IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	03.10.2024
Pronounced on	09.05.2025

CORAM :

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.2685 of 2023
and
C.M.P.No.24899 of 2023

Commissioner of Customs,
Chennai II Commissionerate,
Custom House,
60, Rajaji Salai,
Chennai – 600 001. ... Appellant

Vs.

Mohammed Ali Jinnah ... Respondent

Prayer: Appeal under Section 130 of the Customs Act, 1962, to set aside the order passed by the CESTAT, Chennai in Customs Appeal No.40099/2020 dated 20.04.2023 and allow the said Customs Appeal.

For Appellant : Mr.Sai Srujan Tayi
Senior Standing Counsel
For Respondent : Mr.B.Kumar
Senior Counsel
for Mr.T.Sudhanraj

JUDGMENT

(Judgment of the Court was delivered by **C.SARAVANAN, J.**)

This Civil Miscellaneous Appeal has been filed by the Appellant, the Commissioner of Customs, Chennai II Commissionerate, Chennai against the **Final Order No.40289 of 2023** dated **20.04.2023** passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai in Customs Appeal No.40099 of 2020 under Section 130 of the Customs Act, 1962 (hereinafter referred to as the 'Impugned Order').

2. By the Impugned Order, the aforesaid appeal filed by the Appellant/Customs Department before CESTAT, Chennai against the Order-in-Appeal bearing reference Seaport C.Cus.II No.550 of 2019 dated 14.11.2019 has been dismissed. By the Order-in-Appeal Seaport C.Cus.II No.550 of 2019 dated 14.11.2019, the Appellate Commissioner allowed the appeal filed by the Respondent against Order-in-Original No.65168 of 2018 dated 10.09.2018 passed by the Additional Commissioner of Customs, (Chennai-III) Commissionerate, Chennai.

3. The Respondent had earlier suffered an adverse order in Order-

in-Original No.65168 of 2018 dated 10.09.2018 from the File No.OS.No.08/2017-PAU/DRI/CZU/VIII/48/ENQ-1/INT-01/2017 in the hands of the Additional Commissioner of Customs, (Chennai-III) Commissionerate, Chennai.

4. By the aforesaid Order-in-Original No.65168 of 2018 dated 10.09.2018, the Additional Commissioner of Customs, (Chennai-III) Commissionerate, had passed the following Order:-

i. *I confiscate the seized 3.097 kg of foreign origin gold bars, totally valued at Rs.91,98,090/- under Section 111(a), 111(d) and 111(i) of the Customs Act, 1962.*
ii. *I confiscate the packing materials with no commercial value used for concealing the smuggled gold bars under Section 119 of the Customs Act, 1962.*
iii. *I impose penalty of Rs.5,00,000/- (Rupees Five Lakhs Only) on Shri Mohammed Ali Jinnah under Section 112 of the Customs Act, 1962.*
iv. *I impose a penalty of Rs.10,00,000/- (Rupees Ten Lakhs Only) on Shri Murugan under Section 112 of the Customs Act, 1962.*
v. *I impose a penalty of Rs.10,00,000/- (Rupees Ten Lakhs Only) on Shri Batcha @ Pitchai under Section 112 of the Customs Act, 1962.*

5. The Additional Commissioner of Customs, Chennai-III

Commissionerate has also imposed a personal penalty on the Respondent for sum of **Rs.5,00,000/-** and **Rs.10,00,000/-** each on the said **Murugan** and **Batcha** alias **Pitchai** under Section 112 of the Customs Act, 1962.

6. The above decision was reversed by the Appellate Commissioner vide Order-in-Appeal Seaport C.Cus.II No.550 of 2019 dated 14.11.2019 after framing the following issues:-

(a) Whether the Gold bars are of foreign origin?
(b) Whether they are of standard size?
(c) Whether the case was proved by DRI with cogent evidences?
(d) Whether the smuggling was corroborated with evidences?
(e) Whether the confiscation was legal?
(f) Whether penalty is liable to be imposed?

7. The Appellate Commissioner concluded that the investigation was incomplete so as to conclude that the seized crude gold bars were smuggled or whether the crude gold bars are of standard size of foreign origin with foreign marking and therefore no penalty can be imposed.

8. On a specific intelligence that a person, who was said to be travelling from Devakottai and was carrying 2 smuggled crude gold bars of foreign origin/foreign marked weighing 1720 grams and 1377 grams in a black colour backpack, the Directorate of Revenue Intelligence (DRI) intercepted the Respondent when the Respondent reached the Pallavaram Bus Stand. The Respondent was arrested on 23.01.2017 and was later released on a personal bond.

9. On the date of arrest of the Respondent i.e., on 23.01.2017, a mahazar was drawn and the two crude gold bars were seized from the Respondent. At the time of arrest and during the interrogation, the Respondent had initially denied possessing the smuggled gold bars of foreign origin with foreign mark in person or in his luggage.

10. However, on a persistent enquiry by the officers of the Directorate of Revenue Intelligence (DRI), the Respondent admitted that he was indeed carrying gold bars which were concealed and kept in his bag. The Respondent thus handed over the bag to the Officers of the

Directorate of Revenue Intelligence (DRI).

11. During the personal search, the Officers recovered a copy of the **Aadhaar Card** bearing **No.6674 6560 5340**, 4 Bus Tickets viz., **Ticket No.047841**, **Ticket No.29737**, **Ticket No.85449** and **Ticket No.084311** and **Ticket No.80372** for **Trichy** to **Chennai**.

