CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86888 OF 2021

[Arising out of Order-in-Appeal No: MUM-CUSTIM-AMP-APP-397 TO 405/2021-22dated 23rd July 2021 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Vihari Jewels
C/o Jiten Sheth, Flat No. 24, Gulmarg Building
Nepean Sea Road, Mumbai - 400006 …***Appellant***

versus

Commissioner of Customs
Mumbai – III
Chhatrapati Shivaji Maharaj International Airport
Sahar, Andheri (E), Mumbai - 400099 ***…Respondent***

WITH

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Vihari Sheth
C/o Abhishek Poddar, 85 Mount Unique
62A Peddar Road, Mumbai - 400026 …***Appellant***

versus

Commissioner of Customs
Mumbai – III
Chhatrapati Shivaji Maharaj International Airport
Sahar, Andheri (E), Mumbai - 400099 ***…Respondent***

AND

CUSTOMS APPEAL NO: 86890 OF 2021

[Arising out of Order-in-Appeal No: MUM-CUSTIM-AMP-APP-397 TO 405/2021-22 dated 23rd July 2021 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Jiten Sheth
Flat No. 24, Gulmarg Building
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versus

Commissioner of Customs
Mumbai – III
Chhatrapati Shivaji Maharaj Interinational Airport
Sahar, Andheri (E), Mumbai - 400099 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate and Shri Mihir Mehta for the appellants

Shri S D Deshpande, SpecialCounsel for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86062-86064 /2022

DATE OF HEARING: 17/08/2022
DATE OF DECISION: 10/11/2022

PER: C J MATHEW

It certainly starts out as a tale with all the makings of a script tailored for 'dream merchants' pandering to the public. A young lady, of no inconsequential stature, is intercepted with 'diamond studded

jewellery' and a 'Hublot', wristwatch, totally valued at ₹ 2,45,00,000, at the 'green channel' of Chatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai after arrival from Singapore and confesses that she is the 'carrier' in a family ring for smuggling of the valuable articles; apparently, her father and mother run established jewellery outlets in Singapore while she, with her uncle, handles the Indian end. True to script, she also carries the inevitable diary and mobile phone for deciphering by sleuths intent on destruction of economic saboteurs. A follow up raid at the establishments run by her uncle, uncovers 41 nos. of precious stones and jewellery valued at ₹ 2,05,21,000 that, for the present, were unaccounted in the stock of M/s Vihari Jewels at the Grand Hyatt, Mumbai. The uncle also manufactures and trades in loose diamonds and jewellery under the name and style of Rajesh Brothers and Tisya Jewels.

2. After these revelations, and not surprisingly, the lady passenger is arrested with release on bail taking a while. The uncle, in the meanwhile, retracts the initial admission of lack of explanation for the unaccounted stock and furnished four invoices, for total amount of ₹ 1,75,00,000, purporting to record supply of these precious articles. Under questioning by officials of the investigating agency, the suppliers deny all commercial relationship and admit that they had, out of their personal and professional equation, provided the said invoices against four post-dated cheques that would, instead of being

presented for collection on due dates, be returned to issuer. Everything seems to be tightly sewn up for the denouement and for the ‘good guys’ to take a bow.

3. Here reality intrudes and the narrative turns to the mundane; the provision for ‘settlement’ under section 127C of Customs Act, 1962 was resorted to for termination of proceedings in show cause notice of 27th January 2014 and concluded by order dated 29th June 2016 which was implemented even as it was decided by the customs formation concerned to mount a challenge before the Hon’ble High Court of Bombay in writ proceedings. In the meantime, investigation continued apace for connecting the dots thrown up by the statement of the uncle, Mr Jiten Sheth, implicating the lady passenger, Ms Vihari Sheth, in carriage of similar goods in the past and by several items of information in the red diary and mobile phone which culminated in show cause notice dated 13th January 2015. It is this notice adjudicated by order of the original authority determining assessable value thereon, confiscation under section 111 of Customs Act, 1962 but allowed for redemption under section 125 of Customs Act, 1962 besides imposing of penalties under section 112 of Customs Act, 1962 and modified in order-in-appeal no. MUM-CUSTM-AMP-397 to 405/2021-22 dated 23rd July 2021 of Commissioner of Customs (Appeals), Mumbai–III, now impugned by Ms Vihari Sheth, Mr Jiten Sheth and M/s Vihari Jewels, that we are concerned with.

