

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (CUSTOMS)
ORIGINAL SIDE**

RESERVED ON: 10.05.2024
DELIVERED ON: 15.05.2024

CORAM:

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

CUSTA NO. 16 OF 2023

(I.A G.A NO. 01 OF 2024)

COMMISSIONER OF CUSTOMS (PREVENTIVE)

VERSUS

SHRI RAJENDRA KUMAR DAMANI @ RAJU DAMANI

Appearance:-

**Mr. Kaushik Dey, Learned Senior Standing Counsel.
Mrs. Aishwarya Rajashree, Adv.**

.....For the Appellant.

**Mr. Joydip Kar, Sr. Adv.
Mr. Shovendu Banerjee, Adv.
Mr. Soumyajit Mishra, Adv.**

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. The revenue is on an appeal questioning the correctness of the order passed by the Customs Excise and Service Tax Appellate Tribunal, Kolkata (Tribunal) in Customs Appeals dated 13.03.2023 by which the appeal filed by the respondent along with other connected appeals were allowed holding that the stand taken by the respondent and others that the gold in question was made out of an old jewellery purchased in cash which fact has not been denied by the revenue by cogent reasons and therefore the gold is not liable for confiscation. Further the learned tribunal held that the revenue has failed to establish the fact that the cash recovered from the respondent and others are sale proceeds of the smuggled gold and therefore the cash seized cannot be confiscated and no penalties are imposable.
2. The revenue has raised the following substantial questions of law for consideration:-

- (a) *Whether the Learned Tribunal erred in law in not holding that the statements of the Respondent/Noticee No.1 i.e. Rajendra Kumar Damani was voluntary, while giving credence to the Noticee's submission that they were retracted. The statements made by Respondent/Noticee No. 1 on 07.08.2018, 08.08.2018, and 25.07.2019 were all in his own handwriting and in his vernacular, which indicates that the statements were all voluntary ?*
- (b) *Whether the Learned Tribunal erred in law in not holding that the that the third statement, which is also in his own handwriting and in his vernacular, is after the gap of almost a year, in which he has*

reiterated his original statements. The attempted retraction was almost a year after the initial statement and the noticee had made no mention of any threat or coercion in the initial bail hearing, and hence has to be construed as an after thought?

- (c) Whether the Learned Tribunal was correct in holding Noticees claim that the gold was melted from old jewellery, since this claim was never made at any stage of the investigation, nor any shred of documentary evidence was produced ?*
- (d) Whether the Learned Tribunal erred in law in the holding the claim of the Noticee at face value in the face of overwhelming evidence against the same and not considering Section 123 of the Customs Act, 1956 which places the burden of proof on the Noticees?*
- (e) Whether the Learned Tribunal erred in law in not holding that mere melting of old jewellery will yield gold of purity of only 91-92% and melting of old jewellery into pure gold is a precise chemical process which requires strong chemicals and skilled professionals and cannot, in the normal course, be done at home Noticee No. 1 has produced no evidence or documentary proof of any kind to substantiate engaging any professional to carry out this refining process ?*
- (f) Whether the Learned Tribunal failed to appreciate that Hon'ble Supreme Court in Judgement dated 03.04.1974 passed in Collector of Customs, Madras and Ors. Vs. D. Bhoormul has held that with regard to these specified goods if seized under this Act in the reasonable belief that they are smuggled goods, the burden of proof that they are not such goods shall be on the person from whose possession, they are seized. The prosecution or the Department*

is not required to prove its case with mathematical precision to a demonstrable degree ?

3. We have heard Mr. Kaushik Dey, learned Senior Standing Counsel for the appellant assisted by Mr. Aishwarya Rajashree, learned Standing Counsel and Mr. Joydip Kar, learned Senior Advocate assisted by Mr. Shovendu Banerjee and Mr. Soumyajit Mishra, learned advocates for the respondents.
4. The DRI, Kolkata conducted search at two premises in Kolkata and during the search operation huge amount of cash of Indian currency of 50 to 2000, nine pieces of yellow metallic coins believed to be gold of foreign origin and a pouch of white colour metallic granules believed to be silver of foreign origin were found. A search list cum inventory was prepared by the DRI of the recovered Indian currency as well as the yellow metallic coins believed to be gold of foreign origin and white metallic granules believed to be silver of foreign origin and the search list was signed by the respondent herein. When the respondent was questioned, he stated to have admitted that the entire cash is the sale proceeds of smuggled gold and silver. The DRI officers called upon the respondent to produce documents but they could not produce any document to show that the seized articles were not of foreign origin.
5. In the simultaneous search conducted in the second premises, eleven number of yellow colour metallic bars believed to be gold of foreign origin concealed inside old and used newspapers and several bundles of huge amount of cash of Indian currency secreted in metallic vault fitted on the

