring gold at concessional rate of duty. Contentions were made by the Revenue that goods were imported in violation of Import (Control) Order, 1955, read with Section 3(i) of Import and Export Control Act, 1947. Though in the above case, a contention was raised by the respondent that the gold is not a prohibited item and it was only a restricted item and therefore, there is a mandatory duty, on the part of the proper officer to give option to the person, guilty of adjudicatory proceedings to pay fine, in lieu of confiscation, taking note of the judgment in

Shaik Jamal Basha v. Government of India reported in 1997 (91) ELT 277 (AP), a Division Bench of the Madras High Court, following Om Prakash Bhatia's case (supra), at Paragraphs 7, 9 and 10, held as follows:

> *"7. Section 11 empowers the Central Government to prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance the import or export of the goods of any specified direction by issuing a notification in this behalf. The effect of interpretation of the words prohibited goods was considered in Om Prakash Bhatia Vs. Commissioner of Customs (2003 (6) SCC 161) and in paragraph No.10 of the said judgment the Supreme Court held as follows:*
>
> > *"10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for*

*the purposes specified in Sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in Sheikh Mohd. Omer v. Collector of Customs, Calcutta and others [(1970) 2 SCC 728], wherein it was contended that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by Clause (3) of the Import Control Order, 1955. The Court negatived the said contention and held thus:--*

*"...What Clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "Any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words*

*all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues." Therefore, if we apply this judgment to the notification, the notification contemplates import of gold subject to certain conditions. The relevant paragraphs of Import trade control order are extracted as follows:*

*"Import of Gold permitted as Baggage.*

*Import of gold in any form, including ornaments but excluding ornaments studded with stones or pearls, is allowed to be imported as part of baggage by passengers of Indian origin or a passenger holding a valid passport issued under the Passport Act subject to the following conditions:*

*that the passenger importing the gold is coming to India after a period of not less than six months of stay abroad;*

*the quantity of gold imported shall not exceed 10 Kg, per passenger import duty on gold shall be paid in convertible foreign currency;*

*there will be no restriction on sale of such imported gold.*

*A person shall be deemed to be of Indian origin, if he held an Indian passport at any time, or he or either of his parents or any of his grand parents, was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); provided that the national of Pakistan or Bangladesh shall be deemed to be not of Indian origin.*

*A spouse (not being a national of Pakistan or Bangladesh) of a person of Indian origin shall also be deemed to be of Indian origin.""*

*9. In view of meaning of the word prohibition as construed laid down by the Supreme Court in Om Prakash Bhatia case we have to hold that the imported gold was prohibited goods since the respondent is not an eligible passenger who did not satisfy the conditions. The impugned order deserves to be set aside.*

*10. In 1992 (61) ELT 372(cited supra), the Supreme Court directed the Collector to consider the exercise of discretion. In this case, the Collector had rightly considered it and refused to give the option."*

42. In Abdul Razak v. Union of India reported in 2012 (275) ELT 300 (Ker)(DB), there was an attempt by the appellant therein to smuggle gold, weighing over 8 Kgs, by concealing the same, in emergency light, mixie, grinder and car horns, etc. The authorities seized the same. Adjudicatory proceedings ended in confiscation. Contention of the appellant therein, before the High Court, was that Section 125 of the Customs Act, 1962, does not

provide for confiscation of goods, other than prohibited goods. Repelling the said contention and following Om Prakash Bhatia's case (cited supra), at Paragraph 6, after referring to Section 2(33) of the Customs Act, 1962, a Division Bench of the Kerala High Court, held as follows:

> *"After hearing both sides and after considering the statutory provisions, we do not think the appellant, as a matter of right, can claim release of the goods on payment of redemption fine and duty. Even though gold as such is not a prohibited item and can be imported, such import is subject to lot of restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed. There is no need for us in this case to consider the conditions on which import is permissible and whether the conditions are satisfied because the appellant attempted to smuggle out the goods by concealing the same in emergency light, mixie, grinder and car horns etc. and hence the goods so brought is prohibitory goods as there is clear violation of the statutory provisions for the normal import of gold. Further, as per the statement given by the appellant under Section 108 of the Act, he is only a carrier i.e. professional smuggler smuggling goods on behalf of others for consideration. We, therefore, do not find any merit in the appellant's case that he has the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Act."*

43. On the facts and circumstances, the dictum laid down by the Kerala High Court in Abdul Razak's case (supra), is that even though gold is not an enumerated prohibited item and thus, can

be imported, but when such import is subject to restrictions, including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed, release of the smuggled goods cannot be ordered.

44. The dictum of the Supreme Court and the High Courts above makes it clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition, 'prohibited goods', in Section 2(33) of the Customs Act, 1962, which states that, 'any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with'. When there is a violation of statutory prohibitions, mentioned in Sections 11 and 11A of the Customs Act, 1962 or any other law, for the time being in force or restrictions imposed, such restrictions would also encompass the expression, any prohibition.