4. From the records placed before us and submissions of both sides, the allegation arising from investigation of Directorate of Revenue Intelligence (DRI) is that ‘diamond studded jewellery’ and ‘diamonds’ worth ₹ 16,41,45,682 sold to nine individuals against invoices issued by M/s Vihari Jewels, that were seized between 15th July 2014 and 11th December 2014 from these customers, were brought by Ms Vihari Sheth on her trips in the months preceding the interception at the airport. It has been further alleged that ascertainment of customer requirements as well as engaging with them was handled by Ms Vihari Sheth while the establish ment of M/s Vihari Jewels was utilized by Mr Jiten Sheth, her uncle, for documentation as well as movement of sale consideration. It would appear that the first link in the chain was the statement, though subsequently retracted, of Mr Jiten Sheth on 1st August 2013 that his niece had brought in jewellery similarly in the past and the investigators were able to establish from records of the Bureau of Immigration Service that Ms Vihari Sheth had visited India more than thirty times in the previous twenty seven months.

5. According to the investigation, names of five purchasers, *viz*., Ms Bhakti Modi, Ms Rina Jain, Ms Aditi Kothari, Ms Vinita and Ms Devki Jaipuria and Dr Sujata Jetley, came to light during the painstaking assembly of useful material in the red diary and mobile phone seized from the person of Ms Vihari Sheth and from some of the distinctly labelled files recovered during the search at M/s Vihari

Jewels on 7th August 2013 and 8th August 2013. Four invoices of January 2013 (3 nos) and of May 2013 (1 nos) for sale of jewellery to Ms Bhakti Modi, one invoice of May 2012 for sale of 'diamond studded jewellery' to Mr Manoj Modi and one of December 2012 for sale of 'diamond studded jewellery' to Ms Smita Modi were furnished on their behalf to investigators along with the said articles and these were seized on 15th July 2014 as they appeared to match the details and descriptions in the diary of Ms Sheth. Likewise, the details in the same diary were opined by the investigators as matching articles covered in five invoices of June – July 2013 evidencing sale to Ms Rina Jain leading to seizure thereof on the same day. The articles covered by two invoices issued to Ms Aditi Kothari in March 2013 were similarly subjected to seizure on 4th August 2014 as were also the articles in the two invoices of April 2013 issued to Ms Vinita Jaipuria and Ms Devki Jaipuria on 16th September 2014. The article sold to Dr (Ms) Sujata Jetley against invoice of January 2013 and that pertaining to sale effected in February 2013 to Mr Rishabh Poddar were seized on 11th December 2014 and 25th July 2014 respectively thus rounding off the goods involved in the illicit import and laying out the framework for adjudication proceedings. The records do indicate that the articles seized from the nine individuals had been licitly purchased inasmuch as these were documented, tax discharged on the transaction and payments effected through banking channels.

6. The impugned goods were confiscated under section 111 of Customs Act, 1962 but offered for redemption to Ms Vihari Sheth under section 125 of Customs Act, 1962 subject to payment of fine of ₹ 2,50,00,000 along with applicable duty while penalties of ₹ 2,00,00,000, ₹ 75,00,000 and ₹ 20,00,000 were imposed under section 112 of Customs Act, 1962 on Ms Vihari Sheth, Mr Jiten Sheth and M/s Vihari Jewels upon the adjudicating authority satisfying himself that the seized records and statements sufficed to establish the impugned goods to have been smuggled by Ms Vihari Sheth in person on her visits to India and that her uncle had participated in their disposal to the identified purchasers. The original authority invoked the detriments as the consequence of inability to counter the allegation that the impugned goods involved in the sale transacted through M/s Vihari Jewels had been illicitly sourced from abroad. The value adopted was that appraised by the Government-approved valuer who had also opined that the impugned goods appeared to be of foreign origin.

7. The order of the adjudicating authority was carried in appeal and not just by those penalized; the purchasers were also aggrieved by the offering of option to redeem to a person other than themselves and who had made no claim to those either. Revenue was also in appeal against the offer of redemption and pleaded for absolute confiscation which did not find favour with the first appellate authority. In the

impugned order, the cause canvassed by the purchasers from whom the goods had been seized was accepted and the option of redemption was shifted to them along with the obligation to discharge duties of customs, if any, arising from operation of empowerment under Customs Act, 1962. The outcome in the adjudication order was left undisturbed in the matter of penalties imposed under section 112 of Customs Act, 1962 which is now under challenge in these proceedings.

8. Consequently, the value determined by the ‘approved valuer' is no longer of consequence as far as the show cause notice is concerned with only the value in the tax invoice of relevance for any purpose whatsoever under Customs Act, 1962. The other aspect of the opinion of the 'approved valuer’, *i.e*., of the goods being of ‘foreign origin’ is not, if we may permit ourselves to say so, deserving of oracular sanctity, usually accorded to professional expertise, as gold and diamonds are most likely to have originated at same stage or the other from abroad. Under the customs law of the country, geographical provenance of any good is obliterated after legal import into the country and it is moot if even the most experienced ‘approved valuer’ is able to determine such origin of such goods in the form presented for appraisal. Trade in such goods is not under regulatory control that could walk back the cat to the import in that, or some other, form; it is also common knowledge that gold and precious stones are subject to

remaking and cutting respectively for re-design and further sale without the stigma of ‘used’ or, as the contemporary expression has it, ‘pre-owned’ and without much bearing on its value. These are the peculiar characteristics of the trade that do not admit presumptions which may be acceptable insofar as manufactured goods are concerned.