wall was found. The respondent is stated to have admitted that he is the owner of the shop and the other two persons were his employees and that the eleven yellow colour metallic bars believed to be gold of foreign origin were smuggled in nature and that he used to store those smuggled goods in the said metallic vaults at his shop for selling those to others and the recovered amount of Indian currency are the sale proceeds of such smuggled gold sworn by him on earlier occasions. Statement of the respondent was recorded under Section 108 of the Customs Act, 1962 (the Act) on 06.08.2018 wherein it appears that he has admitted that he has been dealing with smuggled gold and the Indian currency recovered is out of the smuggled gold which was sold earlier.

6. Further he added that there is no document in support of his procurement of the gold bars. Statements of the others were also recorded, test report was obtained from the, Chemical Laboratory, Customs House, Kolkata which certified that the seized items are gold and the percentage of gold by weight was 99.5%. The call detail records of the mobile phones used by the respondent were ascertained from which it was seen that the respondent was in regular contact with two other persons and the other two persons were also dealing in smuggled gold.

7. Based on the above facts and other details, show cause notice dated 28.07.2019 was issued under Section 124 of the Act to six noticees of which the respondent is the first notice. Calling upon them to explain as to why the seized eleven pieces of gold of foreign origin having total weight 10500.80 grams valued at Rs. 3,15,02,400/-, nine pieces of gold coins valued at Rs. 2,07,000/- and 509.100 grams of silver granules valued at Rs.

19,448/- should not be confiscated under Section 111(b) and 111(d) of the Act; why Indian currency notes amounting to Rs. 1,74,76,500/- seized during the investigation, should not be confiscated under Section 121 of the Act and among others things why penalty should not be imposed under Section 112(a) and/or 112(b) and 117 of the Act.

8. In the show cause notice, it had been stated that import of gold in the India is regulated under various provisions and subject to strict conditions. In accordance to Notification No. 50/2017- as amended, gold, with description as mentioned in the notification, is allowed to be imported by the importers and/or eligible passengers upon payment of applicable rate of duty subject to specific conditions being fulfilled. It was stated that as per notification and circulars/instructions/rules, it can be seen that well defined and exhaustive conditions and restrictions are imposed on the import of various forms of gold by eligible passengers/nominated banks etc. These conditions are restrictions imposed on the import of gold. It was stated that in the case on hand that none of the condition was satisfied rendering it a clear case of smuggling. Section 123 of the Act was referred to and it was stated that the burden of proving that the gold is not smuggled gold shall be on the person, who claims to be the owner of the goods so seized or from whom whose possession the goods are seized. In paragraph 27.1 of the show cause notice the role of the respondent has been set out.

9. The adjudicating authority namely The Additional Commissioner of Customs (Preventive) afforded an opportunity of personal hearing to all the noticees on 11.11.2019 including the respondent who has represented by the learned advocate in the hearing fixed on 24.01.2020. The reply given by

the respondent was considered and by order dated 16.09.2020, the gold and silver were ordered to be absolutely confiscated as well as the order for absolute confiscation of the Indian currency which was seized, a sum of Rs. 70,00,000/- was imposed as penalty on the respondent. Aggrieved by such order, the respondent and the other noticees filed appeal before the Commissioner of Customs (Appeals) and by order dated 31.12.2021, the appeal filed by the respondent was dismissed. Challenging the said order, the respondent and others preferred appeal before the tribunal which was allowed and challenging the correctness of the same, the revenue has preferred this appeal.

- 10.** The first aspect to be considered in the case on hand is with regard to on whom the burden of proof lies. Section 123 of the Customs Act deals with the burden of proof in certain cases. Sub Section (1) states that where any goods to which the said section applies are seized under the Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be (a) in a case where such seizure is made from the possession of any person- (i) on the person from whose possession the goods were seized; and (ii) if any person other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other persons; (b) in any other case, on the person, if any, who claims to be the owner of the goods so seized. Sub Section (2) states that Section 123 shall apply to gold and manufacturers thereof, watches and any other class of goods which the Central Government may by notification in the official Gazette specifies.