12. The Officers found two packets of gold bars wrapped with blue adhesive tape which were kept in green and blue polythene bags and on cutting the two packets after removal of the blue adhesive tapes from the two packets, it was found wrapped in black tape, brown adhesive tape and thin white paper. The packet contained 2 crude gold bars weighing about 3097 grams (1720 grams + 1377 grams) and was valued a total sum of **Rs.91,98,090/-** at **Rs.2,970/-** per gram.

13. The seized gold bars appeared to have been concealed and smuggled into India from Srilanka without declaring with the Customs Department with an intention to avoid payment of appropriate customs

duties and therefore were liable for confiscation under the provisions of the Customs Act, 1962 and therefore, a mahazar was drawn on **23.01.2017**.

14. In a voluntary statement dated **23.01.2017**, the Respondent also stated that one person named **Murugan** aged about 55 years from **Pudhupattinam** in Ramanathapuram District had approached him on **22.01.2017** for carrying the smuggled gold from Srilanka for being handed over and delivered to one **Batcha** alias **Pitchai** at Chennai for a monetary consideration of **Rs.5,000/-** and that the Respondent agreed to carry the aforesaid gold and thus carried the gold packed in a plastic cover and got into the bus that would go to **Aranthangi** and further proceed to **Chennai** via., Trichy.

15. The Respondent in his voluntary statement further stated that he reached **Perungalathur** (outskirts of Chennai) on **23.01.2017** and the said called **Batcha** alias **Pitchai** to come to **Pallavaram Bus Stand** and that while waiting at **Pallavaram**, he was intercepted by the Officers of the

Directorate of Revenue Intelligence (DRI), when he admitted to the concealment of smuggled gold in his bag and that he was present during the Mahazar Proceedings on 23.01.2017.

16. In the Mahazar Statement, the Respondent appears to have also stated that on 4 to 5 earlier occasions also, the Respondent had travelled in bus to hand over smuggled gold bar which the Respondent used to collect from the said **Murugan** for being handed over to **Batcha** alias **Pitchai** for a monetary consideration of **Rs.5,000/-** and admitted that he was not the owner of the gold and that he was aware that the gold bars were smuggled from Srilanka and were without payments of customs duty and without any bill/receipt or any other document for the legal possession.

17. However, on **20.02.2017**, the Respondent retracted his statements dated **23.01.2017** and **24.01.2017** and stated that gold was acquired by the Respondent from his earnings when he was abroad and that the Respondent had made the crude gold bars through a goldsmith in Nambuthalai.

18. In **Letter** dated **05.04.2017**, the Respondent further stated that the seized gold bars were not smuggled and that the same were his earnings and that the seized gold was purchased in India only and he had saved it for his daughter's marriage and that he converted the gold biscuits into crude gold bars and was supposed to sell the same in Chennai to buy jewellery for his daughter's marriage.

19. The Respondent in his voluntary statement on **07.06.2017** under Section 108 of the Customs Act, 1962, admitted that he was present during the mahazar proceedings on 23.01.2017 and further agreed with his voluntary statement on 23.01.2017 and 24.01.2017 that he travelled from Devekottai and reached Chennai and that he maintained a Bank Account in **Indian Overseas Bank (IOB)**, **Devakottai** and that had earlier worked in **Malaysia** and **Saudi Arabia** and submitted a copy of the passport. However, the Respondent admitted that he neither had a PAN Card nor was an Income Tax Assessee.

20. The Respondent was thus summoned on 10.04.2017 for personal

appearance on 17.04.2017 to which the Respondent replied that he was not well and would later appear. Letters were also received from Shahul Hameed, Ayesha Beevi and Nashrina Begum, the father, the mother and the wife of the Respondent, who claimed that the seized gold bars were not smuggled gold bars but were purchased in India only from the Respondent earnings.

21. However, on verification from the Bank Statement of the Respondent, it was noticed that the Respondent only had a meagre bank balance of **Rs.415/-** and mostly cash deposits and withdrawals were made only during the period before the seizure of the gold.

22. The **Additional Chief Metropolitan Magistrate (E.O.I), Egmore**, **Chennai** vide Order dated **31.08.2017** in **Crl.M.P.No.1818** of **2017** confirmed that the seized crude gold bars did not have any foreign markings. Necessary certificate was issued by the Magistrate to that effect under Section 110 (1B) and Section 110 (1C) of the Customs Act, 1962. Although gold bar is not a perishable item, the Government in the exercise

of its power under the Customs Act, 1962 has issued Notification bearing M.F.(D.R.) **Notification No.72/97-Cus (N.T.) dated 22.12.1997** and amended **Notification bearing M.F.(D.R.) Notification No. 31/80-Cus, dated 05.02.1986** as already amended by **Notification No.42/89 (N.T.)-Cus., dated 30.06.1989; No. 7/93-Cus. (N.T.), dated 25.01.1993; No. 10/95-Cus, (N.T.), dated 01.03.1995.**

23. In this background, the Respondent was issued with SCN.F.No.DRI/CZU/VIII/48/ENQ-1/INT-01/2017 dated **21.07.2017** along with two named persons **Murugan** and **Batcha alias Pitchai** under Section 124 of the Customs Act, 1962.