9. Yet another *caveat* must not be lost sight of: with the privilege of section 125 of Customs Act, 1962 having passed to those who are not in appeal before us, it cannot be inferred from the absence of any challenge to recovery of duty, if any, arising therefrom, that goods were brought in that, or some other, form without payment of duties of customs as such unquestioned acquiescence of liability may merely be a matter of personal convenience and private conviction on the part of individuals; psychology has no place in the unemotional world of levies. That leaves us with the task of determining the manifest involvement of the appellants, by acts of omission and commission or abetment, in the import of goods that are liable for confiscation under section 111 of Customs Act, 1962. The original authority has adjudged the impugned goods to be so under section 111(d), 111(j), 111(l) and 111(m) of Customs Act, 1962.

10. During the course of investigations, a recovered file was found to contain invoices issued by Mr Murari Mohan Pramanik, a jewellery

worker, and he deposed that he had yet to undertake any work for Mr Jiten Sheth or his establishments but that he had, on persuasion, issued the said invoices which contained a description of some jewellery. It was also ascertained from the statement of persons hereinafter recited that it was a former employee, Mr Dipak Mukesh Ashra, who introduced him to Mr Jiten Sheth and that Mr Namdeo Krishna Solam, a domestic employee of the latter, used to be sent for collection of the documents. It was also ascertained from another jewellery worker, Mr Sagar Das, that work undertaken by him for Mr Jiten Sheth was not covered by any invoices or records. It would appear that these depositions were intended to demonstrate that documentation of work purportedly executed for Mr Jiten Sheth was not acceptable as evidence.

11. The goods impugned in the show cause notice were covered by twenty invoices issued to nine customers and it was recorded by their spouses/authorized person that it was Ms Vihari Sheth who discussed the design of goods and other aspects of their requirements while the money transactions were with Mr Jiten Sheth from whom the goods were collected or who arranged for delivery to them. While Ms Sheth denied having smuggled any jewellery in the past, she did depose that she had discussed designs and requirements with persons known to her through her kin and that she had no further role in the transactions after introducing them to her uncle. Furthermore, she agreed that the

designs in the red diary were of her making but did not elaborate on their significance. Mr Jiten Sheth had, in his very statement, claimed that his niece had, on three occasions since May 2013, brought in 'diamond studded jewellery' for sale at the outlet in Grand Hyatt but did not furnish any explanation on the contents of the files seized there.

12. The link of the furnished invoices with the recovered documents was sought to be established through the descriptions conforming to the sketches in the diary that were admitted to be of Ms Sheth's and in the mobile phone. The details of trips undertaken as ascertained from the records of the Bureau of Immigration Service, the statement of Mr Jiten Sheth implicating his niece and the contriving of the invoices by the job-worker were concatenated to infer that the impugned goods had been smuggled in those very forms by Ms Vihari Sheth in the past. Accordingly, the several threads were woven together thus

> *'15. Further, analysis of the data stored in the said Samsung mobile seized from Mrs Vihari Rajesh Sheth revealed that phone and entries found to be made in the diary indicated that she had apparently indulged in smuggling of diamonds and diamond studded gold jewellery (to the tune of Rs 30 crores approx) in the past. It further appeared from the documents retrieved from the forensic examination of electronic devices and other evidences that Mrs Vihari Sheth was in the habit of smuggling gold jewellery/ diamonds from*

> *Vihari Jewels Pte Ltd, Singapore and House of Gems, Singapore, in which her mother and father are Partner and Managing Director, respectively. Further, it appeared from the statements recorded under the Customs Act, 1962, evidences from the forensic examination and other documents that her uncle Mr Jiten Sheth was using Vihari Jewellers (P) Ltd, Mumbai as a front to market and sell the jewellery smuggled by her in the past. Evidences suggested that jewellery had been sold to many buyers. Also that Vihari Sheth appeared to have been employed as a conduit by her family in India and Singapore to smuggle jewellery and sell them through their family showroom in Mumbai. Ms Vihari Shethhas travelled 32 times in the past (5-3-2011 to 30-7-2013) and have smuggled gold jewellery/diamonds in her previous trips also. Mr Rajesh Sheth and Mrs Manisha Sheth were to join the investigation.'*

into a narrative that bore resemblance to drama worthy of the silver screen. The issue confronting the lower authorities and, now us, is the conformity of the pattern with the design intended by the statute; more so, as the impugned order has, to some extent, redrawn the card for the weave. For that, we must subject the rival submissions to the test of fact and law.

