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

Reserved on: 28th February, 2020

Pronounced on: 1st June, 2020

+ CUSAA 229/2019 and CM No. 53877/2019

ADDITIONAL DIRECTOR GENERAL (ADJUDICATION)

.... Appellant

Through: Ms. Maninder Acharya,
Additional Solicitor General with Mr.
Ajit Sharma, Mr. Krishnesh Bapat,
Mr. Shikhar Kishore, Ms. Shefali
Jaiswal, Mr. Viplav Acharya and Mr.
Annant Ram Mishra, Advs.

Versus

M/S ITS MY NAME PVT LTD Respondent

Through: Mr. S. Ganesh, Sr. Adv.
With Mr. Kumar Shashank, Mr.
Abhishek Malhotra, Mr. Akshay
Anand, & Mr. Aditya Garg, Ms.
Yashashvika Sharma, Ms. Sayesha,
Mr. Samuel Khobung, Ms. Shagufa
Shalini, Mr. A. Kapoor, Mr. Nimesh
Kumar, Ms. Riya Dhingra and Mr.
Satyaveer Yadav, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

C. HARI SHANKAR, J.

1. This appeal, at the instance of the Additional Director General (Adjudication), Directorate of Revenue Intelligence (DRI) (hereinafter

referred to as “the ADG, DRI”), assails Final Order No. 51470/2019, dated 13th November, 2019, passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as “CESTAT”) in Customs Appeal No. 52593 of 2019 which, in turn, was preferred, before the learned Tribunal against Order-in-Original, dated 4th October, 2019 passed by the appellant.

2. *Vide* order dated 29th January, 2020, this appeal was admitted on the following substantial questions of law:

“(i) Whether the CESTAT can substitute its view for the discretion of the Adjudicating Authority U/S 110A?

(ii) Whether the appellate jurisdiction of the CESTAT against an order passed u/s 110A is restricted to examining whether such an order has been passed after duly considering the law in respect of provisional release and not pass arbitrarily?

(iii) Whether the appellant is entitled to provisional release of the seized gold in question in view of the facts and circumstances of this case?”

Though, as noted hereinabove, three questions of law were framed by this Court, Question No. (iii) effectively subsumes Questions No. (i) and (ii).

A Brief Factual Overview

Relevant statutory provisions/Notifications

3. Exemption to imports under Advance Authorisation scheme

3.1 Notification 18/2015-Cus, issued under Section 25(1) of the Customs Act, exempts, completely, from all Customs duties, materials imported into India against a valid Advance Authorisation issued by the Directorate General of Foreign Trade (DGFT) in terms of para 4.03 of the Foreign Trade Policy 2015-2020 (hereinafter referred to as “the FTP”), subject to following the procedure prescribed in the Notification.

3.2 The Advance Authorisation Scheme is one of the export promotion schemes, contained in the FTP, and contemplates allowing of duty-free imports, under a valid Advance Authorisation issued by the DGFT. Para 4.03(a) of the FTP reads thus:

“Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed / utilized in the process of production of export product, may also be allowed.”

4. Duty-free re-import of jewellery, exported for participation in exhibitions abroad

4.1 Para 4.46 of the FTP permits export of jewellery, for participation in exhibitions abroad, and reads thus:

“4.46 Export Promotion Tours/ Export of Branded Jewellery

- (i) Nominated Agencies and their associates, with approval of Department of Commerce and with approval of Gem & Jewellery Export Promotion

Council (GJEPC), may export gold / silver / platinum jewellery and articles thereof for exhibitions abroad.

(ii) Personal carriage of gold / silver / platinum jewellery, precious, semiprecious stones, beads and articles and export of branded jewellery is also permitted, subject to conditions as in Handbook of Procedures.”

4.2 Re-import of jewellery, exported abroad, is permitted, duty-free, under S. No. 5 of the table contained in Notification 45/2017-Cus dated 30th June, 2017, subject only to the satisfaction, of the Assistant/Deputy Commissioner of Customs, that the re-imported jewellery is the same as that which was exported. Notification 45/2017-Cus, to the extent it is relevant for the purposes of the present controversy, is reproduced thus:

“In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within any Chapter of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below when re-imported into India, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, and the whole of the, integrated tax , compensation cess leviable thereon respectively under sub-section (7) and (9) of section 3 of the said Customs Tariff Act, as is in excess of the amount indicated in the corresponding entry in column (3) of the said Table.

Table

Sl. No.	Description of goods	Conditions
(1)	Goods exported – (a) under claim for drawback of any	amount of drawback of customs or excise duties allowed at the time of export;

	customs or excise duties levied by the Union; (b) under claim of drawback of any excise duty levied by the State (c) under claim for refund of integrated tax paid on export goods (d) under bond without payment of integrated tax (e) under duty exemption scheme (DEEC/Advanced Authorisation/DFIA) or Export Promotion Capital Goods Scheme	amount of excise duty leviable by State at the time and place of importation of the goods allowed at the time of export; amount of refund of integrated tax, availed at the time of export; amount of integrated tax not paid; amount of integrated tax and compensation cess leviable at the time and place of importation of goods and subject to the following conditions applicable for such goods – (i) DEEC book has not been finally closed and export in question is de-logged from DEEC Book; Advance Authorisation/DFIA has not been redeemed and the authorisation holder has not been discharged from the export obligation by DGFT; (ii) In case of EPCG scheme the period of full export promotion has not expired and necessary endorsements regarding reimport have been made;
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		(iii) The importer had intimated the details of the consignment reimported to the Assistant Commissioner of Customs DEPUTY Commissioner of Customs in charge of the factory where the goods were manufactured or the premises from where the goods were supplied and to the licensing authority regarding the fact of reimportation and produces a dated acknowledgement of such intimation at the time of clearance of goods; (iv) The manufacturer-exporters may be permitted clearance of such goods without payment of Central Excise duty or integrated tax and compensation cess under transit bond to be executed with the Customs authorities at the port of importation, such bond will be cancelled on the production of certificate issued by the jurisdiction of Customs authority about receipt of reimported goods into their factory or the premises from where the goods were supplied.
2	Goods, other than those falling under Sl. No. 1 exported for repairs abroad	Duty of customs which would be leviable if the value of reimported goods after repairs were made up of the fair cost of repairs carried out including

		cost of materials used in repairs (whether such costs are actually incurred or not), insurance and freight charges, both ways.
3	Cut and polished precious and semi-precious stones exported for treatment abroad as referred to in para 4A.20.1 of the Foreign Trade Policy, other than those falling under SI No. 1	Duty of customs which would be leviable if the value of re-imported precious and semiprecious stones after treatment were made up of the fair cost of treatment carried out including cost of materials used in such treatment, whether such costs are actually incurred or not, insurance and freight charges, both ways.
4	Parts, components of the aircraft to be placed or removed during the course of maintenance, repair or overall of the aircraft in a Special Economic Zone and brought to any other place in India. <i>Explanation.</i> – For the purpose of this notification, “Special Economic Zone” has the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005)	Nil

5	Goods other than those falling under SI No. 1, 2, 3 and 4	Nil
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Provided that the Assistant Commissioner of Customs/Deputy Commissioner of Customs is satisfied that –

- (a) xxxxx
- (b) xxxxx
- (c) in the case of goods exported under the Duty Exemption Scheme (DEEC/Advance Authorisation/DFIA) or Export Promotion Capital Goods Scheme (EPCG) or Duty Entitlement Passbook Scheme (DEPB) or any award scheme of Chapter 3 of Foreign Trade Policy, reimportation of such goods takes place within one year of exportation of such extended period not exceeding one more year as the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, on sufficient cause being shown for the delay may be allowed;
- (d) The goods are the same which were exported;
- (e) xxxxx
- (f) xxxxx
- (g) xxxxx

Provided further that xxxxx

2. This Notification will apply to the exports for which order permitting clearance and loading under section 51 of the Customs Act, 1962, has been given on or after first day of July, 2017.

3. This notification shall come into force w.e.f. the 1st day of July, 2017.

Explanation. – xxxxx ”

4.3 Specifically with reference to the applicability, of the afore-extracted Notification 45/2017-Cus, dated 30th June, 2017, to goods exported for exhibition abroad, the Central Board of Indirect Taxes and Customs (hereinafter referred to as “CBIC”) issued a clarificatory Circular No. 21/2019-Cus, dated 24th July, 2019 which, for ready reference, may be reproduced, *in extenso*, thus:

**“Government of India
Ministry of Finance (Department of Revenue)
Central Board of Indirect Taxes & Customs, New Delhi**

Subject : Clarification regarding applicability of Notification No. 45/2017-Customs, dated 30-6-2017 on goods which were exported earlier for exhibition purpose/consignment basis - Regarding.

Representations have been received for clarifying the issue of applicability of Notification no. 45/2017-Customs on the re-import of goods which had been earlier exported either for participation in exhibition or on consignment basis.

2. Matter has been examined. Circular No. 108/27/2019-GST, dated 18-7-2019 [2019 (26) G.S.T.L. C64] has clarified that the activity of sending/taking the specified goods (i.e. goods sent/taken out of India for exhibition or on consignment basis for export promotion except the activities satisfying the tests laid down in Schedule I of the CGST Act, 2017) out of India do not constitute supply within the scope of Section 7 of the CGST Act as there is no consideration at that point in time. Since such activity is not a supply, the same cannot be considered as ‘Zero rated supply’ as per the provisions contained in Section 16 of the IGST Act, 2017. Also that there is no requirement of filing any LUT/bond as required under section 16 of IGST Act, 2017 for such activity of taking specified goods out of India.