24. Arguing the case on behalf of the Department, the learned Senior Standing Counsel for the Appellant Department relied on the following Judgments rendered by the Hon'ble Supreme Court, Bombay High Court, Kerala High Court and that of this Court both in the context of the Customs Act, 1962 and the Sea Customs Act (India Act VIII, 1878):

i. **Pukhraj** Vs. **D.R.Kohli, Collector of Central Excise, Madhya Pradesh and Vidarbha and another**, AIR 1962 SC 1559 / 1962 SCC OnLine SC 154.
ii. **Kewal Krishan** Vs. **State of Punjab**, AIR 1967 SC 737 / 1962 Supp (3) SCR 613.
iii. **M/s.Kanungo & Company** Vs. **Collector of Customs and others**, (1973) 2 SCC 438.
iv. **Collector of Customs, Madras and others** Vs. **D.Bhoormall**, (1974) 2 SCC 544.
v. **Om Prakash Khatri** Vs. **Commissioner of Customs, Cochin** in Civil Appeal No.5069 of 2019 dated 04.07.2019.
vi. **Patel Engineering Limited** Vs. **Union of India and another**, 2014 SCC OnLine Bom 791 / (2014) 307 ELT 862.
vii. **Commissioner of Customs** Vs. **Om Prakash Khatri**, 2019 SCC OnLine Ker 836 / (2019) 2 KLT 246.
viii. **Shri A.L.Jalaludeen @ Chellavappa** Vs. **The Deputy Director, Enforcement Directorate Shastri Bhavan, Chennai – 600 006**, 2009 SCC OnLine Mad 720 / (2009) 5 Mad LJ 1303.

25. Assailing the Impugned Order, the learned Senior Counsel for the Respondent submitted that the present Civil Miscellaneous Appeal was without any merits and is liable to be dismissed.

26. It is submitted that even though the burden of proof is on the person from whose possession, the goods were seized under Section 123 of the Customs Act, 1962, the initial burden of proof has been discharged

by the Department. It is therefore submitted that **Order-in-Original No.65168 of 2018** dated **10.09.2018** that was passed by the Additional Commissioner of Customs, Chennai-III Commissionerate was rightly interfered and set aside by the Appellate Commissioner vide **Order-in-Appeal Seaport C.Cus.II No.550 of 2019** dated **14.11.2019** which decision was affirmed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) vide Impugned Order.

27. Learned Senior Counsel for the Respondent further submits that at the time when the mahazar statement was recorded, telephone numbers of the said **Murugan** and **Batcha** alias **Pitchai** were recorded. However, no statements were obtained from the said **Murugan** and **Batcha** alias **Pitchai**.

28. It is submitted by Learned Senior Counsel for the Respondent that the seized gold bars were assayed i.e., valued by appropriate gold assayer on **24.01.2017** who certified that the 2 gold bars were of 24 Carat of the purity (99.9%) of 999.9 fineness and that the value of the crude gold

bar weighing about 3097 grams worked out to **Rs.91,98,090/-**. It is however submitted that the Certificate of assayer was not furnished to the Respondent at the time of mahazar proceedings on **23.01.2017** or thereafter.

29. That apart, it is submitted on behalf of the Respondent that the Certificate of assayer is dated 24.01.2017 and was produced for the first time before Customs, Excise and Service Tax Appellate Tribunal (CESTAT), whereas the mahazar was drawn on 23.01.2017. There is large scale irregularity in the investigation.

30. Arguing the case on behalf of the Respondent, the learned Senior Counsel for the Respondent relied on the following cases rendered by the Hon'ble Supreme Court, Allahabad High Court, Karnataka High Court, Delhi High Court and that of this Court and the Order of Customs, Excise and Service Tax Appellate Tribunal (CESTAT):

i. **Radha Kishan bhatia** Vs. **Union of India and others**, AIR 1965 SC 1072.
ii. **Amba Lal** Vs. **Union of India**, AIR 1961 SC 264 / 1960 SCC OnLine SC 67.

iii. **Gian Chand and others** Vs. **State of Punjab**, AIR 1962 SC 496.
iv. **Vinod Solanki** Vs. **Union of India and another**, (2008) 16 SCC 537 / 2008 SCC OnLine SC 1917.
v. **A.Tajudeen** Vs. **Union of India**, (2015) 4 SCC 435 / 2014 SCC OnLine SC 807.
vi. **Mohtesham Mohd. Ismail** Vs. **Spl. Director, Enforcement Directorate and another**, (2007) 8 SCC 254.
vii. **Commissioner, Customs (Preventive) Sector H Aliganj Lucknow** Vs. **Shakil Ahmad Khan and others**, 2019 (2) TMI 465.
viii. **Central Excise Department, Bangalore** Vs. **P.Somasundaram**, 1979 SCC OnLine Kar 187.
ix. **Customs** Vs. **Dina Aruna Gupta**, 2011 (7) TMI 383.
x. **Shanti Lal Mehta** Vs. **Union of India and others**, 1982 SCC OnLine Del 303 / 1983 ELT 1715.
xi. **D.V.Kishore** Vs. **The Commissioner of Customs (Seaports – Imports), Customs House, Chennai and another**, 2017 SCC OnLine Mad 17861 / (2017) 350 ELT 527.
xii. **Shri Sarvendra Kumar Mishra and another** Vs. **Commissioner of Customs, Lucknow**, 2021 (9) TMI 405 (Customs Appeal Nos.70437 and 70438 of 2020, Final Order Nos.70198 and 70199 of 2021 dated 06.09.2021)
xiii. **M/s.Ankit Agarwal** Vs. **Commissioner of Customs (Preventive), Kolkata**, 2020 (10) TMI 783 (Customs Appeal No.76862 of 2018, Final Order No.75504 of 2020 dated 16.10.2020)