11. What is important to note is that Section 123 enacts that where any goods to which the Section applies, are seized under the Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized, the burden thus shifts under the conditions specified in the Section and the conditions being the seizure of goods to which the section applies, seizure under the Act (Customs Act) and seizure in the reasonable belief that they are smuggled goods. When these three elements are proved, the burden would shift to the accused to show that they are not smuggled goods.
12. It has been held that the section does not compel the officers to give reasons and the non-mention of reasons does not vitiate the authorization, even though it was always proper for the officers to give reasons (***Assistant Collector of Customs Versus Pratap Rao Sait and Others***¹). Thus when Section 123(1) of the Act casts on the person concerned, the burden of proving that the goods are not smuggled goods, it is up to him to show whether that goods are not of foreign origin and hence not smuggled or that the goods are of foreign origin, but not smuggled goods, having been lawfully acquired.
13. Reasonable belief that goods are smuggled goods is to be judged from the Customs Officers experience and that sufficiency of material leading to formation of belief is not generally open to judicial review. However, the opinion of the customs officers cannot be wholly objective and the courts can examine the correctness and the circumstances leading to such belief.

¹ 1972 CrLJ 1135

Therefore, it would be sufficient if the circumstances on the material before the officer, prima facie gives sufficient grounds to entertain the belief, one such factor being prior information.

- 14.** Having noted the above legal position, we are required to examine as to what was the stand taken by the respondent and the two others co noticees. As could be seen from the averments set out in the show cause notice, and the adjudication order, a slight inconsistency is noticed in what the respondent and other noticees have stated. In the statement recorded under Section 108 of the Act on 06.08.2018, from the respondent herein who was the first notice, he had stated as herein:-

9. Statement of Shri Rajendra Kumar Damani alias Raju Damani was recorded under Section 108 of the Customs Act, 1962 on 06.08.2018, wherein, he inter-alia stated that;

I. He has a jewelry trading Co. at 72 Monohar Das Street Ground floor in his name (Rajendra Kumar Maheshwari) whose license was acquired by him 5-6 years back.

II. After working at the said shop for some days he indulged himself into illegal business of gold bullion and he was in that illegal business of gold bullion for the last 2 years and earned at about Rs. 50,000/- to 60,000/- per month.

III. He makes profit of about Rs. 2000/- to Rs. 3000/- on trading, per kg of the gold. He operates from his office at 72 Monohar Das Street and 2nd floor of 17, Paggaypatty office, Kolkata

IV. Whatever gold he sold and purchased had illegally been smuggled

into India. He did not keep any documents, neither had he bought gold on documents nor did he sell the gold on documents. He also stated that he carried out the whole business illegally.

V. He used to buy illegally smuggled gold of foreign origin from 1). Pradip Gupta (mobile number 9830023195) at 47B, Nalini Seth Road Maa Ambay Jewlers, Kolkata 7, 2nd floor. 2). Sanker (mobile number 8910380072) at Sona Patti, Kolkata 7, 3). Alope (mobile number 9903193619) at Sona Patti, Kolkata 7. Apart from them, there are some other people namely Gopal, Manoj and Nandu who used to sell him smuggled gold of foreign origin. Phone number of Gopal is 9831426223 and Nandu is 9874618102. But he doesn't know phone number of Manoj and his shops name and address. Sanakar and Alope delivers the gold by themselves and Pradip Gupta of Maa Ambay Jewlers sends his staff Rajesh to deliver the smuggled gold. He takes delivery of 20/25/30 kg of smuggled gold of foreign origin per month from them. As per his knowledge, the smuggled gold of foreign origin are brought into India in Biscuits form, which are then melted to transform into 1 kg Bar by the people of Sonapatti. He had/has given instructions to them to deliver only such 1kg gold bars without any marking on them. On receiving the same, he used to sell those gold bars to different parties, among which, Mr. Anil Agarwal of Banda, M.P, Mr. Abishek Agarwal @ Pawan (mobile number of 7080367020) and Gurudas Babu (Land phone0332258-1730) of Sonapatti were his primary customers. Sometime, one

Deepak of Mirzapur (mobile number 9044381101) used to come to take delivery of the gold. He also stated that he used to make all the transaction in cash and all those transaction did not have any legal documents.