3. Situation mentioned at Sl. No. 1(d) of the Notification no. 45/2017-Customs, dated 30-6-2017 require payment at the time of re-import of integrated tax not paid initially at the time of export, for availing exemption under the said notification. As in the case of re-import of specified goods, no integrated tax was required to be paid for specified goods at the time of taking these out of India, the activity being not a supply, hence the said condition requiring payment of integrated tax at the time of re-import of specified goods in such cases is not applicable. It is clarified that such re-import cannot be taken to be falling under situation at Sl. No. 1(d) of the said Notification. Such cases will fall more appropriately under residuary entry at Sl. No. 5 of the said Notification even though those specified goods were exported under LUT, in view of the fact that the activity of sending/taking specified goods out of India is neither a supply nor a zero rated supply.

4. It is also clarified that, even in cases where exports have been made to related or distinct persons or to principals or agents, as the case may be, for participation in exhibition or on consignment basis, but, such goods exported are returned after participation in exhibition or the goods are returned by such consignees without approval or acceptance, as the case maybe, the basic requirement of 'supply' as defined cannot be said to be met as there has been no acceptance of the goods by the consignees. Hence, re-import of such goods after return from such exhibition or from such consignees will be covered by entry at Serial no. 5 of the Notification No. 45/2017, dated 30-6-2017, provided re-import happens before six months from the date of delivery challan.

5. The above clarification shall apply to all pending matters involving similarly placed exporters and importers, as the case may be.

6. Difficulties, if any, maybe brought to the notice of the Board."

The impugned Final Order passed by the CESTAT

5. The impugned Final Order of the CESTAT permits provisional release of gold jewellery, seized at the Indira Gandhi International Airport (hereinafter referred to as “the Airport”), and of gold, gold pieces, gold dust, gold jewellery and silver, seized from the workshop/office premises of the respondent. Both seizures were effected on 25th April, 2019.

6. The seizure, at the Airport, covered

- (i) 25,400.06 grams of gold jewellery, being imported under Bill of Entry (hereinafter referred to as “B/E”) No. 107190 dated 26th February, 2019 and
- (ii) 25,299.68 grams of gold jewellery being imported under an unregistered Bill of Entry.

Both Bills of Entry (“Bs/E”) were assessed on 24th April, 2019, and clearance of the gold jewellery allowed. The jewellery was seized at the Airport, but after it had crossed the Customs barrier.

7. The seizure at the workshop/factory premises of the respondent covered :

- (i) 25 gold bars, each of which weighed 1 kg, thereby weighing, in total, 25 kg, and
- (ii) gold bars, gold dust, gold jewellery, cut pieces weighing 27,330 grams, and silver bars weighing a total of 44,778 grams.

8. Provisional release, of the aforesaid gold, gold jewellery and silver etc., was repeatedly sought, by the respondent, but to no avail. The respondent, thereupon, moved this Court by way of WP (C)

8707/2019 (*Its My Name Pvt Ltd v. U.O.I.*), which was disposed of, by us, *vide* order dated 9th August, 2019, with a direction, to the present petitioner, to decide the representation, dated 31st July, 2019, of the respondent, for release of the aforesaid seized gold, jewellery and silver, in accordance with law.

9. The representation, dated 31st July, 2019, of the respondent, seeking provisional release of the aforesaid goods, came to be decided, by the ADG, DRI, *vide* order dated 4th/7th October, 2019. Prior thereto, the respondent was visited with Show Cause Notice, dated 26th September, 2019, containing various allegations and proposing various actions, including confiscation of the seized gold, gold jewellery, and other articles forming subject matter of the present proceedings. These proceedings are pending adjudication.

10. The ADG, DRI, *vide* order dated 4th/7th October, 2019, rejected the request, of the respondent, for provisional release of the seized gold, gold jewellery and silver by opining that “it would be premature to arrive at any conclusion, about provisional release of seized goods, before completion of adjudication proceedings”.

11. Aggrieved thereby, the respondent preferred Customs Appeal 52593/2019, before the learned Tribunal, which has come to be allowed by the impugned Final Order.

12. As noted in para 1 supra, the learned Tribunal has, *vide* the impugned Final Order, set aside the order, dated 4th/7th October, 2019,

of the ADG, DRI, and has permitted provisional release of the aforesaid gold, gold jewellery and silver, on furnishing of a bond, for the full value thereof, along with a Bank Guarantee for ₹ 1.25 crores, with an auto renewal clause.

13. Aggrieved thereby, the DRI has invoked the appellate jurisdiction of this Court, conferred by Section 130 of the Act.

14. The learned Tribunal has, at the outset, noted that the decision, of the ADG, DRI, to the effect that it would be premature to adjudicate on the request, of the respondent, for provisional release of the gold, gold jewellery and silver, before completion of adjudication proceedings, effectively rendered Section 110A of the Customs Act otiose.

15. Having, on the basis of the said finding, held the order, dated 4th/7th October, 2019, of the ADG, DRI, to be unsustainable, the learned Tribunal has proceeded to allow provisional release of the seized goods, reasoning thus:

(i) Re. gold seized at the Airport:

(a) It was a matter of record that, at the time of import, Amit Pal Singh, who effected the import on behalf of the respondent, presented, in respect of the goods,

(i) Shipping Bills, with invoices,

- (ii) permission for export of the gold jewellery for exhibition,
- (iii) the Export Declaration Forms filed at the time of export of the goods from Dubai,
- (iv) Customs endorsed colour photographs of the jewellery,
- (v) Bills of Entry, for the imported jewellery, and
- (vi) Packing Lists, covering the imported jewellery.

(b) No evidence had been produced, by the Revenue, which could indicate that the jewellery in issue was different from the jewellery which had been exported, for the purpose of exhibition, under Shipping Bills dated 20th February, 2019 and 13th March, 2019.

(c) The assessing officer had allowed clearance of the jewellery after perusing the documents and satisfying himself that the jewellery being sought to be imported was the unsold jewellery, which had earlier been permitted to be exported for the purpose of exhibition.

(d) In this scenario, procedural violations, regarding the Bill of Entry, whereunder the imports were being sought to be effected, would not render the gold

jewellery prohibited, under the Customs Act read with the Foreign Trade Policy.

(e) Notification 45/2017-Cus, dated 30th June, 2017, read with Notification 21/2019-Cus dated 24th April, 2019, merely requires that the goods, being sought to be imported, were the same as those which had earlier been exported for the purposes of exhibition. The Revenue had not produced any evidence to indicate that the imported jewellery was different from the jewellery that had earlier been exported under Shipping Bills No. 117932 dated 13th March, 2019 and 117209, dated 20th April, 2019. The jewellery could not, therefore, be regarded as “prohibited goods”, within the meaning of Section 2(33) of the Customs Act.

(ii) Re. Goods seized at the workshop

(a) Insofar as the 25 gold bars, seized at the workshop, were concerned, the respondent contended that, of the said 25 gold bars, 22 gold bars had been imported by it, under the Advance Authorisation, dated 4th January, 2019, held by it, *vide* Bill of Entry No. 2873828 dated 17th April, 2019. The respondent contended that, under the said Bill of Entry No. 2873288, 50 gold bars had been imported by it, each of which bore a unique bar number.

(b) Comparison of the serial numbers of the seized 25 gold bars, with the numbers of the gold bars imported *vide* Bills of Entry No. 2873288 dated 17th April, 2019 and the Packing List, dated 15th April, 2019, it was seen that the bar numbers of 22 of the 25 gold bars tallied with the bar numbers of the gold bars imported *vide* the said Bill of Entry. These 22 gold bars had, therefore, been licitly imported, using the Advanced Authorisation issued to the respondent.

(c) The remaining seized goods were in the nature of work in progress. The statement of the artisan (*karigar*) of the respondent, engaged in the said task, was to the effect that he was making jewellery and other articles, out of the imported gold and silver . The respondent was also in possession of invoices evidencing purchase of gold from the local market, which was used to make jewellery.

(d) The Seizure Memo, pertaining to the seizure effected at the workshop premises, did not indicate why the goods were seized, when the respondent was working in bonded premises, and was in possession of documents evidencing licit acquisition of primary gold bars and gold jewellery.

(e) The goods seized at the workshop premises, too, therefore, could not be regarded as “prohibited”.

(iii) There was, therefore, no justification for the ADG, DRI, refusing to allow provisional clearance of the gold, gold jewellery and silver, seized at the Airport and at the workshop premises of the respondent. The balance of convenience favoured permitting such provisional release, as continued detention of the gold, gold jewellery and silver had thrown the business of the respondent into jeopardy.

16. Reasoning thus, the learned Tribunal has, *vide* the impugned Final Order, permitted provisional release, of the seized goods, as noted in para 12 *supra*, on furnishing of a Bond covering the entire value thereof, and a Bank Guarantee for ₹ 1.25 crores.

The present appeal

17. The present appeal, by the ADG, DRI, contends that the learned Tribunal erred in allowing provisional release of the seized gold, gold jewellery and silver.

18. Apropos the gold jewellery seized at the Airport, the appeal contends thus:

(i) Though the Customs Gate Pass, dated 24th April, 2019, stated that Amit Pal Singh would be carrying one package/bag,

he was, in fact, carrying two bags, containing 51172.4 g (post appraisal 50630 g) of gold jewellery.

(ii) The documents issued by the Federal Customs Authority in the UAE, too, allowed Amit Pal Singh to carry one bag.

(iii) The registered Bill of Entry presented by Amit Pal Singh did not cover the entire quantity of 51,172.4 grams of gold jewellery being carried by him.

(iv) At the time of interception, Amit Pal Singh was not found in possession of any copy of any Bill of Entry. All five copies of the following Bills of Entry were found in the office of Vikram Bhasin, the Jewellery Appraiser:

(a) Bill of Entry No. 10710 and Job Entry 109254, dated 26th February, 2019, signed by the Customs Import Clerk, as well as by the respondent, covering 25400.06 grams of gold jewellery, and

(b) a second undated, unregistered Bill of Entry, and signed by the respondent, covering 25299.68 grams of gold jewellery.