31. Learned Senior Counsel for the Respondent would further

contend that the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has appreciated both the oral and documentary evidence placed on record in proper perspective and has rightly dismissed the appeal preferred by the Appellant as against the Order passed by the Commissioner of Customs (Appeals-II), Chennai, who also on going through the entire materials placed before him, has set aside the confiscation of goods (gold) and also penalties imposed by the adjudicating authority. Therefore, it is contended that both the authorities below have rightly adjudicated the matter and passed well-considered orders which require no interference.

32. It is submitted by the learned Senior Counsel for the Respondent that the observation of the Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai vide Order dated 31.08.2017 in Crl.M.P.No.1818 of 2017 that the seized crude gold bars did not have any foreign markings which ought to have been considered by the Additional Commissioner of Customs, Chennai-III Commissionerate while ordering absolute confiscation of the gold bars seized from the respondent

weighing about 3097 grams under Section 111(a), (d) and (i) of the Customs Act, 1962 while passing Order-in-Original No.65168 of 2018 dated 10.09.2018.

33. Learned Senior Counsel for the Respondent pointed that the Appellant had failed to prove that the seized gold was of foreign origin. Further, it is the case of the Appellant that the gold was seized from the Respondent at a public place i.e., Bus Stand and that it was alleged in the Show Cause Notice that the Respondent deposed that the gold was handed over to him by one Murugan who in turn smuggled the same from Srilanka and asked the respondent to hand over to Batcha @ Pitchai, but the Department could not establish this version and no cell phone from the respondent was seized by the Department to establish that he made calls to the said Murugan and Batcha alias Pitchai.

34. The Learned Senior Counsel for the Respondent further submitted that the method adopted by the Department to prove the purity of gold is not an acceptable one, since they have not obtained any report from the

competent agency like the Government Mint.

35. Therefore, the learned Senior Counsel for the Respondent would urge this Court to dismiss the appeal as devoid of merits.

36. We have considered the arguments advanced by the learned Senior Standing Counsel for the Appellant and the learned Senior Counsel for the Respondent. We have also perused the various statements recorded under Section 108 of the Customs Act, 1962 from the following persons:-

Sl. No.	Date	Name
1.	23.01.2017	Mohammed Ali Jinnah *
2.	14.07.2017	Nashrina Begum (Respondent's wife)
3.	14.07.2017	G.Kannan (Gold Assayer)
4.	14.07.2017	K.Umar (Relation to the respondent's wife)

* The Respondent.

37. We have also perused the letters sent by the Respondent's father, mother, wife and the retraction letter of the Respondent.

38. The Directorate of Revenue Intelligence (DRI) had gathered intelligence to the effect that the gold bars of foreign origin were being smuggled from Srilanka through Coastal Tamil Nadu and were being brought to Chennai from a Coastal Village near Pudhupattinam by a smuggling gang operating from Chennai, Tamil Nadu.

39. Based on the Intelligence gathered, the Officers from the Directorate of Revenue Intelligence (DRI), Chennai Zonal Unit, maintained a surveillance at the Pallavaram Bus Stand, Chennai on **23.01.2017** which led to seizure of the two gold bars from the custody of the Respondent.

40. It has to be borne in mind that the seizure of gold bars from the Respondent on **23.01.2017** was not a mere coincidence or a chance as seizure was from an area which is normally and ordinarily under the control of the local police.

41. It has to be remembered that the Officer from the Customs Department including the Directorate of Revenue Intelligence (DRI) depend on tip-off from wide network of informants they have developed. The Officers from the Directorate of Revenue Intelligence (DRI) admittedly seized the gold bars from the custody of the Respondent at the Pallavaram Bus Stand, Chennai on **23.01.2017**. The Respondent has not denied that the gold bars were seized from his custody.

42. But, for the intelligence gathered by the Officers from the Directorate of Revenue Intelligence (DRI) from their sources, they would not have got information regarding transportation of gold bars in person with the Respondent.

43. Based on the aforesaid information gathered, the Officers from the Directorate of Revenue Intelligence (DRI) intercepted the Respondent at Pallavaram Bus Stand, Chennai at about 6.30 p.m. in the evening on **23.01.2017** in presence of two independent witnesses and seized 2 crude gold bars weighing **3.097 Kg** valued at **Rs.91,98,090/-** from the custody of

the Respondent.

44. Statement was also recorded from the Respondent on the date of seizure on **23.01.2017**. The statement confirms that the seized gold bars weighed about **3.097 Kg.** In the statement, the Respondent has stated that the seized gold bars were smuggled from Srilanka and were to be handed over to him by one **Murugan** for being delivered to **Batcha** alias **Pitchai** in Chennai.

45. The Additional Chief Metropolitan Magistrate (E.O.I) Court, Egmore, Chennai vide **Order** dated **31.08.2017** passed under Section 123 of the Customs Act, 1962 in **Crl.M.P.No.1818 of 2017** in F.No.DRI/CZU/III/ENO-1/INT-01/2017, observed that the seized crude gold bars did not have any foreign markings.