45. In Commissioner of Customs, Chennai v. Brinda Enterprises reported in 2010 (262) ELT 239 (Mad.), the company mis-declared the goods and there was no specific licence or certificate of registration. The adjudicating authority ordered for confiscation. Matter went upto the Tribunal, which remanded the same, for a decision, which ultimately landed up in the High Court. After considering the rival contentions therein, and Om Prakash Bhatia's case (cited supra), at Paragraph 20, a Division Bench of the Madras High Court, held as follows:

*"20. If we employ the meaning of the word 'prohibition' as was done in Om Prakash Bhatia's case we have to hold that the imported 'druid' was 'Prohibited goods' since the respondent is not an eligible passenger as he did not satisfy the conditions. The impugned order deserves to be set aside. In view of the above decision, the order, dated 30.04.2008 consequent to the order of remand also is set aside. Since we are of the opinion that the conclusion of the Tribunal was wrong and the order of remand was also erroneous."*

*46.* From the decisions in Samyanathan Murugesan's case (supra), Abdul Razak's case (cited supra) and Brinda Enterprises case (supra), it is manifestly clear that the adjudicating authorities/Courts have to consider two aspects, viz., (1) eligibility of the passengers to import the goods; and (2) whether such passengers had fulfilled the conditions of import or export, any restriction on import or export, which is also to be treated as prohibition.

47. In Fast Track Traders v. Commissioner of Customs (Seaport - Imports), Tuticorin reported in 2012 (286) ELT 681 (Mad.), there was mis-declaration of goods. Finding that there was a false declaration, a Division Bench of the Madras High Court held that when the condition is violated, the authorities can definitely have the recourse under law.

48. In Ashish Kumar Chaurasia v. Commissioner, CESTAT reported in 2015 (325) ELT 250 (All.), 79 silver ingots of foreign origin, were recovered from the premises of the appellant therein. On the facts and circumstances of the case, the Allahabad High

Court held that the appellant therein has failed to prove that the seized silver ingots were not smuggled goods and in such circumstances, upheld the levy of penalty, and ordered for confiscation.

49. In Sheik Mohammed Rafique Ahmed v. Joint/Additional C.C., Airport, Chennai reported in 2016 (331) ELT 337 (Mad.), a learned Single Judge of the Madras High Court considered a case, where a passenger was carrying gold chains of 18 carat, two bangles of 24 carat purity, 12 kg of saffron, RMD Gutkha, Gudang Garam Cigarette cartons, perfumes and two Samsung mobiles. A search was conducted by the Officers of Directorate of Revenue Intelligence, Trivandrum, in the baggages of the petitioner therein. Thereafter, statements were recorded. On completion of the investigation, a show cause notice was issued, under Section 124 of the Customs Act, 1962, proposing as to why, the seized goods should not be confiscated and penalty should not be imposed. He sent a reply, disputing the allegations. A Writ Petition has been filed, seeking for a direction to the respondent therein to release the seized imported goods, under the Mahazar. Accepting the contention of the revenue that since the passenger had attempted to smuggle goods into India, by concealing the same in his person, as well as in his hand baggage and checked-in-baggage, without declaring the same to the Customs, in order to evade payment of Customs duty, the afore-stated goods, are held liable for confiscation, under the provisions of Section 111(d) and 111(1) of the Customs Act, 1962 and hence, cannot be released provisionally under Section 110 of the Customs Act, 1962, at Paragraphs 13 and 14, a learned Single Judge of the Madras High Court held as follows:

*"13. Further, when the goods were confiscated under Section 111(d) and 111(I) of the Customs Act, 1962, the question of provisional release under Section 110 of the Customs Act, 1962, does not arise. Therefore, this Court is of view that only after the completion of adjudication process, the adjudicating authority would decide whether the goods confiscated under Section 111(d) and 111(1) of the Customs Act, 1962, could be released or not.*

*14. Accordingly, the respondent, who is the adjudicating authority, is directed to complete the adjudication, after affording an opportunity of personal hearing to the petitioner, within a period of eight weeks from the date of receipt of a copy of this order. The petitioner shall cooperate with the adjudicating authority to complete the adjudication as afore-stated."*

50. In Commissioner of Customs (Prev.), Mumbai v. M.Ambalal & Co., reported in 2010 (260) ELT 487 (SC), after referring to the expression, 'dutiable goods', 'duty', 'import', 'imported goods', 'importer' and 'smuggling', etc., the Supreme Court explained the object of the Act and as to how, the words, 'smuggled goods' should be read within the definition of `imported goods' for the purpose of the Customs Act, 1962. At Paragraphs 6 to 8, 10, 13 and 14, the Supreme Court held as follows:

*"(6) We may now briefly notice the scheme of the Act. The expression 'dutiable goods', 'duty', 'import', 'imported goods', 'importer' and 'smuggling' are defined in the following manner :-*

*'Dutiable Goods' means any goods which are chargeable to duty and on which duty has not been paid.*

*'Duty' means a duty of Customs and leviable under this Act. 'Import', with its grammatical variations and cognate expressions, bring into India from a place outside India.*

*'Imported goods' means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.*

*'Importer' means in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.*

*'Smuggling', in relation to any goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113 of the Act.*

*(7) Dutiable goods are goods whose import is permitted by the Act or any other law in force. Duty is the tax leviable on the goods occasioned by their import into India or their export out of India. The dutiability of the goods is covered by Section 12 of the Act which is the charging section. Under this Section, all goods imported into or exported from India are liable to Customs duty unless the Customs Act itself or any other law for the time being in force provides otherwise. The rate of duty is fixed by the Customs Tariff Act, 1975. "Import" and "Imported Goods" means that if goods are brought into India, meaning thereby into the territory of India from outside, there is import of goods and the goods*

*become imported goods and become chargeable to duty upto the moment they are cleared for home consumption. The word 'importer' has been defined in the Act as importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption includes any owner or any person who holding himself out to be importer. The word 'smuggling', in relation to goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113 of the Act.*

*(8) Section 11 of the Act enables the Central Government to prohibit importation or exportation of goods either absolutely or subject to conditions as specified in the notification, the import or export of the goods of any specified description. Section 11A to 11G speaks of detention of illegally imported goods and prevention of the disposal thereof. Section 12 of the Act is the charging Section. Under this Section, the duty is leviable on all imported goods. Valuation of the imported goods is done as provided under Section 14 of the Act. Section 25 of the Act empowers the Central Government to issue notifications exempting generally either absolutely or subject to such conditions as specified in the notification, goods of any specified description from the whole or any part of the Customs Act leviable thereon. The definition of imported goods has to be read along with Section 111 of the Act which deals with goods brought from place outside India. Section 111 of the Act provides for confiscation of goods and conveyances and imposition of penalties. Section 111(d) of the Act provides that any goods which are imported or attempted to be imported or are brought within*

*Indian Custom Waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force, shall be liable for confiscation. Section 112 of the Act provides for penalties for improper importation of goods.*

*(10) It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. The rule regarding exemptions is that exemptions should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. This composite rule is not stated in any particular judgment in so many words. In fact, majority of judgements emphasize that exemptions are to be strictly interpreted while some of them insist that exemptions in fiscal Statutes are to be liberally interpreted giving an apparent impression that they are contradictory to each other. But this is only apparent. A close scrutiny will reveal that there is no real contradiction amongst the judgements at all. The synthesis of the views is quite clearly that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. The two go very well with each other because they relate to two different sets of circumstances.*

*(13) In short, question before us is whether goods that are smuggled into the country can be read within the meaning of the expression 'imported goods' for the purpose of benefit of the exemption notification. We are of the view that 'smuggled*

*goods' will not come within the definition of 'imported goods' for the purpose of the exemption notification, for the reason, the Act defines both the expressions looking at the different definitions given to the two classes of goods: imported and smuggled, and we are of the view that if the two were to be treated as the same, then there would be no need to have two different definitions.*

*(14) In order to understand the true meaning of the term 'imported goods' in the exemption notification, the entire scheme of the Act requires to be taken note of. As noted above, 'imported goods' for the purpose of this Act is explained by a conjoint reading of Section 2(25), Section 11, Section 111 and Section 112. Reading these Sections together, it can be found that one of the primary purposes for prohibition of import referred to the latter is the prevention of smuggling [See Section 11(2)(c)]. Further, in the light of the objects of the Act and the basic skeletal framework that has been enumerated above, it is clear that one of the principal functions of the Act is to curb the ills of smuggling on the economy. In the light of these findings, it would be antithetic to consider that 'smuggled goods' could be read within the definition of 'imported goods' for the purpose of the Act. In the same light, it would be contrary to the purpose of exemption notifications to accord the benefit meant for imported goods on smuggled goods.'*

51. No sooner goods are brought from outside, into the territorial waters of the country, they become imported goods. At this juncture, it has to be seen, as to whether, such goods are legally or illegally imported, whether they fall within Section 11

of the Customs Act, 1962, which defines, an illegal import as, import of any goods in contravention of the provisions of the Customs Act, 1962 or any other law for the time being in force. Goods imported, contrary to the enumerated subject matters in chapters IV and IV-A of the Customs Act, 1962, which deal with prohibition on importation and exportation goods and detection of illegally imported goods prevention and disposal thereof, more fully described in Sections 11 and 11A of the Act, are also to be treated as prohibited. Goods imported from outside of the territory waters of the country, against any prohibition or restriction under the Customs Act, 1962 or any other law, time being in force, are to be treated as prohibited goods.