Of these, the second Bill of Entry was not found in the list of manual Bills of Entry obtained from the ACC (Import).

(v) Standing Order No. 03/2018, dated 18th December, 2018, mandated that the manual Bill of Entry was required to be submitted, containing the Bill of Entry Number, the Job ID

Number and the date and signature of the Import Clerk. For want of compliance with this requirement, it was clear that the second, undated and unregistered Bill of Entry, found at the office premises of Vikram Bhasin, was fake/fraudulent.

(vi) The aforesaid fake/unregistered Bill of Entry had been presented, for clearance of 25299.68 grams of gold jewellery, as was admitted in the statements recorded by Gopal Gupta and Amit Pal Singh, under Section 108 of the Act.

(vii) It was also admitted, in the said statements, that the aforesaid two Bills of Entry were meant to be replaced, with a Bill of Entry covering a smaller quantity of gold jewellery, by Gopal Gupta, in collusion with Vikram Bhasin.

(viii) This was also supported by the recovery of Bill of Entry No. 107854, dated 18th April, 2019, for 662.12 grams of gold jewellery, from the premises of the respondent, on 24th/25th April, 2019. It had been admitted, by Gopal Gupta, in his statement, recorded under Section 108 of the Act, that the said Bill of Entry was meant, later, to replace the aforesaid two Bills of Entry, whereunder clearance of the gold jewellery had been effected. The quantity of 662.12 grams, specified in Bill of Entry No. 107854, corresponded, exactly, with the quantity mentioned in the Consignee Copy of the Export Declaration, filed with the Dubai Customs, whereunder Amit Pal Singh was reported as carrying 0.662 kg gold jewellery.

(ix) The seized documents, therefore, corroborated the oral statements of the witnesses.

(x) Clearly, therefore, 51172.4 grams of gold jewellery had been brought, into India, by Amit Pal Singh, on behalf of the respondent, with intent to evade Customs duty.

19. Insofar as the gold, gold jewellery and silver, seized from the workshop premises of the respondent, was concerned, the appeal merely relies on statements, recorded during the course of investigation, from various persons, to allege that the said gold, too, had been similarly smuggled into India. There is, however, significantly, no traverse, in the appeal, to the specific finding, of the learned Tribunal, that 22 of the 25 gold bars, seized from the workshop premises, contained distinctive bar numbers, which corresponded to the bar numbers of the gold bars imported by the respondent, using the Advance Authorisation issued to it, under Bill of Entry No. 2873288 dated 17th April, 2019, and Packing List dated 15th April, 2019.

Submissions at the Bar

20. Detailed submissions were advanced, before us, on the appeal; on behalf of the ADG, DRI/the appellant, by Ms. Maninder Acharya, learned Additional Solicitor General, and, on behalf of the respondent, by Mr. S. Ganesh, learned Senior Counsel.

21. The learned ASG prefaced her arguments by submitting that the impugned Final Order had been passed, by the learned Tribunal, in violation of the principles of natural justice, as it was passed on the very first date of hearing, without affording the Revenue any time to respond to the appeal of the respondent. On merits, advertent, first, to the airport seizure, the learned ASG emphasised the fact that the Bills of Entry, whereunder the gold jewellery had been imported, were not recovered from the respondent, but from Vikram Bhasin, which itself indicated that the imports were fraudulent. Relying on the judgement of the Supreme Court in *Om Prakash Bhatia v. Commissioner of Customs*¹, the learned ASG submitted that the imported gold jewellery, thereby, was rendered “prohibited”, and the release thereof, even at a provisional stage, impermissible. She also placed reliance, in this context, on the judgement of the Supreme Court in *Sheikh Mohd. Omer v. Collector of Customs*² and of the High Court of Madras in *Malabar Diamond Gallery P. Ltd v. ADG, DRI*³.

22. The learned ASG placed especial reliance on Circular 35/2017-Cus, issued by the Central Board of Excise and Customs (CBEC), titled “Guidelines for provisional release of seized imported goods pending adjudication under Section 110A of the Customs Act, 1962”, specifically on para 2 thereof, which reads thus:

“While provisional release of seized imported goods under Section 110A of the Customs Act, 1962 may normally be considered by the competent adjudicating authority upon

¹ 2003 (155) ELT 423 (SC)

² 1983 (13) ELT 1439 (SC)

³ 2016 (341) ELT 65 (Mad)

request made by the owner of the seized goods, *provisional release shall not be allowed in the following cases –*

(i) *Goods prohibited under the Customs Act, 1962 or any other Act for the time being in force;*

(ii) *Goods that do not fulfil the statutory compliance requirements/publications in terms of any Act, Rule, Regulation or any other law for the time being in force;*

(iii) *Goods specified in order notified under Section 123 of the Customs Act, 1962;*

(iv) Where the competent authority, for reasons to be recorded in writing believes that the provisional release may not be in the public interest.”

(Emphasis supplied)

23. The learned ASG submitted that the persons, whose statements had been recorded, during investigation, under Section 108 of the Act, had admitted the smuggling, into India, of gold jewellery in larger quantities, and later substitution of Bills of Entry, for lesser quantities. She also questioned the correctness of the finding, in para 25 of the impugned Final Order of the learned Tribunal, to the effect that the order, dated 4th October, 2019, of the ADG, DRI, rejecting the prayer for provisional release of the seized gold, silver and jewellery, was unreasoned or cryptic. She submitted that the subsequent finding, in para 26 of the impugned Final Order, to the effect that the gold, seized at the Airport, was covered by two Bills of Entry, namely Bill of Entry No. 107190 dated 26th February, 2019, and a second, undated, Bill of Entry, was incorrect on facts, as, on being intercepted, Amit Pal Singh was not found in possession of any Bill of Entry. The

learned ASG further drew attention to the recital, in the Show Cause Notice issued to the respondent, to the effect that the consignee copy of the Shipping Bill, issued by the Dubai Customs authorities indicated export, by Amit Pal Singh, of 0.745 kg gold jewellery, in one bag, with the remaining 20.8205 kg gold jewellery being exported by one Mustafa Kamal Ramalappa, who was destined for Kathmandu. To buttress her submissions, the learned ASG placed reliance on the judgement of the High Court of Madras in *Commissioner of Customs (Air) v. P. Sinnasamy*⁴.

24. The learned ASG submitted that the Act completely prohibited import of goods without filing of a Bill of Entry. Such goods were, *ex facie*, in her submission, liable to confiscation, and the act of import of the goods tantamounted to “smuggling”. Provisional release, of such smuggled goods, she submits, was impermissible. No reliance, she submits, could be placed on the appraisal report of Vikram Bhasin, who was in collusion with the respondent, and was a co-noticee in the proceedings. She took us through the grounds, in the present appeal, as urged by the ADG, DRI. She also submitted that differential amounts were channelled out of India through hawala.

25. The above factors, submits the learned ASG, cumulatively viewed, clearly indicated that the learned Tribunal had erred in permitting provisional release of the seized gold, gold jewellery and silver.

⁴ 2016 (344) ELT 1154 (Mad)

26. Without prejudice to her submission, regarding the impermissibility of provisional release of the goods in issue, Ms. Acharya submits, as a fallback argument, that , even if the learned Tribunal were of the view that the seized gold, gold jewellery and silver could be provisionally released, the matter ought to have been remanded to the Commissioner/ADG to fix the terms of provisional release . She submits that the learned Tribunal was not competent to itself determine the terms of provisional release, thereby usurping the authority of the Commissioner/ADG, which had never been exercised in the first place.

27. Responding to the submissions of the learned ASG, Mr. Ganesh, learned Senior Counsel, submitted that the learned Tribunal was the final authority on facts, and that an appeal lay, against the decision of the learned Tribunal, before this Court, only on substantial questions of law. Findings of fact, returned by the learned Tribunal, submits Mr. Ganesh, were not amenable to interference, by this Court, exercising appellate jurisdiction under the Act, unless the findings were perverse. No perversity, in Mr. Ganesh's submission, could be said to attach the findings, of the learned Tribunal, in the present case. Mr. Ganesh places reliance, in this context, on the judgement of the Supreme Court in *K. Ravindranathan Nair v C.I.T.*⁵

28. Addressing, first, the residual submission, of the learned ASG, to the effect that the learned Tribunal ought not to have, itself, fixed the terms for provisional release, Mr. Ganesh submits that there is no

⁵ 2001 (127) ELT 11 (SC): (2001) 1 SCC 135

justification or basis for this argument. He submits that, once the learned ADG had already opined that the goods were prohibited, and that provisional release, thereof, could not be allowed prior to adjudication, no purpose, whatsoever, would have been served, by remanding the matter to the learned ADG. He submits that the powers of the learned Tribunal were coequal with those of the adjudicating authority, insofar as permitting provisional release of the goods was concerned, and drew the attention of this Court to various decisions, in which the High Court had itself fixed the terms of provisional release or, in the alternative, directed the learned Tribunal to do so, including *M. D. Overseas Ltd v. U.O.I.*⁶, *Mink Tradecom Pvt Ltd v. U.O.I.*⁷, *Mala Petrochemicals & Polymers v. A.D.G., DRI*⁸ and *Commissioner of Customs (Port) v. Aman Exports*⁹.

29. Mr. Ganesh submits that his client is not a fly by night operator, but is a 3 star export house, which has earned, for the country, foreign exchange in excess of ₹ 1000 crores. He submits that his client had been issued an Advance Authorisation, permitting import of 1000 kg of gold. As such, he submits, the finding, of the learned Tribunal, to the effect that the seized gold, seized from the office premises of his client, pertained to earlier imports, could not be faulted.