46. The above statements given by the Respondent on **23.01.2017** at the time of seizure of gold bars was later retracted by the Respondent on **20.02.2017** and on **05.04.2017**.

47. It is the case of the Respondent that the Office of the Directorate

of Revenue Intelligence (DRI) had resorted a to third degree treatment to extract the above Confessional Statement from the Respondent on **23.01.2017.** It is therefore the case of the Respondent that such statements are not true and in any event are not binding on the Respondent.

48. It is the further case of the Respondent that he had purchased gold coins over a period of time, since his employment in Saudi Arabia between 1993-1999 and thereafter in Malaysia between 2004-2013 and that these gold bars were later melted into 2 bars for being sold in T.Nagar in connection with the future marriage of his daughter who was aged about 16 years at the time of seizure of the Respondent.

49. After the Respondent had retracted the earlier statement dated **23.01.2017** on **20.02.2017** and on **05.04.2017**, three letters dated **13.04.2017**, **17.04.2017** and **18.04.2017** were sent by the father, namely Shahul Hameed, the mother, namely Ayesha Beevi and the wife, namely Nashrina Begum of the Respondent respectively.

50. These letters more or less reiterated that the Respondent had left

Devakottai on **22.01.2017** with 2 gold bars for being sold in Chennai and that they were purchased in the past as small jewellery and gold coins over a period of time by the Respondent and his wife out of the savings from his earning and were melted into 2 gold bars through a goldsmith.

51. However, in response to the summons issued by the Department, the Respondent in his statement dated **07.06.2017**, stated that he started from **Devekotta**i, **Sivagangai District** to **Pudhupattinam** on **21.01.2017** in the night and that he visited **Kottaipattinam Dhargha** at about **3.00 a.m.** on the following day on **22.01.2017** and thereafter proceeded back to **Devakottai** via **Thondi,** from where he proceeded to **Pudukottai** and thereafter to **Chennai** via **Trichy**.

52. The Respondent had not stated that he visited his house in **Devakottai, Sivagangai District** on **22.01.2017** enroute to **Chennai** via **Pudukottai, Trichy** after returning from **Kottaipattinam Dhargha**. The uniform and consistent statement of the Respondent from the date of retraction and the letters of the father, namely Shahul Hameed, the mother,

namely Ayesha Beevi and the wife, namely Nashrina Begum of the Respondent are similar though with contradictions.

53. However, the facts remains that the Respondent's wife in her statement dated **14.07.2017**, has introduced the name of **Kannan Aachari of East Street, Nambudhalai** who allegedly melted the jewellery and gold coins purchased by her out of savings and chits into gold bars.

54. The Respondent's wife stated that the gold bars were melted way back in 2015 after she handed over the jewellery to her uncle named **Umar Katha** for melting who later handed over the gold bar after a month to her.

55. In the same statement, the Respondent's wife has also stated that the Respondent was earlier employed in Malaysia and used to send amounts and that she had invested the savings in chits to purchase the following jewellery:-

i. 2 ½ sovereign gold necklace
ii. 2 gold rings (each 8 grams)

iii. 15 gold coins (each 2 grams)

iv. 60 sovereigns gold jewellery

v. Gold necklace (No.2)

vi. Bangles (4)

vii. Stone Bangles (2)

viii. Gold Chain (3)

ix. Bracelet (2)

56. The above quantity cannot total to the seized quantity of the gold bars from the Respondent. Further, no records were produced to show that the Respondent had sent money to his wife to purchase the above gold jewellery.

57. In the statement given in response to summons, the Respondent's wife clearly stated that the seized gold bars were melted out with the jewellery purchased from and out of the savings made from the amounts transferred by the Respondent, whereas it is the categorical statement of the Respondent, his father and mother, that, gold coins were purchased over a period of time by the Respondent which were melted into two bars which were seized by the Officers from the Directorate of

Revenue Intelligence (DRI) on **23.01.2017** from the custody of the Respondent.

58. While it is case of the Respondent, his father, his mother and his wife, and the statement of the Respondent/letters of the persons that, the seized gold items were purchased in India, the statement of the Respondent's wife contradicts her own statement. The wife of the Respondent has stated that the gold bars were made / melted out of the jewellery purchased by her in Chit Finance. Thus, there are contradictory versions regarding the source of the seized gold.

59. The further statement of the Respondent's wife dated 14.07.2017 is that the jewellery items were given to one **Kannan Aachari** of **East Street, Nambudhalai** with the help of her uncle namely **Umar Katha** for melting. This statement also stands contradicted by the statement of **G.Kannan Aachari**, who also deposed and gave statements under Section 108 of the Customs Act, 1962 on **14.07.2017**.

60. The statement of the Respondent and his wife also stands

contradicted by the statement of the said **Umar Katha**, the uncle of the Respondent's wife. Both these person have denied either melting of the jewellery or having any connection with the gold bar or jewellery seized from the Respondent.

61. In fact, in his statement dated **14.07.2017**, the said **G.Kannan Aachari** of **East Street, Nambudhalai** has clearly stated that the Respondent's wife's uncle namely the said **Umar Katha** used to sometimes place orders for small jewellery and that barring the same, there were no other transactions and that the Respondent and his family members have merely used his name deliberately to extricate themselves from the problems they were facing under the Customs Act, 1962.