VI. He has an account in H.D.F.C Bank and Axis Bank of Bourbourn Road Branch. The total balance, at that time, in both the accounts, amounts to Rs. 6 lac approximately. He also stated that he did not have any other bank account either in his name or in the name of his company i.e. Rajendra Kumar Mahaswari.

VII. On 06/08/2018, he reached his Office at 72 Manohar Das Street, Kolkata 700007, at around 11 AM in the morning. As usual, his three Parties namely, Maa Ambay Jewlers, Sankar and Alope came and gave delivery of 4kgs, 2 kgs and 2 kgs of gold bars of 1 kgs, of foreign origin without any markings to him. With that he reached his shop/godown at 17 Pageyapatty, Kolkata - 700007. He already had 2.50 Kgs Gold in the Office. In the morning only Shri. Anil Agarwal of Banda had told him that to buy 4 kg gold for which Shri. Anil Agarwal of Banda had sent Rs. 1 Crore 8 lakh through his staff to shop/godown at 17 Pageyapatty, Kolkata - 700007 at around 12 noon. He had kept 8 kgs gold in his shop/godown at 17 Pageyapatty, Kolkata, took Rs. 35 Lakh with him and came back to his Office at 72 Manohar Das Street, Kolkata. Thereafter, Officers of DRI led by Deputy Director along with 2 panchas came to his Office at 72 Manohar Das Street, Kolkata at around 1.30 PM. Then he narrated the whole

incidence of interception, search, recovery, preliminary assaying and seizure.

VII. On being asked, he stated that, Shri Sanatan Behra @ Hari do the work of cleaning the office at 72 Monohar Das Street besides receiving illegal gold bar and cash rupees from different parties. He further stated that Bhola Rai do the work of cleaning the office at 17 Paggay Patty besides receiving illegal gold bar and cash rupees from different parties. He added that both of them are well aware of his illegal business and he used to pay Rs. 10,000 per month to Sanatan Behra @ Hari and Rs. 9,000 per month to Bhola Rai.

IX. On being asked about Shri Abhishek Kumar Agrawal he stated that at the time of search at his 17 Paggay Patty office, Shri Abhishek Kumar Agrawal @ Pawan came to buy gold bar from him in illegal manner. He also stated that previously, i.e. more or less 10 days ago from that day Shri Abhishek Kumar Agrawal @ Pawan bought about 500 gm of gold bar from him. Also Shri Abhishek Kumar Agrawal stated that he possessed Rs. 15 lakh (which was recovered from Abhishek Kumar Agarwal) and he came to take delivery of 500 gram gold.

X. Earlier only once he delivered gold to Shri Abhishek Kumar Agrawal @ Pawan.

XI. For the last two years, he was in that business of buying and selling gold bar in an illegal manner due to which his business accelerated and those recovered and seized cash amount were results of that illegal business. He also

stated that he received those cash amount on selling gold bar in an illegal way.

*XII. His prime source of income is buying and selling the gold in an illegal way. **He further stated that the cash amount recovered from his residence was the sale proceeds of the gold.***

XIII. He used to keep contact with Sankar and Alope through his mobile no. 9831111575 and 8334042852. He mentioned that Alope roam around to do this work and Sankar has one Jewelry shop which is situated near Dhramkata at Sonapatti. He visited twice or thrice to his shop, but he did not have the exact details of his shop. He did not know anything about their residential address.

15. The authority while issuing the show cause notice dated 28.07.2019 after considering the statement given by the respondent herein and other matters connected therewith, explained the role of the respondent in paragraphs 27.1 of the show cause notice which is as follows:-

27.1 Shri Rajendra Kumar Damani alias Raju Damani: *From the statement dated 06.08.2018 and 07.08.2018 of Shri Rajendra Kumar Damani alias Raju Damani, recorded under Section 108 of the Customs Act, 1962, it could be seen that Shri Rajendra Kumar Damani used to do trading of the smuggled gold and silver of foreign origin by way of procuring them from different person at Sona patti, Kolkata. The very fact that he never did the trading of Gold and silver under cover of legal documents establishes that the Gold and silver which he used to trade are procured illegally. Shri Rajendra Kumar*