30. Mr. Ganesh submits, further, that the appellant has not, in its appeal, either pleaded perversity, in the findings of the learned Tribunal, or suggested any issue to that effect. He submits that,

⁶ 2017 (355) ELT 185 (Del)

⁷ 2018 (8) GSTL 129 (Del)

⁸ 2017 (353) ELT 446 (Del)

⁹ 2018 (362) ELT 747 (Cal)

therefore, the finding of fact, of the learned Tribunal, to the effect that the imported gold was completely accounted for, and that the gold, that had been exported for exhibition, was the same as that which was re-imported and subsequently seized, did not call for interference, at the hands of this Court.

31. Mr. Ganesh also seriously contests the submission, of the learned ASG, to the effect that the learned Tribunal acted in violation of the principles of natural justice. He submits that there was no request, on the part of the Departmental Representative, who argued the matter before the learned Tribunal, for an adjournment; rather, submits Mr. Ganesh, arguments, before the learned Tribunal, continued for over two days.

32. Apropos Circular No. 35/2017-Cus *supra*, on which the learned ASG placed pointed reliance, Mr. Ganesh invites attention to the judgement, of this Court, in *Agya Import Ltd v. Commissioner of Customs*¹⁰, which holds that Paras 2.1 and 2.2 of the said Circular were merely by way of guidance, and could not be treated as mandatory.

33. Mr. Ganesh concluded his arguments, by submitting that the continued detention of the gold jewellery, imported by his client, had thrown his client's business into jeopardy. He, therefore, submitted that his client was willing, were the gold to be released, to submit daily accounts of the usage and production of the gold, to the Customs

¹⁰ 2018 (362) DLT 1037 (Del)

authorities, and keep his premises open for 24-hour supervision by the Revenue. This, he submits, would sufficiently safeguard the interests, and allay the apprehensions, of the Revenue.

Discussion and Findings

Scope of the present appeal

34. Before proceeding to address the primary issues, canvassed at the Bar and urged in the pleadings, we deem it appropriate to delineate, precisely, the scope, and ambit, of the present proceedings.

35. At the outset, we are required to bear, in mind, the fact that the issue of whether there was, in fact, smuggling of gold, gold jewellery, and silver, by the respondent, and whether the seized goods were liable to confiscation, are alive before the authority, adjudicating the Show Cause Notice, dated 26th September, 2019, issued to the respondent. It would be entirely inappropriate, on our part, to express any opinion, even tentative, regarding the allegations in the Show Cause Notice, save and except to the extent such expression is absolutely indispensable, for the purposes of deciding the present appeal. We cannot allow the present appeal to be converted into an appellate proceeding, against an adjudication order, which is yet to be passed, consequent on adjudication of the Show Cause Notice dated 26th September, 2019.

36. The present appeal, it is necessary to note, is directed against an order, passed by the learned Tribunal, permitting provisional release, of the gold, gold jewellery and silver, seized from the respondent at the Airport, and from its workshop premises, on certain terms. Our brief, therefore, it is only to adjudicate on whether the said decision, of the learned Tribunal, to permit provisional release, and the terms fixed by the learned Tribunal in that regard, call for interference, by us, in exercise of the appellate jurisdiction, conferred on us by Section 130 of the Act.

37. While exercising appellate jurisdiction under Section 130 of the Act, the High Court does not sit as an appellate authority on issues of fact. The learned Tribunal, as Mr. Ganesh correctly points out, is the final fact-finding authority. Before opining further in this regard, we deem it appropriate to extract, for ready reference, sub-section (1) of Section 130 of the Act, thus:

“130. Appeal to High Court. –

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment), *if the High Court is satisfied that the case involves a substantial question of law.*”

(Emphasis supplied)

38. An appeal, therefore, lies, to this Court, under Section 130 of the Act, only on “substantial questions of law”. Dealing with an identical expression, as it occurs in Section 130A of the Act – which

provides for reference, to the High Court, against orders of the learned Tribunal, and was the provision in existence, prior to 1st July, 2003, when the provision of appeal was introduced – the Supreme Court, in ***Beer Sain v. Commissioner of Customs (ICD)***¹¹, held that there was a distinction between a question of law and a substantial question of law. Paras 22 to 25 of the report in ***Commissioner of Customs (Preventive) v. Vijay Dashrath Patel***¹² are also instructive, in this regard, and may be reproduced, therefore, thus:

“22. We are not oblivious of the fact that high Courts jurisdiction in this behalf is limited. What would be substantial question of law, however, would vary from case to case.

23. Moreover, although a finding of fact can be interfered with when it is perverse, but it is also trite that where the courts below had ignored the rate of preponderating circumstances and allowed the judgement to be influenced by inconsequential matters, the High Court would be justified in considering the matter and incoming to its own independent conclusion. [See ***Madan Lal v. Mst. Gopi & Anr. (AIR 1980 SC 1754)***]

24. The High Court shall also be entitled to opine that a substantial question of law arises for its consideration when material and relevant facts have been ignored and legal principles have not been applied in appreciating the evidence. Arriving at a decision, upon taking into consideration the relevant factors, would also give rise to a substantial question of law. It may, however, be different that only on the same set of facts the higher court takes a different view. [See ***Collector of Customs, Bombay v. Swastic Woollen (P) Ltd & Ors, (1988) Supp SCC 786*** and ***Metroark Ltd v. Commissioner of Central Excise, Calcutta, (2004) 12 SCC 505***]

25. Even in the case where the evidence is misread, the High Court would have the power to interfere. [See ***West***

¹¹ 2006 (203) ELT 364 (SC)

¹² 2007 (210) ELT 321 (SC)

Bengal Electricity Regulatory Commission v. CESC Ltd, (2002) 8 SCC 715, and also Commissioner of Customs, Mumbai v. Bureau Veritas & Ors, (2005) 3 SCC 265] ”

In *Paras Ship Breakers Ltd v. Commissioner of Central Excise*¹³, the Supreme Court upheld the decision, of the High Court, not to interfere with the finding of fact, arrived at by the learned Tribunal, as no substantial question of law arose therefrom.

39. Significantly, in *Kushal Fertilisers (P) Ltd v. Commissioner of Customs and Central Excise*¹⁴, the Supreme Court held that a finding, by the learned Tribunal, to the effect that, as there was no wilful misstatement or suppression of fact, the extended period for issuance of Show Cause Notice, under the proviso to Section 11A of the Central Excise Act, 1944, was purely one of fact, and did not give rise to any substantial question of law. We may reproduce, in this context, para 17 of the judgement of the Supreme Court, thus:

“Whether non-furnishing of information was wilful and would amount to suppression of material fact in terms whereof the extended period of limitation as provided for in Section 11A of the Customs Act, 1944, could be invoked or not, in our opinion, was not a substantial question of law. *The finding of fact arrived at by the Tribunal should have been treated to be final. It would be binding on the High Court while exercising its appellate jurisdiction.* A “substantial question of law” would mean – of having been understood as something in contradistinction with – technical, are of no substance or consequence, or academic merely. [See *Boodireddy Chandraiah v. Arigela Laxmi, (2007) 8 SCC 155*]”

¹³ 2007 (217) ELT 321 (SC)

¹⁴ 2009 (238) ELT 21 (SC)

40. In *Chandna Impex Ltd v. Commissioner of Customs*¹⁵, the Supreme Court, relying on its earlier decision in *Hero Vinoth (Minor) v. Seshammal*¹⁶, held thus, with respect to the defining characteristics of a “substantial question of law”:

“In *Hero Vinoth (Minor) v. Seshammal* - (2006) 5 SCC 545, referring to the Constitution Bench decision of this Court in *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning & Manufacturing Co. Ltd.* - AIR 1962 SC 1314 as also a number of other decisions on the point, this Court culled out three principles for determining whether a question of law raised in a case is substantial. One of the principles so summarised, is :

“The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences *from proved facts* by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding”.

(Emphasis supplied)

41. Certain instructive cases, where the Supreme Court opined that no substantial question of law had arisen, from the order of the learned Tribunal, may be noticed, at this juncture:

(i) In *Commissioner of Customs v. Contessa Commercial Co. Ltd*¹⁷, it was alleged, by the Revenue, that the respondent-

¹⁵ 2011 (269) ELT 433 (SC)

¹⁶ (2006) 5 SCC 545

¹⁷ 2015 (324) ELT 638 (SC)

importer was importing junk software, on CD-ROMs, highly overvaluing the imports, so as to avail various benefits. The Tribunal rejected the allegation, relying, for the purpose, on expert opinion. It was also held, by the learned Tribunal, that, as the goods were exempt from Customs duty, no motive, for overvaluing the imports, could be discerned. The Supreme Court held that these were purely findings of fact, which did not give rise to any substantial question of law.

(ii) In *Commissioner of Central Excise and Customs v. Ador Welding Ltd*¹⁸, the Supreme Court held the finding, by the learned Tribunal, to the effect that the respondent, and its purchaser, were not “related persons”, and that the explanation, of the respondent, for charging extra trade discount of 10%, was acceptable, to be pure findings of fact, not giving rise to any substantial question of law.

(iii) In *Commissioner of Customs (Adjudication) v. R. K. International*¹⁹, it was alleged that the respondent imported ball bearings, misdeclaring the imports as lead scrap. It was also alleged that the respondent had lent its name to certain decoy importers, who effected imports on behalf of the respondent. The learned Tribunal held that there was lack of conclusive proof with regard to actual identification of ballbearings , and that the Revenue had failed to prove the presence of ballbearings in the two consignments in issue. The Supreme

¹⁸ 2015 (325) ELT 6 (SC)

¹⁹ 2017 (355) ELT 165 (SC)

Court refused to interfere , holding that “the entire findings of the learned Tribunal ... is on a pure appreciation of the evidence and material on record”. The Supreme Court clarified the matter by observing that “the learned Tribunal being the last forum for determination of questions of fact and no perversity in the appreciation of the materials being discernible from the order of the learned Tribunal”, it did not see “how these appeals can be scrutinised any further”. It was held, therefore, that no substantial question of law arose in the appeal is, which required an authoritative determination by the Court.