13. Before doing so, it may be worthwhile to take note of the course of this appeal before the Tribunal. An application for early hearing was allowed on 13th January 2022 to direct listing of the appeal on 30th March 2022. Following request of Learned Authorized Representative for adjournment, the hearing was re-scheduled for 6th

April 2022 when maintainability of appeal before the Tribunal was raised for the first time and, to enable further submissions, hearing was adjourned to 23rd May 2022 and, thereafter, to 16th August 2022. As none had entered appearance for respondent-Commissioner and Tribunal had not been made aware of any re-deployment of representation on behalf of Revenue, the bench was, and justifiably, prompted to make critical observations on the inability of Revenue to participate in proceedings that had been considered fit to be heard 'out of turn' and in which maintainability was insinuated almost as an afterthought. Learned Special Counsel, and after appearance on 17thAugust 2022 to argue the case of Revenue to its conclusion, filed a submission explaining his absence; while we may have sympathy with the circumstances, it is necessary for him to take note that it is for him, along with others for whom courts are their workplace, to maintain the dignity of judicial functioning. It was his hesitancy in harnessing the not inconsiderable establishment of the Principal Commissioner (AR) assigned to represent the formations of the Central Board of Indirect Taxes & Customs (CBIC) that lies at the root of it all. We say no more on this matter.

14. According to Mr SD Deshpande, Learned Special Counsel, the forum for airing grievance against the impugned order is the Government of India in its revision jurisdiction as the impugned goods were intended to be brought in as baggage. Reliance was placed

on the decision of the Tribunal in *Shailendra Kashyap v. Air Customs Superintendent (Adjudication) [final order no. 50008/2022 dated 4th January 2022 disposing off appeal no. 50001 of 2019 against order-in-appeal no. CC(A) CUS/D-I/Airport/202/2018 dated 19th July 2018 of Commissioner of Customs (Appeals), New Custom House Delhi]* and of the Tribunal in *Prakash Chandra Shantilal v. Commissioner of Customs, Ahmedabad [2013 ELT (290) 125]*. This is a peculiar stand for Revenue to take shelter under at this stage of the proceedings for there is a clear finding by the adjudicating authority that

> *'77.11 In view of the above discussion and findings, I find that the seized jewellery was in such quantity and nature that it cannot be construed as bonafide household article required for day to day use of Ms Vihari Sheth and was admittedly brought for commercial purpose, hence it is not allowed to be imported as personal baggage under the provisions of Baggage Rules, 1998 read with Para 2.26 of the Foreign Trade Policy.'*

and from that clear cut exclusion from assessment as 'baggage' in the form presented, the validity of transformation as regularised import, albeit on the travelling person, upon discharge of redemption fine in lieu of confiscation is unquestionable; it is that very confiscation for having imported 'goods', *sans* compliance with procedure prescribed for 'goods', that was in appeal before Commissioner of Customs (Appeals). The alternative forum, Government of India, proposed by Learned Special Counsel, can assume jurisdiction only if the imports

are, without a shadow of doubt, ‘baggage’ and the appeal of Commissioner of Customs before the first appellate authority sought absolute confiscation which may be invoked not for ‘baggage’ but only to goods. To the extent that one of the issues canvassed is the inappropriateness of confiscation for not being ‘baggage’, the claim of unavoidable recourse to jurisdiction of Government of India in the appellate hierarchy is not legally sustainable.

15. Furthermore, the impugned order has rectified a perceived flaw in the order of adjudicating authority which adopted the appraisal by the ‘approved valuer’ as not being in conformity with provisions for valuation in section 14 of Customs Act, 1962. For assessment and clearance, the essence of ‘baggage’ is classification against the omnibus description corresponding to heading 98 03 of First Schedule to Customs Tariff Act, 1975 despite being set of products of differing descriptions, that may, otherwise, individually find conformity with varying descriptions corresponding to other tariff items in the First Schedule to Customs Tariff Act, 1975, owing to common attribute of the same ownership before and after import. Though first *proviso* to section 14 of Customs Act, 1962 does envisage inclusion of manner of determination of value in the event of ‘no sale’ under the empowerment to make rules, recourse has not been had to it; it is questionable if rule 12 of Customs (Determination of Value of Imported Goods), 2007 can be invoked for ‘baggage’ to enable

recourse to these sequentially described methods of valuation and, by reason thereof, for an appellate authority to sit in judgement over the legality and propriety of such re-determination without being subject to the appellate jurisdiction envisaged in section 130E of Customs Act, 1962. Inherent in the assumption of such adjudicatory and appellate prerogative of valuation by the lower authorities is exclusion of the revision jurisdiction of the Government of India in the present dispute.