Damani, in his Statements, given under Sec. 108 of Customs Act, 1962, has categorically admitted that the 11 pieces of gold bars seized from his possession are smuggled gold of foreign origin which had been melted and were delivered to him without markings, as per his instructions. It is ostensible that the huge cash in India currency, recovered from the office and residential premises of Shri Rajendra Kumar Damani were the sale proceeds of the illegal gold. Shri Rajendra Kumar Damani alias Raju Damani, has failed to produce documents evidencing their licit source. Moreover, Shri Rajendra Kumar Damani alias Raju Damani, in his statements recorded under Sec. 108 of Customs Act 1962, has admitted that these are the sale proceeds of the smuggled gold and also that he had been involved in the said illicit trading of smuggled gold in the past also. Most importantly, in the said seized Indian Currency Notes, one Indian Currency of denomination of Rs. 2000/- has been found to be Fake Currency (FICN), which also clearly indicates that the entire amount was sale proceed of the smuggled gold which came into his possession, by way of Hawala transactions. He personally controlled and headed this illegal business of smuggled gold, in lure of money. The magnitude of smuggling in which he engaged himself is shocking. The unexplainable Indian Currency recovered from the Office and residential premises of Shri Damani established the fact of his involvement in the business of smuggling gold for long time causing havoc on the economy of the Country. In the statement of Shri Rajendra Kumar Damani alias Raju Damani, recorded under Section 108 of the Customs Act, 1962, on 06.08.2018 and 07.08.2018 he stated that he took delivery of 4 kg, 2 kg and 2 kg of gold of foreign origin from his three parties namely

Maa Ambay Jewellers (Prop. Pradip Gupta), Sanker and Alope respectively. However, from the Call Detail Report (CDR) of the mobile number 9831111575, stated to be used by Shri Rajendra Kumar Damani alias Raju Damani, it could be seen that no call was made from Rajendra Kumar Damani to his said three parties or vice-versa and also that in the statement of the said three persons they have denied of supplying the said gold to Shri Rajendra Kumar Damani alias Raju Damani. Further, it could be seen from the statements of Shri Ashok Kumar Jalan @ Pappu Jalan and Shri Amit Jalan and the CDR of the mobile number 9831111575, that the actual supplier of the 10.5 Kg gold seized from the shop of Rajendra Damani was Shri Ashok Kumar Jalan and Amit Jalan. However, Shri Raju Damani knowingly suppressed the true fact with an intention to shield his principal supplier and tried to jeopardize the investigation. On the other hand he tried to rope in some small traders which proves his criminal intention.

From the foregoing, it appears that Shri Rajendra Kumar Damani, knowingly indulged himself in smuggling of gold for monetary benefit. Further, Shri Damani appears to have suppressed the name of actual supplier of the smuggled gold by naming some of the name of small businessman of Sonapatti, Kolkata with a mala-fide intention to hide the actual supplier of the smuggled gold from the clutch of law of the land.

Thus it appears that Shri Rajendra Kumar Damani had been knowingly involved in the Illegal activity of smuggling gold and he in connivance with Shri Bhola Ray @ Bholi Ray and Shri Sanatan Behera alias Hari smuggled 11 pcs of gold weighing 10500.800

gms valued at Rs.3,15,02,400/-, 9 pcs of gold coin, valued at Rs. 2,07,000/- and 509.100 grams of silver granules, valued at Rs. 19,448/-, in the instant case of seizure, along with seized Indian Currency Note of Rs. 1,74,76,500/-. It therefore appears that he is involved in carrying, removing, keeping and dealing with the said goods in any other manner which he knew were liable for confiscation under Section 111(b), 111 (d) & 121 of the Customs Act, 1962, and thus appears to be liable for penalty under Section 112(a) and/or 112(b) & 117 of the Customs Act, 1962.