42. Significantly, these were cases emanating out of a final adjudication of the liability of the concerned assessee/importer, after due appreciation of evidence. No such final determination of the liability of the respondent, before us, qua any part of the seized goods, has taken place in the present case. While deciding whether to release, or not release, the seized goods provisionally, the learned Tribunal was not called upon to adjudicate, either finally or tentatively, on the alleged infractions committed by the respondent, or the consequent liability, if any, of the seized goods to confiscation under the Act. In the absence of any such adjudicatory exercise having taken place at the hands of the authority below, the question of whether any “substantial question of law”, relatable to the infractions alleged to have been committed by the respondent, at all arises before us at this stage, becomes seriously questionable.

43. Perversity, as the afore-cited decisions would make it apparent, is a ground on which the High Court could, in exercise of its jurisdiction under Section 130 of the Act, interfere with findings of fact, returned by the learned Tribunal. A finding is treated as “perverse” when no reasonable person should have arrived at such a finding.²⁰ In *Sumitomo Heavy Industries Ltd v. O.N.G.C.*²¹, it was held that a perverse finding was one which was “not only against the weight of evidence but altogether against the evidence”. A comprehensive dissection of the concept of perversity, when applied to findings of fact, is to be found in the following passage, from *S. R. Tewari v. U.O.I.*²², which relies, in turn, on a veritable phalanx of precedents:

“The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weight of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.”

In *Kuldeep Singh v. Commissioner of Police*²³, it was held that, “if there is some evidence on record which is acceptable and which could

²⁰ *Triveni Rubber & Plastics v. Collector*, AIR 1994 SC 1341

²¹ (2010) 11 SCC 296

²² (2013) 6 SCC 602

²³ (1999) 2 SCC 10

be relied upon, however, compendious it may be, the conclusion would not be treated as perverse and findings would not be interfered with.” This enunciation, of the law, was followed in *Prem Kaur v. State of Punjab*²⁴.

44. Absent perversity, or any of the other inhibiting factors highlighted in the judgements cited *supra*, findings of fact, returned by the learned Tribunal, are to be treated as final, and are not amenable to interference, in exercise of the powers conferred by Section 130 of the Act.

45. Having thus generally delineated the scope of appellate jurisdiction under Section 130 of the Act, we deem it appropriate to emphasize, at the cost of repetition, that this Court is not sitting in appeal, consequent to an adjudicatory exercise, determining the correctness of the allegations in the Show Cause Notice dated 26th September, 2019, having been completed, and carried in appeal before the learned Tribunal. The present appeal is directed against an order of provisional release. No final determination, of the liability of the imported gold, gold jewellery, or silver, to confiscation, has taken place; nor has the learned Tribunal accorded its imprimatur to any such decision. The learned Tribunal has directed provisional release of the seized gold, gold jewellery and silver. An order of provisional release is, at all times, an interlocutory exercise, and does not finally

²⁴ (2013) 14 SCC 653

adjudicate on any liability. The following passages, from *U.O.I. v. Manju Goel*²⁵, merit reproduction, in this context:

“3. The High Court, after hearing the matter, disposed of the writ petition vide impugned judgment dated 2-3-2005 directing the appellants to release the goods on provisional basis on the condition that the respondent herein would deposit the amount of customs duty and would also furnish a bank guarantee of 20 per cent of the value of the goods in question and for the balance value of the goods, she would furnish a personal bond to the satisfaction of the concerned authority in the Customs Department. Operative portion of the judgment reads as under :

“However to protect the interest of revenue, we direct that the goods in question be released on provisional basis within two weeks from the date of receipt of this order, provided that the petitioner deposits the amount of CD and furnishes bank guarantee of 20% of the value of the goods in question and for the balance value of goods, furnish a personal bond to the satisfaction of concerned authority in the Customs Department.

The petition stands disposed of with the above directions.”

4. It is this judgment which is the subject matter of the present appeal. It is clear from the aforesaid direction that the respondent was allowed to get the goods released on provisional basis with certain conditions. We are informed that after the passing of this aforesaid direction by the High Court, the Respondent had even got the goods released after complying with the directions of the High Court. In these circumstances, nothing survives in the present appeal. *Otherwise also, there is no reason to interfere with the order in question, when the arrangement made by the High Court in the said order was only provisional one by way of interim arrangement.”*

(Emphasis supplied)

²⁵ 2015 (321) ELT 19 (SC)

46. “Provisional”, we may note, has been defined, in Ramanatha Aiyar’s Advanced Law Lexicon as “temporary, preliminary; tentative; taken or done by way of precaution or ad interim.”

47. The exercise of power, to release imported goods on a provisional basis, under Section 110A of the Act is, essentially and fundamentally, discretionary in nature. At this point, we deem it appropriate to reproduce Section 110A of the Act, for ready reference, thus:

“110A. Provisional release of goods, documents and things seized or bank account provisionally attached] pending adjudication. - *Any goods, documents or things seized or bank account provisionally attached under section 110, may, pending the order of the adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.”*

(Emphasis supplied)

It merits mention, here, that, while, earlier²⁶, this Court had expressed the view that there was no substantial difference between “provisional release” and “provisional attachment”, a clear departure, from this view, was voiced in *Mala Petrochemicals & Polymers v. A.D.G., D.R.I.*²⁷, in which, additionally, the fundamentally discretionary nature of the power exercised by the Commissioner/ADG, under Section 110A of the Act was underscored, thus (in para 23 of the report):

²⁶ *Bhaiya Fibres Ltd v. ADG, DRI*, 2012 (281) ELT 396 (Del)

²⁷ 2017 (353) ELT 346 (Del)

“The power under Section 110A of the Act involves exercise of discretion. The scope of judicial review is to examine if the discretion has been rightly exercised; that it is not based on irrelevant materials and is fair and reasonable in the circumstances. It is not an appellate power. The drawing of a distinction between seizure of imported goods as a result of undervaluation and seizure of imported goods upon misdeclaration cannot *per se* be said to be irrational. On the contrary, the failure to draw such a distinction and treat all types of wrongful imports on an equal footing might result in miscarriage of justice. That is perhaps why Section 110A has been worded in the way it has, leaving some margin to the Customs in the exercise of their discretion subject, of course, to the recognised legal limits.”

Mala Petrochemicals & Polymers²⁷ was followed, subsequently, in ***Maggie Marketing (P) Ltd v. Commissioner of Customs (Exports)***²⁸.

48. Clearly, provisional release may be allowed, under Section 110A of the Act, of “any goods, documents or things seized”. The Court, as the interpreter of the legislation, cannot profess to greater wisdom than the legislator. Where the legislature has not thought it appropriate to limit, in any manner, the nature of goods, documents or things which may be provisionally released, under Section 110A, in our view, it is no part of the function of a court to read, into the said statutory provision, any artificial limitation, not to be found therein. It is only in exceptional situations, where there is an apparent legislative lacuna, which, if left unfilled, would result in manifest injustice, or frustrate the object of the legislation, that a Court can step in and fill the lacuna and, to that limited extent, perform a quasi-legislative function. Else, the Court must rest content with being an interpreter of existing legislation, and has to accept the legislation for what it is.

²⁸ (2019) 366 ELT 70 (Del)

49. We may, to make matters clearer, contradistinguish Section 110A of the Act, as extracted hereinabove, with Section 125(1) thereof, which 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 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 :”

(Emphasis supplied)

Section 125(1) of the Act permits release, on payment of duty and redemption fine, of goods *prohibited, as well as not prohibited*. In the case of prohibited goods, Section 125(1), by using the word “may”, confers discretion, on the adjudicating authority, to grant, or not grant, the person, from whose custody or possession the goods had been seized, the option to release the goods on payment of redemption fine. In the case of goods which are not prohibited, however, Section 125 (1) mandates grant of permission, to the person, from whose custody or possession the goods were seized, the option to redeem the goods on payment of redemption fine. We are not concerned, in the present case, with Section 125, directly, as the issue of liability to confiscation is still at large before the adjudicatory authority; reference to the said provision has been made only to indicate that, *even in the case of prohibited goods, the Act permits release thereof*, on payment of redemption fine.

50. We are, therefore, unable to subscribe to the submission, of the learned ASG, relying on *Om Prakash Bhatia*¹, that , by virtue of their having been imported in contravention of the Act, the gold, gold jewellery and silver, which were seized, had acquired the character of “prohibited goods” and had, consequently, become ineligible for provisional release. We do not deem it necessary to enter into the niceties of the issue of whether, applying *Om Prakash Bhatia*¹, the goods in issue could be regarded as “prohibited” or not. It is not the case of the Revenue that the gold, gold jewellery or silver, forming subject matter of controversy, was prohibited for import per se, in that there was any provision, in the Foreign Trade Policy, or any other statutory instrument, absolutely prohibiting import thereof. The learned ASG seeks to treat the import of the seized gold, gold currency and silver as “prohibited”, by drawing an analogy from *Om Prakash Bhatia*¹. Even if, for the sake of argument, the gold, gold jewellery and silver were to be treated as “prohibited”, that, by itself, would not render the ineligible for provisional release, under Section 110A of the Act, for the simple reason that Section 110A does not except its application in the case of “prohibited” goods. Rather, it indicates, unequivocally, to the contrary, by using the omnibus expression “any goods, documents or things”.