16. It may not be out of place to refer to the valuation method adopted by the first appellate authority should that aspect be relevant to disposal of these appeals. The first appellate authority has, without further dispute on the part of Revenue, disapproved of the method adopted by the original authority for not being in conformity with the relevant valuation code and this attained finality as far as the respondent-Commissioner is concerned, but in attempting to remedy that defect the impugned order has, by acknowledgment of obligation to grant abatement but yet not carried to its logical conclusion, left the task undone with consequence to others without doubt and not excluding the appellants herein. It would appear that he was not unconscious of the impediments barring consummation for he has purposefully drawn upon section 2(30) of Customs Act, 1962, defining ‘market price’, even though it has no bearing, of itself, on the valuation code. Indeed, it would be grossly improper on our part to

accord approval to a venture that stretches the deployment of an expression intended for other specific purposes in Customs Act, 1962; needless to state, it is contrary to law for a definition intended to elaborate on the specific expression employed within specific provisions in an enactment to be deployed elsewhere merely because of some 'intersection of phrase' or vulgar cross-usage occasioned by transliteration. The valuation of the impugned goods by the first appellate authority does not conform to rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 even by the most liberal latitude. It can certainly be asserted, notwithstanding any justification offered, that invoice price in a domestic sale is not 'transaction value' – original, derived or even deemed – as envisaged in the said Rules. This, for the moment, is parked for appropriate evaluation should the need arise at a later stage.

17. Considering that goods had not been seized upon entry into India, the manner in which the evidence has been marshalled and confiscation ordered by recourse to section 111 (d), (j), (l) and (m) of Customs Act, 1962 by noting that

> *'65……I find that M/s Vihari Jewellers didn't have any documents to prove licit import and possession of the said goods before sale. Further, the present owners of these jewellery also do not have any evidence/proof of licit import of these articles of jewellery…'*

before adverting to decisions such as *Collector of Customs, Madras*

and others v. D Bhoormull [1983 (13) ELT 1546 (SC)] and *Sailesh Amulakh Jogani v. Union of India [2009 (241) ELT 348 (Bom)]* and the turn adopted by appellate authority on redemption of the goods, it is abundantly clear that adverse presumption sanctified by section 123 of Customs Act, 1962 is the bedrock of the proceedings. We are, therefore, obliged to recall the scheme of Customs Act, 1962 and, more so, in the light of the submissions made by Learned Special Counsel designed to persuade us to adopt his proposition on the justifiability of penalty imposed on the appellant.

18. Customs Act, 1962 is not merely a legislated enactment for furtherance of Article 265 of the Constitution in conjunction with the enablement of levy in the Seventh Schedule of the Constitution – for that the charging provision of section 12 and the valuation standard in section 14 would have sufficed along with recoveries empowered by section 28 and facilitation of refund in section 27 of Customs Act, 1962; it is also not merely a legislated enactment for ensuring that only permissible goods are imported into or exported out of the country – an empowerment attached, not unnaturally, to an agency of the State concerned with policing of the frontiers. It is also replete with several procedural regulations intended to funnel all imports and exports towards ‘proper officers’ for facilitating assessment to duties and ascertaining of conformity to the permissible.

19. The procedural stipulations encompass control over conveyances during sojourn over Indian land, in Indian skies and on Indian waters, control over the goods contained in or carried on board such conveyances, control over custodians of imported goods and keepers of warehoused goods, oversight of goods in transit and under transshipment, control over coastal shipping and designating of responsibility for not tainting the goods. It is the breach of these procedural threads that are visited by the detriment of confiscation under the authority of section 111 and section 113 of Customs Act, 1962 and the sequence of arrangement therein reflects the progression of goods through the statutory barriers with recourse to later enumerations only upon non-recourse to the preceding cause for confiscation. We do not dwell on this aspect of confiscating power for the nonce.

20. These statutory norms are obligatory prescriptions devolving on person-in-charge of conveyances, custodians and keepers and importers and exporters; the contours of control leave no gap for slippage through the net. The trail on failure to comply is, thus, not difficult to establish and it is intended that only by breach in the normative dimension emplaced on inanimate goods are these to be rendered as offending in the eyes of law; the onus of proving that goods are, in consequence, smuggled lies upon the ‘proper officer’ proximate to the funnel. Owing to the frailty of systems and ingenuity

of human behavior, provision however, must be had for 'presumptive smuggling' that shifts the onus for establishing otherwise – not as a general rule but in specified contexts. Two of the three such relate to goods that are visibly offending: goods brought near land frontier, coast and bay, gulf, creek or tidal river which is rendered liable for confiscation under section 113(c) of Customs Act, 1962 as presumed to be intended for smuggling out and that enumerated in section 123 of Customs Act, 1962 with the presumption of having been smuggled in unless proved otherwise. A third, with inbuilt detriment, presumes, under section 116 of Customs Act, 1962, that goods not landed after despatch from place of loading are in breach of the procedure prescribed in Customs Act, 1962. It is the second of the former that we are concerned with here for that has been cited in the show cause notice though the adjudicating authority tried to distance himself from it and as Learned Special Counsel has placed emphasis thereon in his submissions.