62. In his statement dated **17.07.2017**, the Respondent has however tried to downplay the statement given by his wife on **14.07.2017** by stating that the Respondent's wife's uncle **Umar Katha** was acquainted with another Aachari namely **Kannan Aachari** of **Thondi, Ramanathapuram District** when the Respondent was employed in abroad, the said **Kannan**

Aachari was known the Respondent's wife's uncle namely **Umar Katha**.

63. The Respondent has further contradicted by stating that he used to hand over the gold coins to the said **Kannan Aachari** and this was done as a matter of routine. However, the Respondent has stated that the Respondent's wife's uncle namely **Umar Katha** was unaware of the habit of the Respondent in melting gold coins given by the Respondent to the said **Kannan Aachari** from **Thondi, Ramanathapuram District** and that it was not melted by the **Kannan Aachar**i of **East Street, Nambudhalai**. If that was the case, it was open for the Respondent to have produce the said **Kannan Aachari** from **Thondi, Ramanathapuram District** as a witness.

64. There are several contradictions in the statement of the Respondent inasmuch as an impression that the gold coins were melted from time to time by **Kannan Aachari, Thondi, Ramanathapuram District** and that the **Kannan Aachari, Thondi, Ramanathapuram District** was different from **Kannan Aachari** of **East Street,**

Nambudhalai.

65. However, in the retraction statement of the Respondent dated **20.02.2017**, the Respondent has clearly admitted that the Respondent had got the gold bars melted from the same **Kannan Aachari** of **East Street, Nambuthalai**. Relevant statement reads as under:-

Statement in Tamil	**Statement in English**
நான் என்னுடைய கடுமையான உழைப்பின் மூலம் வெளிநாடுகளில் வேலை செய்து சிறுக சிறுக சேர்த்த சேமிப்பைக் கொண்டு இந்த தங்கத்தை வாங்கி சேமித்து வைப்பது வழக்கம். அவ்வாறு சேர்த்து தங்ககட்டியை நம்புதாளையைச் சேர்ந்த ஆச்சாரியிடம் கொடுத்து உறுக்கி பெரிய கட்டிகளாக செய்து கொள்வேன்.	I used to buy and store this gold with the savings I had accumulated little by little through my hard work in foreign countries. Then, I would give the gold ingots to the Aachari from Nambuthalai and grind them into big ingots.

66. The Respondent, in his statement before the Appellant/Customs Department on **07.06.2017** has also specifically admitted that he did not have any steady job either in **Malaysia** or in the **Middle East** or in **South Korea**. In his statement, the Respondent stated that he worked in Saudi

Arabia as a cook and earned around Rs.2000/- per month From 1993-1999.

67. The Respondent further stated that he ran a provision shop in India between 1999-2001 where he sustained loss. The Respondent has admitted that in 2001, he went to **South Korea** in search of job but was arrested and deported back from South Korea by the Government and he did not have money to even buy a ticket for his return journey to India.

68. Therefore, it is inconceivable as to how a person like the Respondent with limited income who was on the very go insolvency, was deported back from **South Korea** could have purchased gold which was valued at **Rs.91,98,090/-** on the date of the seizure from the Respondent on **23.01.2017.**

69. Thus, there are several contradictions in the retraction statement dated **20.02.2017** of the Respondent and the statement given on **17.07.2017** by the Respondent. It is only on the strength of these

contradictory statements, **Show Cause Notice** dated **21.07.2017** was issued subsequently to the Respondent, to the said Murugan and to the said **Batcha** alias **Pitchai**.

70. The fact however remains that the Respondent has not discharged the burden of proof cast on him under Section 123 of the Customs Act, 1961. The Respondent has not proved the means of purchase of huge quantity of gold bars which according to him were purchased as bullions / gold coins over a period of time and melted.

71. As per Section 123 of the Customs Act, 1962, the burden of proof in certain cases, where any goods to which the Section applies are seized in the reasonable belief that they are smuggled goods then the burden of proving that they are not smuggled goods shall be, in a case where such seizure is made from the possession of any person, the burden of proof would be on the person from whose possession the goods were seized and if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other

person.

72. Section 123 of the Customs Act, 1962 is extracted hereunder:-

123. Burden of proof in certain cases.—
(1) Where any goods to which this section applies are seized under this 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 person;
(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]

(2) This section shall apply to gold, 6 [and manufactures thereof], watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.

73. A perusal of the aforesaid Section would reveal that where any goods, namely gold, watches or any other class of goods as specified in the Section are seized under the Act in the reasonable belief that the said goods are smuggled goods then the burden of proving that they are not

smuggled goods shall be on the person from whose possession the seizure was made or if any other person claims ownership of the said goods, the burden of proof is shifted on the person in case he claims to be the owner of the goods so seized.

74. In "**Kewal Krishan Vs. State of Punjab",** AIR 1967 SC 737, the Hon'ble Supreme Court, while dealing with Section 123 of the Customs Act, 1962 regarding burden of proof in certain cases, held that when goods are seized under the reasonable belief that they are smuggled goods, then the onus of proving that they are not smuggled goods and is not of foreign origin is on the person from whose possession the goods were seized. Relevant portion of the aforesaid Judgment of the Hon'ble Supreme Court is as follows:-

> "When goods are seized by the Customs Officer in the reasonable belief that they are smuggled goods then under Section 178A of the Sea Customs Act the onus of proving that they are not smuggled goods, that is, not of foreign origin on which duty is not paid, is on the person from whose possession the goods are seized. The onus is not on the prosecution to show that the goods are not of Indian origin".