51. The learned ASG also placed pointed reliance on Circular 35/2020-Cus *supra*, issued by the CBEC, para 2 of which absolutely proscribes provisional release of “goods prohibited under the Customs Act, 1962 or any other Act for the time being in force”, “goods that do

not fulfil the statutory compliance requirements/obligations in terms of any Act, Rule, Regulation or any other law for the time being in force; and “goods specified in or notified under Section 123 of the Customs Act, 1962”. Mr. Ganesh relied on *Agya Import Ltd*¹⁰, which holds that para 2 of the said Circular was merely in the nature of a “general guideline”, and did not incorporate any mandate. We, having perused para 2 of Circular 35/2017-Cus *supra*, vis-à-vis Section 110A of the Act, are not inclined to be so magnanimous. According to us, para 2 of Circular 35/2017-Cus is clearly contrary to Section 110A and is, consequently, void and unenforceable at law. It is not permissible for the CBEC, by executive fiat, to incorporate limitations, on provisional release of seized goods, which find no place in the parent statutory provision, i.e. Section 110A of the Act. Executive instructions may, it is trite, supplement the statute, where such supplementation is needed, but can never supplant the statutory provision.²⁹ By excluding, altogether, certain categories of goods, from the facility of provisional release, para 2 of Circular 35/2017-Cus *supra* clearly violates Section 110A, whereunder *all* goods, documents and things, are eligible for provisional release. Goods, which are eligible for provisional release under Section 110A of the Act, cannot be rendered ineligible for provisional release by virtue of the Circular. (Be it noted, here, that we refer to the “eligibility” of the goods for provisional release, as distinct from the “entitlement” thereof, which has to be determined by the adjudicating authority in exercise of the discretion conferred on her, or him, by Section 110A.) Para 2 of Circular 35/2017-Cus, therefore, effectively seeks to

²⁹ *Lok Prahari v State of U.P.*, (2016) 8 SCC 389, which digests several earlier decisions.

supplant Section 110A, to that extent, and has, therefore, to be regarded as void and unenforceable at law.

52. An executive instruction, which runs contrary to the parent statute and is, therefore, void and unenforceable and, in view thereof, need not be challenged. It is stillborn *ab initio*, faultily conceived; its evisceration, by legal process, is entirely unnecessary. As such, the reliance, by the learned ASG, on the absence of any specific challenge, by the respondent, to the Circular, fails to impress.

53. We have, therefore, in exercising our jurisdiction under Section 130 of the Act, to ensure that such exercise regulates within the aforesaid well-delineated boundaries.

On merits

54. Before proceeding to deal with the actual aspect of provisional release of the seized gold, gold jewellery and silver, we deem it appropriate to deal with the residual submission, of the learned ASG, to the effect that the learned Tribunal ought not, in any case, to have itself exercised the jurisdiction, vested in the adjudicating authority – in the present case, in the ADG, DRI – and fixed the terms of provisional release. According to her, the only course of action open to the learned Tribunal, consequent to quashing the Order, dated 4th October, 2019, of the ADG, was to remand the matter to the ADG, to exercise the jurisdiction vested in him by Section 110A of the Act, and fix the terms of provisional release. The learned Tribunal,

according to her, could not have undertaken this exercise, and, by doing so, it effectively usurped the jurisdiction of the learned ADG, conferred by Section 110A.

55. We are unable to agree, for various reasons.

56. Firstly, Section 129B(1) of the Act empowers the learned Tribunal, seized with an appeal, challenging the order of the adjudicating authority, to “pass such orders thereon as it thinks fit, *confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order* with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary”. We are convinced that the jurisdiction, of the learned Tribunal, to “confirm, modify or annul” the order dated 4th October, 2019, was wide enough to encompass the power to direct provisional release, and fix the terms thereof. Remand, to the authority to pass the order under appeal before the learned Tribunal, is, statutorily, only an alternative course of action, the learned Tribunal. We may take judicial notice, at this point, of the fact repeated demands, to the authorities below, merely clog the litigative process and lead to multiplicity of proceedings, and benefits neither the assessee nor the Revenue. Where, therefore, the learned Tribunal is in a position to decide the appeal, it would be well advised to do so, rather than merely remand the matter to the authority below. Indeed, in a case in which the learned Tribunal is in a position to decide the appeal on merits, and pass effective unenforceable directions, remand,

by it, of the proceedings, the authority below, may amount, practically, to abdication of its jurisdiction. It is obviously with a view to ensure that the demand is not resorted to, as an “easy way out”, that the legislature has, advisedly, conferred wide powers, on the learned Tribunal, to confirm, modify or annul the order before it. On principle, therefore, we are unable to discern any apparent illegality, or want of propriety, on the part of the learned Tribunal, in directing provisional release and fixing the terms thereof, rather than remand in the matter to the ADG, to undertake the said exercise.

57. Secondly, in the present case, any such demand, by the learned Tribunal, to the ADG, as Mr. Ganesh has correctly submitted, would have been an exercise in futility. We are entirely in agreement with the finding, of the learned Tribunal, regarding the unsustainability, *ex facie*, of the order, dated 4th October, 2019, of the learned ADG. In fact, the order borders on perversity, and may also amount, perilously, to disobedience, of the directions issued by us in our order dated 9th October, 2019 in WP (C) 8707/2019. Para 7.3 of the order, dated 4th October, 2019, of the learned ADG, reads thus:

“In view of above mentioned citations on restricted and prohibited goods, it appears that *it would be premature to arrive at any conclusion, about provisional release of seized goods, before completion of adjudication proceedings.*”

(Emphasis supplied)

To us, this finding is completely inscrutable, and is, on the face of it, contradictory in terms. There can be no question of provisional release of seized goods, *after* completion of adjudication proceedings. Section

110A of the Act specifically empowers provisional release “*pending* the order of the adjudicating authority”. It is impossible, therefore, to conceive provisional release consequent on adjudication, or to understand how the ADG chose to opine that it would be “premature” to arrive at any conclusion about provisional release, before completion of adjudication proceedings. As, after conclusion of adjudication proceedings, the question of provisional release of the goods would be rendered infructuous and, in fact, the adjudicating authority would become *functus officio* in that regard, in view of the specific words used in Section 110A, the only conclusion, that can follow from the afore-extracted inexplicable finding of the ADG, is that he had made up his mind not to release the seized gold, gold jewellery and silver, provisionally, at any cost. We, therefore, find ourselves in agreement with Mr. Ganesh that any remand, of the matter, to the ADG, to fix the terms of provisional release, would have been an exercise in futility. For this reason, too, we are unable to hold that, in directing provisional release of the gold, gold jewellery and silver, and fixing the terms thereof, the learned Tribunal exceeded the jurisdiction vested in it.

57. Thirdly, it is trite that an appeal is a continuation of the original proceedings, and that the appellate authority enjoys the powers vested in the original authority.³⁰ The power to direct provisional release, therefore, did vest in the learned Tribunal, and continues to vest in this Court, seized with successive appeals, emanating from the order of the ADG. It is for this reason that, in the orders to which Mr. Ganesh has

³⁰ *Kamla Devi v. Kushal Kanwar*, (2006) 13 ELT 295

alluded – and to which we do not deem it necessary to make reference – the terms of provisional release have been fixed by this Court and, on occasion, this Court has directed the learned Tribunal to fix the terms of provisional release.

59. We, therefore, reject the submission, of the learned ASG, that the learned Tribunal exceeded its jurisdiction in directing provisional release of the seized gold, gold jewellery and silver, and fixing the terms thereof.

60. Proceeding to the merits, we reiterate that our jurisdiction, conferred by Section 130 of the Act, is limited to deciding substantial questions of law, arising from the impugned order of the learned Tribunal. We are not an appellate authority on facts; we exercise appellate jurisdiction only on “substantial questions of law”. It is obvious that an order of provisional release, is essentially a discretionary order, as is apparent from the very tenor of Section 110A of the Act. The scope of interference, by an appellate court, with a discretionary order of the court below, especially where the appellate jurisdiction is statutorily limited to substantial questions of law, is heavily circumscribed. In passing an order of provisional release, there is no adjudication, by the authority concerned, of the competing rights and liabilities of the parties before it. The authority does not pronounce on the issue of whether there has, or has not, been an actual evasion of duty, or other contravention of Customs law, by the importer seeking provisional release. That is an exercise which has to suffer the rigour of the adjudicatory process, which, in the case of

the present respondent, stands set in motion with the issuance of Show Cause Notice dated 26th September, 2019.

61. At the same time, provisional release is not a rule, or a vested right. Section 110A has, advisedly, left the matter to the discretion of the adjudicating authority, to be exercised in his best judgement, keeping in mind the overall facts and circumstances. The use of the word “may” is amply sufficient to clothe the adjudicating authority with the jurisdiction to decide one way or the other, on the request for provisional release, keeping, at all times, the interests of justice paramount. The sequitur would, however, be that, where the authority – in the present case, the learned Tribunal – has decided to provisionally release the goods in issue, and has fixed the terms of provisional release, this Court would, in appellate jurisdiction under Section 130 of the Act, interfere only where the exercise of discretion, by the learned Tribunal, is found to be perverse, in that it is contrary to the facts before the learned Tribunal, amounts to a perverse appreciation thereof, or is such as no reasonable person would have arrived at. Absent these infirmities, we are convinced, in our mind, that no case for interference, with the decision of the learned Tribunal could be said to have been made out, even if we, on the facts, may be of the opinion that the learned Tribunal could have decided otherwise. These, in our view, are principles which are too well settled to merit repetition.