21. The particular presumption that this dispute is concerned with, *viz*., section 123 of Customs Act, 1962, has an interesting genealogy. It has a forebear in Sea Customs Act, 1878 *albeit* not in its original design; after the Republic came into being and, on the basis of

> *'(1) to make smuggling a criminal offence, and (2) to transfer the onus of proof in respect of offences relating to smuggling to the person in whose possession any dutiable, restricted or*

prohibited goods are found.'

in the recommendations in the report of the Taxation Enquiry Commission in 1954, by Sea Customs (Amendment) Act, 1955 (Act 21 of 1955)

> *'178A. Burden of proof . - (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 on the person from whose possession the goods were seized.*
>
> *(2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf.*
>
> *(3) Every notification issued under Sub-section (2) shall be laid before both Houses of Parliament as soon as may be after it is issued.'*

was incorporated in much the same manner as carried forward in Customs Act, 1962 thereafter as

> *'**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 on the person from whose possession the goods were seized*
>
> *(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.'*

though with the intendment, manifested in sub-section (2) and (3) of section 178A of the predecessor statute, severely restricted from that contemplated in Bill no. 48 of 1954, as introduced and explained thus

> *'Clause 14. – At present when action is taken against persons who are in possession of smuggled goods, it is not always easy for customs authorities to prove that the goods are smuggled goods. this clause places the burden of proof in such cases on persons, from whose possession suspected smuggled goods are seized. Such a provision is necessary in order to safeguard the revenues of the State.'*

in the Notes appended thereto.

22. By section 4 of Act 36 of 1973, with effect from 1st September 1973, any person who claimed to be the owner of seized goods was also bought within the operational scope and by section 2 of Act 40 of 1989, with effect from 26th October 1989, 'diamonds, manufactures of gold or diamonds' were substituted for in the special provision to now read as

> *'**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, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.'

23. The significance of legislative will, evident on the occasion of enactment of the special provision in Sea Customs Act, 1878, cannot be overemphasized while reflecting upon the scope of an intendment that runs counter to the general principle of customs authorities having to introduce sufficient evidence, other than presumption, to enable shifting the burden of response to the recipient of notice for invoking detriment of confiscation and penalty under Customs Act, 1962. In like manner, the subsequent amendments to the special provision are not just textual but contextual and deserving of particular attention. That in the report of the Select Committee of Parliament dated 12th November 1962, which considered Customs Bill, 1962 (No 56A of 1962) and overhauled some of the proposals therein, the dissenting attention of a tenth of the thirty law makers was drawn to section 123 is earnest of the extent of deviation from normative rule of law and sufficient authority for its implementation within the narrow confines

of legislative articulation.

24. The special provision for shifting the onus from the agent of the State to an individual rests upon three pillars: that it is limited to goods enumerated in sub-section (2), that reasonable belief of being smuggled must have prompted the seizure under section 110 of Customs Act, 1962 and that onus lies on the person in possession at the time of seizure with additional obligation vesting in any other person claiming ownership. Akin to the traditional pillars of classical Greek architecture – Doric, Ionic and Corinthian – in which the functional essentiality of the first two was, by evolution, elevated to a thing beauteous by the third, the interests of the larger good are sufficed by discharge of the legislated onus in a restricted sphere while retaining the integrity of rule of law for all others generally.

25. From as far back as 1955, several disputes on the constitutional validity, the scope of enforcement reach and the consequences of resort to the special provision had surfaced before the constitutional courts. These, by and large, were considered by the Hon'ble Supreme Court in rendering judgment in *Collector of Customs, Madras v. Nathella Sampathu Chetty [1962 SCR (3) 786]* in which it was held that

> *'(1) …that s. 178A was constitutionally valid, (2) that the rule*

> *as to burden of proof enacted by that section applies to a contravention of a notification under s. 8(1) of the Foreign Exchange Regulation Act, 1947, by way of a notification under s. 19 of the Sea Customs Act, (3) that the preliminary requirement of s. 178 A that the seizing officer should entertain "a reasonable belief that the goods were smuggled" was satisfied in the present case….'*

and, thereby in the second and third *supra*, enunciating the test of legal sanction for invoking this contrarian principle emplaced in the customs law of the land. With the constitutional *vires* of the provision having been upheld, it is but natural that most of the disputes thereafter have almost entirely been about the pre-requisite of 'reasonable belief' of the goods being smuggled having been apparent at the time of seizure. This is a critical aspect of exercise of this extraordinary power vested in officers of customs by the statute: the onus devolves on the person from whom it was seized along with coordinate onus on person, if any, claiming ownership of the said goods and it merely requires inability to establish provenance, which may well be less than sinister, for the consequence of confiscation under section 111 of Customs Act, 1962. Judgements have examined the state of 'reasonable belief' on such pleadings by referring to facts and circumstances that were considered by adjudicating authorities and appellate bodies including the Tribunal. The decision of the Hon'ble Supreme Court in *Indru Ramchand Bharvani and ors v. Union of India [(1988) SC 247]*, relied upon by Learned Special