75. The Hon'ble Supreme Court in **“Union of India Vs. Shyamsunder”**, AIR 1994 SC 485, held that the persons from whom the contraband articles were seized had not satisfactorily discharged the burden of proof cast on them as required by Section 123 of the Customs Act, 1962 that they are not smuggled.

76. Applying the decisions of the Hon'ble Supreme Court to the facts of the case, it is clear that that if the goods are seized on a reasonable belief that they are smuggled goods, then the burden is shifted on persons as specified in the aforesaid Section.

77. The Respondent has not produced any document to establish the means to purchase **3.097 Kg** of gold bars / coins or gold jewellery as was stated by the Respondent and later by the Respondent's wife Nashrina Begum on 14.07.2021.

78. The Respondent has not explained the source of Income for

having purchased gold worth valued at **Rs.91,98,090/-** on the date of seizure. Therefore, it cannot be said that the Respondent had discharged the burden of proof under Section 123 of the Customs Act, 1962.

79. That apart, adjudication under the Customs Act, 1962 is governed by the Principle of Preponderance of Probability. In our view, the Additional Commissioner was right in ordering confiscation of the gold bars seized from the Respondent, as there were no convincing reasons to believe that seized gold bars were that of the Respondent and were purchased by the Respondent out of his income.

80. Though the Respondent had retracted the earlier statement dated **23.01.2017** on **20.02.2017** and **05.04.2017**, three letters dated **13.04.2017**, **17.04.2017** and **18.04.2017** sent by the father, mother and wife of the Respondent respectively contradict with each other regarding the nature of procurement of gold and their melting. Similarly, statement records also contradict with each other.

81. That apart, the authorities adjudicating a Show Cause Notice

under the Customs Act, 1962 are not governed by strict rules of evidence. Rather, they are governed by Preponderance of Probability. This Court is also governed by Preponderance of Probability. The Preponderance of Probability is that the Respondent was merely a hired labour who was employed by regular smugglers on commission. The role of the Respondent was to merely deliver the smuggled gold to the contact in Chennai.

82. The following Table will further reveals that mobile numbers with fake SIM identities were used to raise a cloud of dust to not only disorient the law enforcing authorities but also the adjudicating authorities:-

Mobile SIM Number	Name of the person in whose name the number was registered	Actual user of the Mobile Number	Remarks
7395940600	Latha	Batcha alias Pitchai	Person who allegedly handed over the two Gold Bars to the Respondent.
7397320012	Krishnaveni	Mohammed Ali Jinnah *	The carrier respondent.

Mobile SIM Number	Name of the person in whose name the number was registered	Actual user of the Mobile Number	Remarks
7530059389	Nagendran	Murugan	The person who was to allegedly receive the seized Gold Bars.

* The Respondent

83. The Notice served on Batch alias Pitchai and Murugan remained unserved. We therefore summoned files from the Customs Department. We were surprised to note that the investigation was incomplete, perhaps to allow the main kingpin who was indulged in the smuggling to go scot-free.

84. It is noticed that though call details were summoned as early as **01.02.2017** by the Directorate of Revenue Intelligence (DRI) from the M/s.Bharthi Cellular Limited (M/s.Bharti Airtel Limited), the investigation was incomplete. The Department has not made an attempt to trace out the call details of the persons and their whereabouts on the date

of the seizure and few days before the date of the seizure.

85. Records reveal that the mobile SIM number which was used by the Respondent was registered in the name of one **Krishnaveni** and was procured from a retailer namely **'Filosa Communications'**.

86. The photographs attached to the SIM Registrations Forms / Applications for the aforesaid mobile SIM number and the photographs in the Electoral Photo Identity Card / Voter Identity Card itself indicates that photos are of two different persons but the name of **Krishnaveni** was used to register the SIM.

87. The call data between **09.01.2017** and **23.01.2017** indicates that several calls were exchanged between **Mobile No.7395940600** and **Mobile No.7397320012. Mobile No.7395940600** which was used by the said **Batcha** alias **Pitchai** had been in regular touch with **Mobile No.7397320012** used by the Respondent.

88. It was incumbent on the part of the Customs Department to have also taken steps to get to the root of *modus operandi* adopted by the smugglers right from the registration of mobile numbers with fake names / identity and how an ordinary person like the Respondent with modest means of income could possess huge quantity of gold bar and where the Respondent was employed.

89. In the statements before the authorities, there is also no clear explanation forthcoming from the Respondent as to who were the persons to whom he had made panic calls particularly on **23.01.2017**. There are few calls made to few other mobile numbers on **22.01.2017** as well.

90. Similarly, the Customs Department or the Directorate of Revenue Intelligence (DRI) should have obtained statement of **Krishnaveni, Nagendran** and **Latha** and the **dealers** who are issued the SIM Cards in their name.

91. The file also indicates that the Department has rewarded the Officers from the Department and the informants. A sum of **Rs.2,32,000/-** was sanctioned on **08.02.2019** and paid to these persons. It is also noticed that the Respondent was also being prosecuted before the Additional Chief Metropolitan Magistrate (E.O.I) Court, Egmore, Chennai, in connection with the smuggling of **3.097 Kg** of gold bars / coins.