62. Viewed thus, how does the present case pan out?

63. Insofar as the 25 gold bars (each weighing 1 kg), 26.404 kg work in progress (in the form of gold) and 44.778 kgs of silver, seized at the workshop premises of the respondent, is concerned, the findings of the learned Tribunal reads thus:

“28. So far as the seizure of 25 gold bars (1 kg each) totalling weighing 25 kg and cut pieces of gold bars, gold dust and assorted gold jewellery weighing 26,404 g and certain silver bars and cut pieces weighing 44908 g is concerned, *it has been shown to us by learned Advocate that out of the 25 gold bars weighing 1 kg each is concerned, 22 gold bars had been imported by the appellant under Advance Authorisation Scheme vide Bill of entry No. 2873828 dated 17 April 2019. The bill of entry for import have been assessed at the rate of duty under Advance Authorisation No. 0510409190 dated for January 2019 for import of Gold bar having purity of 0.995. It is a matter of record that 50 gold bars had been imported by the appellant under Bill of entry No. 2873288 dated 17 April 2019 which are having specific and unique bar number. On verification of the unique bar number of the seized gold bars which the gold bars imported vide above mentioned bill of entry having packing list dated 15 April 2019 for the invoice H-3470, we find that 22 gold bars weighing 1 kg each totally weighing 22 kg, absolutely tallies with the Gold bar numbers which was imported under the bill of entry No. 2873288. It is also a matter of record that the main ‘karigar’ of the appellant who was supervising manufacturing of gold jewellery has categorically mentioned that from the imported gold bars he has made jewellery of 7 kg and certain other jewellery and certain quantities were ‘work-under progress’ in the form of gold, dust and other pieces of jewellery at different stages of manufacturing. We also find that the appellant have also made certain purchases of the gold from the local market and for which he has necessarily purchase invoices and this Court has also been used for manufacture of gold jewellery. We find that the seizure made by the Investigating Agency at the factory premises of the appellant does not explain in detail as to why the goods have been seized when the appellant had been working in the bonded premises and he has all the documents for illegal possession of primary gold bars as well as gold jewellery. Prima facie, we do not find any ground to hold that*

the seized/detained goods falling under the category of prohibited goods as the appellant prima facie has all the legal documents for rightful possession of the same.”

(Emphasis supplied)

64. These are pure findings of fact, returned by the learned Tribunal after examining the record before it. Absent any perversity therein, this Court cannot re-appreciate the said findings, in exercise of its jurisdiction under Section 130 of the Act. Far from alleging perversity, qua these findings, the appeal, of the ADG, DRI, does not contain even a whisper of an averment, disputing or traversing the said findings. There is no submission, anywhere in the body of the appeal before us, which could even obliquely indicate that the above findings, returned by the learned Tribunal – including the finding that the bar numbers of 22 of the 25 gold bars, seized from the workshop of the respondent, were identical to the bar numbers of the gold bars imported *vide* Bill of Entry No. 2873828 dated 17th April, 2019, using the Advance Authorisation issued to the respondent – are incorrect in any manner.

65. The decision, of the learned Tribunal, to permit provisional release of the gold, gold jewellery and silver, seized at the workshop premises of the respondent, being consequent on the afore-extracted findings, which have not been traversed in the appeal of the ADG, DRI, we find no reason to interfere therewith.

66. Adverting, now, to the gold jewellery seized at the Airport.

67. The gold jewellery, seized at the Airport, consisted of

- (i) 25400.06 g gold jewellery, in respect of which Bill of Entry No. 107190, dated 26th February, 2019, with corresponding Job No. 10954, dated 26th February, 2019, was presented, and
- (ii) 25299.68 kg gold jewellery, covered by an unregistered Bill of Entry, not bearing any Job number, and unsigned by any Customs Import Clerk or even by the respondent.

68. These two “categories”, of the gold jewellery seized at the Airport have, we feel, to be dealt with, differently.

69. Insofar as the first category, of 25400.06 grams of gold jewellery, is concerned, the learned Tribunal has, in para 26 of the impugned Final Order, observed that “the Assessing Officer after scrutiny of all the relevant documents and on satisfaction has allowed the clearance of the imported gold jewellery and had endorsed that the imported gold jewellery was same which had been exported under the 2 shipping bills (as mentioned in preceding paras).” The appeal, of the ADG, DRI, does not seek, in any manner, to traverse this specific finding, i.e., that the imported gold jewellery was the same as that which had been exported, for participation in the exhibition, and that the competent assessing officer had satisfied himself on this count. The appeal, before us, avers, instead, that

- (i) the Customs Gate Pass Book, dated 24th April, 2019, found in the possession of Amit Pal Singh, indicated that he

would be carrying one package, whereas he was found carrying two packages/bags,

(ii) similarly, the documents issued by the Federal Customs Authorities in the UAE, also indicated that Amit Pal Singh would be carrying one package/bank of 22 carat gold jewellery, and not two packages/bags,

(iii) at the time of his interception, Amit Pal Singh was not found to be in possession of any copy of either of the Bills of Entry, and all five copies of the Bills of Entry were found with Vikram Bhasin, the Jewellery Appraiser, and

(iv) it was admitted by Gopal Gupta, in his statement, under Section 108 of the Act, recorded during the course of investigation, that the 2 Bills of Entry, which were presented at the time of clearance of the gold jewellery, were intended to be replaced, later, with Bill of Entry No. 107854, dated 18th April, 2019, for 662.12 grams of gold jewellery.

70. The appellant has also placed extensive reliance on the statements, recorded under Section 108 of the Act, during investigation, from various persons, and the assertions, in this regard, as contained in the appeal, we may note, mirror the allegations in the Show Cause Notice, dated 26th September, 2019, which is presently pending adjudication before the Commissioner of Customs. The learned ASG has also, in her submissions, sought to draw the attention

of the Court to various “admissions”, in the said statements which, according to the, indicate that the aforesaid quantity of 51172.4 grams of gold jewellery was, in fact, being smuggled into India, using Bills of Entry which, at a later point of time, were to be replaced with Bills of Entry for lesser quantities. According to the allegations in the Show Cause Notice, the differential quantity of gold jewellery was, in fact, destined for Nepal, and had been smuggled into India by availing, illegally, the benefit of Notification 45/2017-Cus *supra*.

71. The submissions, though attractive at first blush do not, on closer scrutiny, make out a case for interference, by this Court, with the decision, of the learned Tribunal, to permit provisional release of the seized gold jewellery. The mere fact that, at a later point of time, all copies of the concerned Bills of Entry were found with the Jewellery Appraiser Vikram Bhasin, in our view, does not militate against the fact that, at the time of their clearance, Amit Pal Singh did, in fact, present to Bills of Entry, one of which was duly registered, with a Job number, and had been signed by the Customs Import Clerk, and the second, unregistered, undated and unsigned. The first Bill of Entry covered 25400.06 g, and the latter, 25299.68 g, gold jewellery. Clearance of the jewellery was permitted, after appraisal and recording of satisfaction, by the Appraiser, of the fact that the jewellery was, in fact, the same as that which had earlier been exported *vide* Shipping Bills dated 20th February, 2019 and 13th March, 2019, for the purpose of exhibition abroad. While examining an appeal, against the decision, of the learned Tribunal, to allow provisional clearance of the jewellery, we are not required to enter

into the correctness of these facts, especially as, save and except by way of reference to various statements, recorded during the course of investigation, there is precious little, in the appeal of the ADG, DRI, to dispute the same.

72. Insofar as the quantity of 25400.06 grams of gold jewellery, covered by the registered, appraised, dated and signed Bill of Entry, dated 20th April, 2019, is concerned, therefore, the decision, of the learned Tribunal, to allow provisional clearance, cannot be said to be perverse, so as to give rise to any substantial question of law, as would warrant interference, in appeal, by us. We may repeat, in this context, that the decision, as to whether the gold jewellery ought, or ought not, to have been provisionally released, was entirely discretionary. The facts before the learned Tribunal, which are also before us, cannot be said to be such as would render the exercise of discretion, by the learned Tribunal, in favour of provisional release of the 25400.06 grams of gold jewellery, perverse. Absent such perversity, no case, in our view, can be said to exist, as would justify our interference, with the exercise of discretion by the learned Tribunal, in exercise of our jurisdiction under Section 130 of the Act.

73. We may hasten to add, here, that our view, in this regard, does not discountenance, in any manner, the allegation, of the DRI, that the entire quantity of 51172.4 grams of gold jewellery was, in fact, being smuggled into India, or that it was, consequently, liable to confiscation. That is a matter to be decided in adjudication. Provisional release of the gold jewellery does not, in any manner,

inhibit the adjudicating authority from holding that the jewellery was, in fact, liable to confiscation, or passing appropriate orders in that regard. It is precisely for this reason that, at the time of provisional release, the importer is required to furnish a bond, covering the full value of the imported goods, along with security, in accordance with law. Allowing provisional release of the seized gold jewellery does not, therefore, interfere, in any manner, with due adjudication of the Show Cause Notice, or with the jurisdiction, of the adjudicating authority, to hold the gold jewellery liable to confiscation. The mere fact that imported goods, consequent on adjudication may, possibly, be held to be liable to confiscation at a later stage, cannot be a ground to refuse provisional release. Else, Section 110A of the Act would, in our view, be largely rendered nugatory and otiose.

74. The order, dated 4th October, 2019 *supra*, of the ADG, DRI, as also the submissions advanced by the Revenue before the learned Tribunal and, thereafter, before us (through the learned ASG) rely, essentially, on the allegations in the Show Cause Notice, dated 26th September, 2019, as a ground to oppose the request for provisional release of the seized gold jewellery. This, in our view, is an erroneous approach. Seizure of goods is, in nearly every case, bound to invite, in its inevitable wake, a Show Cause Notice, proposing confiscation thereof. If the mere fact of issuance of such a Show Cause Notice, and the allegations therein, are to be treated as sufficient to justify rejection of the prayer for provisional release, Section 110A would be reduced to a dead letter.

75. Allegations in a Show Cause Notice are merely allegations, till proved, in adjudication. Were there to be no material, whatsoever, justifying clearance of the imported goods, such allegations may, conceivably, have a part to play, in examining the request for provisional release. Where, however, as in the case of the 25400.06 grams of gold jewellery, seized at the Airport in the present case, a duly registered and assessed Bill of Entry was present, the goods were appraised and found to be identical to the goods exported for exhibition, and the Bill of Entry had been signed by the Customs Import Clerk, as well as by the importer, we cannot fault the learned Tribunal in having permitted provisional release of the gold jewellery.