Counsel, did, in the light of challenge by the appellants, examine conformity with the prescription of 'reasonable belief' as a pre-requisite for seizure of goods to which section 123 of Customs Act, 1962 is brought to bear by customs authorities. It is evident that power to seize, which flows from section 110 of Customs Act, 1962, is circumscribed by the state of mind of the officer effecting the seizure irrespective of coverage within section 123 of Customs Act, 1962 or not. This has been additionally emphasized by settled law, in relation to seizure of goods enumerated in section 123 of Customs Act, 1962, owing to the judicial obligation to protect innocent persons from this 'sledgehammer' entrusted to an agency of the State even as the imperative is acknowledged judicially.

26. It is, nonetheless, of import, though not directly in the matter before us, that section 110 – the power to seize – is contingent on 'reasons to believe' that goods are liable to confiscation while section 123 of Customs Act, 1962 is triggered upon seizure of goods in the 'reasonable belief' of having been smuggled with 'smuggling' being

> *'(39) …. in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113;'*

This facet of the reversal of onus and to establish absence of offence is also parked for the nonce to be reverted if of relevance later in the proceedings. Suffice it to say that such onus is triggered upon valid

seizure of goods enumerated in section 123 of Customs Act, 1962 and the proof of licit ownership is sufficient defense against proposal to confiscate such goods under section 111 of Customs Act, 1962. It is needless to state the obvious, and in the light of judicial exposition, that the presumption of such goods having been smuggled cannot, of itself, lead to confiscation but may, in circumstances of the person on whom the onus devolves having foregone sufficient opportunity of evidencing otherwise, be subjected to that detriment without interference from higher appellate authority. That is the culmination of the decision in *re Indru Ramchand Bharvani* which held that

> *'.....This court…. held that the Evidence Act does not contemplate that the accused should prove the case with same strictness and rigour. But in this case the nature of the evidence on which the reliance could not be placed was rightly rejected by the Customs and the High Court held it properly that the petitioners had not discharged the onus to prove that the goods were not smuggled.*
>
> *In this case there was no denial of opportunity, the proceedings followed excluded the possibility of denial of opportunity. The proceedings taken were in order and in consonance with natural justice. The High Court was right in answering the first question by saying that the Tribunal was justified in holding that the seizing Customs had adequate material to form a reasonable belief as contemplated under Section 110 read with Section 123 of the Act and it rightly held that the appellants had failed to discharge the onus. The High Court answered the second question in the negative. In our opinion, the High Court was right.*

> *There is, however, one aspect of the matter which was emphasised before us, i.e. that the conclusions of the fact-finding body or statutory authority must be arrived at after giving a fair opportunity to the party to be effected by the order to be passed. As has been reiterated by a Bench decision of the Calcutta High Court in Bal Kissen Kejriwal v. Collector of Customs, Calcutta & ors., AIR 1962 Cal 460 a fair hearing has two justifiable elements. The first is that an opportunity of hearing must be given and the second is that the opportunity must be reasonable. Whether a person has a fair hearing, can be gone into by the Court and the Court's conscience must be satisfied that an Administrative Tribunal charged with the duty of deciding a dispute has conformed to the principles of natural justice….. In our opinion, judged by the aforesaid two aspects a reasonable and fair hearing was afforded to the petitioners. Hence, it cannot be accepted that there was a legitimate cause of grievance.'*

27. Thus, it would appear from the inherent vulnerability of this special provision, the curtailment of the onus proposed in the amendment bill by legislative wisdom, the proceedings of the Select Committee of Parliament entrusted with detailed consideration of the then new and comprehensive customs statute and attention to the facts and circumstances of each such dispute carried to the Hon'ble Supreme Court that section 123 of Customs Act, 1962 is not amenable to stretching by appeal to morality or for mitigating the burden of the enforcement agency entrusted with anti-smuggling. To begin with, only a few, even if significant, goods are enumerated therein as to conjecture imminent threat to the State but for by latitude afforded to

enforcement authorities to be subjected to less than rigid oversight. For another, in a vast country of teeming millions there are bound to be quite a few in possession of such goods and to subject them to criminal consequences merely for lack of diligence and meticulousness in maintaining personal records is to place a premium on an obligation that is not even contemplated by the law. The question that begs answer, therefore, is whether a person who was intercepted once with such goods for proceedings under the regular law and whose suggested facilitation of unaccounted stock of such goods at the premises of another is intended to be penalized by recourse to this special provision in relation to another set of such goods alleged to have been smuggled even earlier.