52. There is one thing to state that gold is not one of the enumerated prohibited goods and another, to state that goods are not permitted to be brought into the country, by smuggling, which, means any act or omission which would render such goods liable to confiscation under section 111 or section 113. There may not be total prohibition for import of goods, but if import is not done lawfully, in other words against any prohibition or restriction, which are inbuilt in the Customs Act, 1962 or any other law for the time being in force, then such goods should fall within the definition of Section 2(33) of the Act.

53. A conjoint reading Sections 2(33), 11 or 11A of the Act and other provisions in the Customs Act, 1962, and any other law, for the time being in force, would also make it clear that importation of goods, defined as illegal or prohibited or without complying with the conditions, or in violation of statutory provisions in the Customs Act, 1962 or any other law for the time being in force and in all cases, whether there is either total

prohibition or restriction, in the light of the judgment of the Supreme Court in Om Prakash Bhatia's case, such goods should fall within the definition of Prohibited goods. When import is in contravention of statutory provisions, in terms of Sections 11 or 11A of the Customs Act, 1962 or any other law, for the time being in force and when such goods squarely fall within the definition 'illegal import', or the other provisions in the statute, dealing with prohibition/restriction, the same are to held as, "prohibited goods" and liable for confiscation.

54. Under Section 123 of the Customs Act, 1962, if the importer fails to discharge the burden that the goods seized from him, were not smuggled, then there is a strong reason for the proper officer to seize such goods. Smuggling is nothing but importing goods clandestinely, without payment of duty and such goods would squarely fall within the definition of 'Prohibited goods', under Section 2(33) of the Act.

55. The expression, 'subject to the prohibition under the Customs Act, 1962 or any other law for the time being in force, in Section 2(33) of the Customs Act, has to be read and understood, in the light of what is stated in the entirety of the Act and other laws. Production of legal and valid documents for import, along with payment of duty, determined on the goods imported, are certainly conditions to be satisfied by an importer. If the conditions for import are not complied with, then such goods, cannot be permitted to be imported and thus, to be treated as prohibited from being imported.

56. In Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) ELT 423 (SC), the Supreme Court held

that if there is intentional over-invoicing of the goods imported, then such goods imported, fall under the category, 'prohibited goods', as per Section 2(33) of the Customs Act, 1962. Smuggling under the Customs Act, 1962, in relation to any goods, means any act or omission which will render such goods liable to confiscation, under section 111 or section 113 of the Act and therefore, those goods, would also fall under the definition of prohibited goods, in terms of Section 2(33) of the Customs Act, 1962.

57. If there is a fraudulent evasion of the restrictions imposed, under the Customs Act, 1962 or any other law for the time being in force, then import of gold, in contravention of the above, is prohibited. For prohibitions and restrictions, Customs Act, 1962, provides for machinery, by means of search, seizure, confiscation and penalties. Act also provides for detection, prevention and punishment for evasion of duty.

58. The expression, 'subject to prohibition in the Act and any other the law for the time being in force.' in Section 2(33) of the Customs Act, has wide cannotation and meaning, and it should be interpreted, in the context of the scheme of the Act, and not to be confined to a narrow meaning that gold is not an enumerated prohibited good to be imported into the country. If such narrow construction and meaning have to be given, then the object of the Customs Act, 1962, would be defeated.

59. The Provisions in the Customs Act, 1962, dealing with prohibition/restriction or any other law for the time in force, have to be read into Section 2(33) of the Act. Section 11A of the Act, as to what is 'illegal import', cannot be thrown to winds,

while interpreting, 'what is prohibited goods', in terms of Section 2(33) of the Customs Act, 1962. To add, while interpreting Section 2(33) of the Customs Act, 1962, as to what is prohibition, imposed in other laws, for the time being in force, one cannot ignore, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, rules framed by way of delegated legislation, like the Baggage Rules, 1998, framed in exercise of the powers conferred under Section 79 of the Customs Act, 1962 or for the matter, Section 77 of the Customs Act, 1962, which mandates, the owner of the baggage for the purpose of clearing the goods, to make a declaration of the contents of the baggage to the proper office and also the customs Notification No.3/2012, dated 16.01.2012, that only passengers of Indian origin or a passenger in possession of a valid passport, issued under the Passport Act, 1967, who have stayed abroad for six months and above alone are eligible to import gold of foreign origin and clear the same on payment of customs duty, at the rate prescribed.

60. Thus, in the overall view of the matter, we are convinced that no case is made out by the writ-applicant for grant of any relief as prayed for in this writ-application.

61. In the result, this writ-application fails and is hereby rejected.

**(J. B. PARDIWALA, J.)**

**(ILESH J. VORA, J.)**

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