76. We are not persuaded to change our view, on the basis of the various statements, recorded under Section 108 of the Act, on which the learned ASG sought to rely. Statements, under Section 108 of the Act, we may note, though admissible in evidence, acquire relevance only when they are, in fact, admitted in evidence, by the adjudicating authority and, if the affected assessee so chooses, tested by cross-examination. We may, in this context, reproduce, for ready reference, Section 138B of the Act, thus:

“138B. Relevancy of statements under certain circumstances. —

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) *when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.”

A Division Bench of this Court has, speaking through A. K. Sikri, J. (as he then was) held, in ***J & K Cigarettes Ltd v. Collector of Central Excise***³¹ that, by virtue of sub- section (2), Section 138B(1) of the Act would apply, with as much force, to adjudication proceedings, as to criminal proceedings. Following this, it has been held, by the High Court of Punjab and Haryana, in ***Jindal Drugs Pvt Ltd v. U.O.I.***³² that, unless and until one of the circumstances contemplated by clause (a) of Section 138B(1)(a) applies, the adjudicating authority is bound to follow, strictly, the procedure outlined in clause (b), before treating a statement, recorded under Section 108 of the Act, as relevant. (We may note, here, that ***Jindal Drugs***³² was rendered in the context of Section 9D of the Central Excise Act, 1944 which is, however, *in pari materia*, and *in haec verba*, with Section 138B(1)(b) of the Act.) Paras

³¹ 2009 (242) ELT 109 (Del)

³² 2016 (340) ELT 67 (P & H)

19 to 21 of the judgement in *Jindal Drugs*³² may, for ready reference, be reproduced thus:

“19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

20. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

21. It is only, therefore, –

- (i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and
- (ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.”

(Emphasis supplied)

We express our respectful concurrence with the above elucidation of the law which, in our view, directly flows from Section 138B(1) of the Act – or, for that matter, Section 9D of the Central Excise Act, 1944.

77. The framers of the law having, thus, subjected statements, recorded under Section 108 of the Act, to such a searching and detailed procedure, before they are treated as relevant in adjudication proceedings, we are of the firm view that such statements, which are yet to suffer such processual filtering, cannot be used, straightaway, to oppose a request for provisional release of seized goods. The reliance, in the appeal before us, on various statements recorded during the course of investigation in the present case cannot, therefore, in our view, invalidate the decision, of the learned Tribunal, to allow provisional release of the seized 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019.

78. We find no reason, therefore, to interfere with the decision of the learned Tribunal, to allow provisional release of the said 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019.

79. We are, however, of the view that the learned Tribunal erred in clubbing the aforesaid quantity of 25400.06 grams of gold jewellery which 25299.68 grams of gold jewellery, the Bill of Entry in respect

of which was undated, unregistered and unsigned, by the importer as well as by the Customs Import Clerk. Submission of a registered Bill of Entry, in accordance with Section 46 of the Act, is the *sine qua non* for licit importation of goods. In the absence of a registered Bill of Entry, importation of goods is impermissible. The quantity of 25299.68 grams of gold jewellery, being not covered by any registered, signed or appraised Bill of Entry, bearing the signature either of the importer or of the Customs Import Clerk, could not, in our view, have been provisionally released, as the import was invalid and irregular *ab initio*. The exercise of discretion, by the learned Tribunal, in allowing provisional release of the said quantity, by clubbing it with the 25400 grams of gold jewellery, in respect of which there was a registered, signed and appraised Bill of Entry, with a specific Job Number, in our view, was completely untenable in law. It cannot, therefore, be said that the learned Tribunal, in allowing provisional release of the quantity of 25299.68 grams of gold jewellery, for which no registered or signed Bill of Entry, having an assigned Job No, was available, exercised its discretion in accordance with law. The exercise of discretion by the learned Tribunal, in respect of this quantity of gold, therefore, in our view, suffers from perversity in law, and cannot sustain.

80. We are constrained, therefore, to set aside the decision of the learned Tribunal, to allow provisional release of the quantity of 25299.68 grams of gold jewellery, seized at the Airport, which was not covered by any registered Bill of Entry.

81. The resultant position is, therefore, that, while we uphold the decision, of the learned Tribunal, to allow provisional release of the gold, gold jewellery and silver seized at the workshop premises of the respondent, as well as 25400.06 grams of gold jewellery, seized at the Airport, in respect of which there was a registered Bill of Entry, bearing the signatures of the respondent as well as the Customs Import Clerk, as also the Jewellery Appraiser, with a corresponding Job ID No., we set aside the decision, of the learned Tribunal to allow provisional release of the remaining quantity of 25299.68 grams of gold jewellery, seized at the Airport, in respect of which the Bill of Entry, presented for clearance, was unregistered, with no corresponding Job Id No., and did not bear the signature either of the Customs Import Clerk or of the respondent.

83. Adverting, now, to the terms of provisional release, the impugned Final Order does not set out any precise reasoning for having permitted provisional release on furnishing of a bond with Bank Guarantee for ₹ 1.25 crores. A Division Bench of this Court had, in *Navshakti Industries Ltd v. Commissioner of Customs, ICD*³³, permitted provisional release, of the goods in issue in that case, on furnishing of a bond covering 20% of the differential duty payable on the goods, with no other condition. The said condition was modified by the Supreme Court, in appeal³⁴, by directing furnishing of a bank guarantee for 30% of the differential duty payable on the goods. *Zest Aviation Pvt Ltd v. U.O.I.*³⁵ and *Aban Exim Pvt Ltd v.*

³³ 2011 (267) ELT 483 (Del)

³⁴ as reported in 2011 (269) ELT A 146 (SC)

³⁵ 2013 (289) ELT 243 (Del)

*Principal Commissioner of Customs*³⁶, too, followed the same standard, by allowing provisional release on furnishing of a bank guarantee covering 30% of the differential duty payable on the goods in issue. Furnishing of a bond, for the value of the goods, along with a bank guarantee covering 30% of differential duty, was the standard followed, subsequently, while permitting provisional release, in *G. S. Nuts v. Commissioner of Customs*³⁷, *Daya Enterprises v. Commissioner of Customs (Export)*³⁸ and *Spirotech Heat Exchangers Pvt Ltd v. U.O.I.*³⁹.

84. In the present case, however, the gold was imported, seeking exemption from payment of duty under the Advance Authorisation scheme and the Exhibition Export scheme. The Show Cause Notice, dated 26th September, 2019, issued to the respondent by the ADG, DRI, to, does not propose any duty demand, but seeks, instead, to confiscate the seized gold, gold jewellery and silver. The total value of the said gold, gold jewellery and silver has been reckoned, in the Show Cause Notice, to be ₹ 28,23,82,357/–.

85. The learned ASG submits that, given the value of the gold seized, the condition of furnishing of a Bank Guarantee for ₹ 1.25 crores, is woefully inadequate.

86. There appears, *prima facie*, to be substance in the grievance voiced by the learned ASG. In our view, therefore, the interests of

³⁶ 2015 (319) ELT 430 (Del)

³⁷ 2016 (335) ELT 397 (Del)

³⁸ 2016 (336) ELT 73 (Del)

³⁹ 2016 (341) ELT 110 (Del)

justice would justify modification, of the terms fixed by the learned Tribunal for provisional release of the seized gold, gold jewellery and silver, by requiring the respondent to furnish a bond, for the full value of the seized goods, along with a Bank Guarantee, containing an auto-renewal clause, for ₹ 10 crores, which works out to over 30% of the value of the seized gold (including the gold of which provisional release is *not* being permitted). This, in our opinion, would sufficiently safeguard the interests of the Revenue.

Conclusion

87. Resultantly, the substantial questions of law, framed *vide* our order dated 29th January, 2020, and reproduced hereinabove, are answered thus:

- (i) Questions (i) and (ii) are answered by holding that the power and jurisdiction of the learned Tribunal, hearing an appeal against an order of provisional release, is coequal with the power exercised by the adjudicating authority. The learned Tribunal, therefore, has the power to direct provisional release, as well as to fix the terms thereof. In the present case, no question of substitution, by the learned Tribunal, of its view, for the discretion of the adjudicating authority, arises, as the adjudicating authority, i.e. the learned ADG, DRI, *vide* his order dated 4th October, 2019, never proceeded to fix any terms for provisional release, but held, instead, that it would be premature to arrive at any conclusion, about provisional release

of the seized goods, before completion of adjudication proceedings. The learned Tribunal held that this view was palpably untenable, and amounts to a complete negation of Section 110A of the Act. We agree with the decision of the learned Tribunal, and uphold the quashing of the order, dated 4th October, 2019, of the learned ADG, DRI.

(ii) Question (iii) is answered by upholding the decision, of the learned Tribunal, to release, provisionally, and forthwith, the gold, gold jewellery and silver, seized from the warehouse premises of the respondent, as well as 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190 dated 17th April, 2019, on furnishing of a bond, by the respondent, covering the entire value of the said goods, along with a Bank Guarantee for ₹ 10 crores, containing an auto-renewal clause. However, the direction for release of 25299.68 grams of gold jewellery, the Bill of Entry in respect of which was unsigned by the respondent as well as by the Customs Import Clerk, unregistered and unaccompanied by any Job ID No., is quashed and set aside.

(iii) Needless to say, there shall be no misuse or illegal diversion of the gold, gold jewellery and silver, being provisionally released to the respondent. For this purpose, the premises of the respondent would be kept open for inspection by the appellant, at all points of time, and all utilization/sale of the gold, gold jewellery or silver shall be duly accounted for.

We direct that weekly account statements, in that regard, shall be furnished, by the respondent, to the appellant.

88. The appeal is disposed of accordingly.

89. Pending applications, if any, also stand disposed of accordingly.

C. HARI SHANKAR, J.

CHIEF JUSTICE

JUNE 1, 2020
HJ