92. It was also incumbent on the part of the Directorate of Revenue Intelligence (DRI) to have thoroughly investigated how the SIM numbers with fake identity were registered and were allowed to be used. The call details would have revealed the foot prints of the calls including the locations of the recipient of calls and the time of seizure of the Gold bars on **23.01.2017** and few days before the same. This aspect was required to have been probed by the Directorate of Revenue Intelligence (DRI).

93. The file also indicates that the seized quantity of 2 gold bars weighing about **3.097 Kgs** value at **Rs.2,970/- per gram** was sent to India Government Mint, Mumbai for conversion into standard gold bars and the

sale proceeds were also deposited with the **Commissioner of Customs** vide **TR-6 Challan No.587** dated **21.12.2017.**

94. It is evident that no serious steps were taken by the Customs Department or by its elite wing of investigators in the Directorate of Revenue Intelligence (DRI) to trace out the said **Murugan** and **Batcha** alias **Pitchai** or the **Murgan** even though there were several calls made from the mobile SIM numbers registered in the name of **Krishanaveni**, **Nagendran** and **Latha** which were given by the **Respondent** on **23.01.2017** to the Officers at the time of seizure.

95. The fact however remains that the Respondent has not stated why he was using Mobile Phone with SIM **No.7397320012** which was in the name of **Krishnaveni.** The Respondent has also not given any explanation as to why he was not having a mobile SIM registered in his name. It is quite possible this information was elicited but was deliberately not kept in the official records to allow the real persons

behind the scene out of the bounds of law.

96. It is clear that the Respondent was employed by high and mighty. They were regularly indulging in nefarious activities including the smuggling of gold and contraband items using mobile phone with fake identities and employed the Respondent as a carrier to transport the smuggled gold bars.

97. It is thus clear that there are several infirmities in the shoddy investigation carried out by the Directorate of Revenue Intelligence (DRI). The investigation was shoddy only to allow the actual smugglers of the gold bars to go scot-free and to punish the Respondent who was merely used a cheap labour to transport the smuggled gold bars. It is clear that the Customs Department and the Directorate of Revenue Intelligence (DRI) have allowed the main culprit to go scot-free.

98. It was incumbent on the part of the Respondent to have explain to the Customs Department that the calls made on **22.01.2017** and **23.01.2017** were regular calls made to only the family members and not acquaintance any of the persons who were behind the smuggling.

99. Further, the Respondent gave a statement on **23.01.2017** accepting his involvement in the smuggling, wherein the Respondent admitted that he was merely entrusted with the job of transportation of smuggled gold bars to be delivered to the said Batcha alias Pitchai. There are also indication of involvment of the Respondent in the past in similar activity for Murugan.

100. It is evident that the Respondent was merely a puppet in the hands of the smugglers, who are funding and bankrolling the litigation for the Respondent both before the Original Authority, First Appellate Authority before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) and before this Court. A person like Respondent with modest means cannot possibly have the resource except in case of *pro bono*

appearance.

101. The statement of the Respondent as mentioned above is bundled with contradictions and therefore the Order passed by the Appellate Commissioner vide Order-in-Appeal Seaport C.Cus.II No.550 of 2019 dated 14.11.2019 reversing the Order-in-Original No.65168 of 2018 dated 10.09.2018 from File No.OS.No.08/2017-PAU/DRI/CZU/VIII/48/ENQ-1/INT-01/2017 of the Additional Commissioner of Customs, (Chennai-III) Commissionerate was erroneous and ought to have been reversed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

102. The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has given a very superfluous finding in the Impugned Order to uphold the order dated 14.11.2019 of the Appellate Commissioner in Order-in-Appeal Seaport C.Cus.II No.550 of 2019 and therefore warrants an interference. The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) as the ultimate fact finding authority, has miserably failed to

perform its duty while passing the Impugned Order under the provisions of the Customs Act, 1962. We are therefore left with no other option except to reverse the impugned decision of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

103. Therefore, the Impugned Order dated **20.04.2023** passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) is liable to be set aside. Since the Respondent was only a carrier with no means, we are inclined to partly modify the penalty imposed on him. It is reduced to **Rs.1,00,000/-** to allow him to start his life afresh.

104. Since the Respondent has not proved that he had no means to buy gold worth **Rs.91,98,090/-,** we hold that it was correctly ordered to be confiscated by the Additional Commissioner of Customs, (Chennai-III) Commissionerate in the Order-in-Original No.65168 of 2018 dated 10.09.2018 from File No.OS.No.08/2017-PAU/DRI/CZU/VIII/48/ENQ-1/INT-01/2017.

105. Thus, this Civil Miscellaneous Appeal stands allowed. No costs. Connected Civil Miscellaneous Petition is closed.

[R.S.K., J.] **[C.S.N., J.]**

09.05.2025

Neutral Citation : Yes / No

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To:

1.Commissioner of Customs,
Chennai II Commissionerate,
Custom House,
60, Rajaji Salai,
Chennai – 600 001.

2.The Customs, Excise and Service Tax
Appellate Tribunal (CESTAT),
Chennai.

R.SURESH KUMAR, J.

and
C.SARAVANAN, J.

arb

Pre-Delivery Judgment in
C.M.A.No.2685 of 2023
and
C.M.P.No.24899 of 2023

09.05.2025