- 16.** In the reply to the show cause notice which has been noted by the adjudicating authority in paragraph 30.1, it was contended that the gold did not have any foreign markings or any foreign inscription to establish that the seized gold was of foreign origin and in spite of the same these officers formed the reasons to believe that the seized gold bars were of foreign origin. Reiterating the submissions made in the reply dated 26.11.2019, it was stated that the seized gold bars and coins were obtained after importing of old and used gold jewellery which were by no means smuggled. Further it was contended that the chemical tests report also does not prove that the gold to be of foreign origin and smuggled as eleven pieces of seized gold bars the purity has been found to be 99.5% and the purity of nine gold coins have been found to be about 91% and therefore there are no grounds to presume that the gold under seizure was of foreign origin and smuggled into India. With regard to the seized Indian currency, it was submitted that no incriminating records or gold or goods were found along with the Indian

currency, therefore it cannot be considered as sale proceeds of the smuggled goods.

17. As could be seen from the statement recorded under Section 108 of the Act on 06.08.2018, the respondent has admitted that he indulged himself into illegal business of gold bullion and he was in that illegal business for the last two years and whatever gold he sold and purchased had illegally been smuggled into India and he did not keep any documents neither had he brought gold with documents nor did he sell the gold on documents. He had also stated that he carried out the whole business illegally and he used to buy the illegally smuggled gold of foreign origin from six persons and that for the last two years, he was in the business of buying and selling gold bars and that the recovered and seized cash amount were result of selling of the smuggled gold bars.

18. The adjudicating authority on facts found that the respondent and the other two noticees who were also the appellants before the tribunal could not produce any document in support of importing/ possessing/ carrying/ otherwise dealing with gold so recovered and seized from them and therefore held that they failed to discharge the burden of proof as required under Section 123 of the Act. Further the adjudicating authority held that no documents could be produced by the respondent and the two other co-noticees in support of legally possessing the silver granules. With regard to the Indian currency notes which was seized the adjudicating authority holds that the respondent failed to produce any documents evidencing the source of the said cash and has referred to the admission in the statement recorded under Section 108 of the Act that they are the sale

proceeds of the smuggled goods. In the background of these facts, the order of absolute confiscation and imposition of penalty was passed.

19. Before the appellate authority, the grounds raised by the respondent and other co noticees before the adjudicating authority were reiterated in a more elaborate fashion and the decisions of the courts were referred to. The appellate authority considered the stand taken by the respondent and the other two co noticees and found that the respondent and other co noticees could not produce any document in support of importing/ possessing/ carrying/ otherwise dealing with the gold so recovered and seized from them and they had failed to discharge the burden of proof as required under Section 123 of the Act and accordingly affirmed the view taken by the adjudicating authority. Reliance was placed on the decision of the Hon'ble Supreme Court in ***Om Prakash Katari Versus Commissioner***² which upheld the decision of the High Court of Kerala wherein it was held that the appellant therein having been unable to explain the source of the gold which was confiscated, the order passed by the High Court cannot be interfered and the appeal was dismissed.

20. Thus, it is seen that though a faint plea was taken before the appellate authority as well as before the adjudicating authority that the gold came into possession through purchase of old gold jewellery was never established by the respondent and other co noticees at any point of time that apart that no documents were produced with regard to the source of the money which was seized which was the Indian currency. In the light of

² 2019 (368) ELT (A) 155 SC

the above factual conclusion, the appellate authority affirmed the order passed by the adjudicating authority.

21. When the matter travelled on appeal to the learned tribunal what was required to be seen is whether the respondent and other co noticees were able to establish the stand taken by them that the gold was obtained by them by purchasing old gold jewellery. Before the tribunal, apart from reiterating the stand taken before the appellate authority, it was contended that the respondent and the other noticees have retracted their statements on the ground that they were not voluntary and therefore the statement recorded under Section 108 cannot be relied on. The department contended that in terms of Section 123 of the Act, the burden is on the respondent and having failed to discharge the burden, the adjudicating authority rightly ordered for absolute confiscation and imposed penalty.

22. With regard to the effect of an alleged retractive statement and its evidential value, the department referred to several decisions which include the decision of the Hon'ble Supreme Court in ***Percy Rustomji Basta Versus State of Maharashtra*** ³ and ***Surjeet Singh Chhabra Versus Union of India and Others*** ⁴. The learned tribunal in paragraphs 17 records that during the course of investigation, it was found that there was no mark on the gold seized and the purity of the gold was found to be 99.5% and not 99.9% and during the course of investigation, the respondent has made a statement stating that the source of procurement of the said gold is made from old jewellery purchased in exchange of cash during the long

³ 1983 ELT 1443 (SC)

⁴ 1997 89 ELT 646 (SC)

period of time and due to the stock of gold was melted through the said old jewellery and converted into gold bars. The tribunal holds that this fact has not been verified by the revenue. After recording such a finding, the tribunal has referred to certain decisions and holds that the noticees have explained the source of procurement of gold which is not denied by the revenue and further having no mark on the gold and purity of the gold is not in conformity of the foreign gold, the benefit of doubt goes in favour of the noticees.

23. Further the tribunal holds that the statements recorded during the investigation was retracted by the respondent and other two co noticees and they are not admissible in absence of corroborative evidence. After referring to certain decisions, the tribunal hold that the currency seized from the respondent and the other two co noticees were not established by the revenue with corroborative evidence to show that the same are the sale proceeds of smuggled gold and then proceeds to refer to a certain decision and has recorded its conclusion in paragraph 26 holding that the respondent and the two co noticees have submitted that the smuggled/procured gold in question is made out of old gold jewellery purchased in cash and the said fact has not been denied by the revenue by any cogent evidence, therefore the gold in question is not liable for confiscation and the same is required to be released. Further the tribunal holds that the revenue has failed to establish the fact that the cash recovered from the respondent and the two co noticees are the sale proceeds of the smuggled gold and therefore the cash seized cannot be confiscated

and the same is required to be released. Further the tribunal holds that no penalties are imposable on the respondent and the two co noticees.

24. What is important to note is that though the respondent took a plea that the gold bars was made out of old gold jewellery purchased in cash it was a very faint plea which was raised by the respondent and the co noticees. Assuming such a plea was required to be considered, the onus is on the respondent and the co noticees to establish with documents that the gold which was seized was from and out of the old gold jewellery purchased by cash. This aspect of the matter was never established by the respondent and the co notices. Therefore, the learned tribunal erroneously shifted the burden on the department stating that the same has not been denied. The question of denial will come only if the onus is discharged by the respondent and the co noticees as required under Section 123 of the Act. Thus, without any document placed by the respondent and the co noticees, the tribunal could not have come to the conclusion that the department did not establish the same by cogent evidence. This finding is absolutely perverse and contrary to the scheme of Section 123 of the Act.

25. The respondent and the other co noticees would contend that the purity of the gold not been 99.9%, it is established that it is not smuggled gold. Such conclusion cannot be arrived at in the absence of any proof to show that the gold was from and out of the gold jewellery which was purchased for cash. That apart, merely because the statement is said to have been retracted, it cannot be regarded as involuntary or unlawfully obtained. In this regard, the revenue has rightly placed reliance on the decision of the Hon'ble Supreme Court in ***Vinod Solanki Versus Union of***

India and Others ⁵. If the learned tribunal was of the view that the statement recorded under Section 108 of the Act was not admissible on account of the retraction, that by itself cannot render the statement as involuntary. It is the duty casts upon the court to examine the correctness of the validity of the retraction, the point of time at which the retraction was made whether the retraction was consistent and whether it was merely a ruse. These aspects have not been examined by the learned tribunal resulting in perversity. The mobile phones which were recovered and the call details record which were obtained have all been elaborately discussed by the adjudicating authority. This aspect has not been dealt with by the learned tribunal. The seizure cannot be denied by the respondent since the seizure list was drawn in the presence of two independent witnesses and the DRI officers and copy of which was handed over to the respondent and the other two co noticees. Further we find there was nothing on record before the learned tribunal to hold that mere melting of old gold jewellery will yield gold of less purity and considering the quantity which has been seized, it can never be the case of the respondent or the other two co noticees that they have done the melting process at their residence as such melting requires expertise and also use of several chemicals. Thus, the observations of the tribunal have to be held to be without any basis or foundational facts or documents.

26. Thus, for all the above reasons, we find that the order passed by the tribunal suffers from perversity and calls for interference.

⁵ (2009) 233 ELT 157 (SC)

- 27.** In the result, the appeal is allowed and the order passed by the learned tribunal is set aside and the order passed by the adjudicating authority as affirmed by the appellate authority is restored. The substantial questions of law are answered in favour of the revenue.

(T.S. SIVAGNANAM, C.J.)

I Agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A – SACHIN)