28. The ‘studded jewellery’ impugned in the appeal before us were not intercepted in a customs area; it is also not in doubt that it was not an interruption of a transaction of the appellants that commenced these proceedings. Under the normal procedure of confiscation under the statute, it would be necessary to present evidence, even if not necessarily direct, of the impugned goods having been in the baggage of Mrs Vihari Sheth during one or more of her inbound travels to invoke the penal provisions against the three appellants; section 123 of Customs Act, 1962 obviates that in relation to goods considered by the State as warranting such recourse. The scope for invoking of section 123 of Customs Act, 1962 must now be turned to.

29. Section 123 of Customs Act, 1962 is all about responsibility for discharging onus of licit possession and, in terms of the law as it stands today, it is cast on the person from whom the suspectedly smuggled goods were seized and, in the event of any such assertion, on the person claiming ownership. It is on record that the impugned goods were neither seized from any, or all, of the appellants and nor have any of them claimed to be the owner; the first is incontrovertible fact and the second is not one that can be foisted for reason of an established past, or probability of a future, incident of offence. The statute does not acknowledge putative ownership. At least, it cannot be under a law for punitive detriment that the customs statute is. It cannot also lend itself to being an instrument of investigation that would permit elimination in a regressive trail till a link is fastened with offence merely for being unable to establish licit possession. It is an instrument for conviction in the specific circumstances envisaged therein. The special provision is explicit in listing the persons who may have such onus devolving on them which none of the appellants can be.

30. Much has been made of the description of the impugned goods, including the headings and contents of the appropriate column of the First Schedule to Customs Tariff Act, 1975 which, in any case, is of relevance only for section 12 of Customs Act, 1962 and, incidentally, running counter to the proposition of jurisdictional incompetence of

the Tribunal, to emphasize recourse to section 123 of Customs Act, 1962 with its near-permanent applicability to ‘gold and manufactures thereof’ and thereby shift the onus to the appellants herein. The goods, nonetheless, are ‘studded jewellery’ which is a description, in common parlance, of precious stones set in articles of precious metals, most commonly gold, and to those not familiar with the chronological mutation of section 123(2) of Customs Act, 1962 coverage of the impugned goods therein may even be acceptable. But we have taken note *supra* that with effect from 26th October 1989, ‘diamond and manufactures’ included therein was legislatively rescinded to exclude ‘diamonds and manufactures’ thereof. It is, therefore, moot if the presumption in section 123 of Customs Act, 1962 can continue to apply to articles that have ‘diamonds’ embedded in them and it would appear that legislative intent was to restrict applicability to gold in primary form and articles made of gold. The alternative proposition of Revenue reduces the rescinding to the absurdity of not fastening the presumption to ‘diamonds’ of themselves but to ‘diamonds set in gold’ and leaves us puzzled about the policy imperative that may have prompted this very fine line of distinction that Learned Special Counsel urges us to accept as unquestionable. Law is intended to serve a working purpose and is not for mere display in a vacuum or to exemplify sterile existence. The amendment brought about in 1989 has had the effect of alienating the presumption in section 123 of

Customs Act, 1962 from the goods impugned here. For these reasons, the imposition of penalties on the appellant must find justification in the evidence that were set out in the show cause notice to be sustained.

31. Admittedly, there are no markings on the impugned goods that would attribute provenance outside India. The sole link of the goods with foreign sourcing is frequency of travel of Ms Vihari Sheth, an admission of shared imputation in unidentifiable jewellery dealt with in the past through Vihari Jewels by Mr Jiten Sheth, that was construed upon by the customs authorities as relating to all, and any, jewellery available and dealt with in the past, complementary statements of two job-workers – one as mere source of documents and the other as supplier operating under the radar – which advances no proof of the impugned goods not having been produced in India and the conformity of designs in a workbook of Ms Vihari Sheth, purportedly valued in foreign currency, with the goods recovered from customers to whom 'studded jewellery' had been sold by Mr Jiten Sheth. Each of these is not objectionable on its own but taken together these contain as many rents and gaps as to detract from being fabric entire of itself. There are no statements to fill these blanks and render the story complete. Absence of the persons allegedly concerned with the entire exercise from investigations should not, in the absence of legally satisfied presumption, be construed to their detriment. In the

absence of recourse to section 123 of Customs Act, 1962, the linkage of the several inferences and suppositions must be established with material and/or oral evidence to be compliant with normative requirement of customs officials having to establish that one or the other reasons for confiscation under section 111 of Customs Act, 1962 are manifest. The essential requirement of evidencing association with goods liable for confiscation has not been discharged even by the guidelines set out in *Collector of Customs, Madras and others v. D Bhoormul [1974 SCR (3) 833]* which also took note that

> *'…These goods, without exception, were all of foreign origin… They were all lying packed as if they had been freshly delivered, or were ready for dispatch to a further destination…'*

and precluded from presuming otherwise because

> *'..They were not lying exhibited for sale in the show cases of the shop…'*

before going on to observe that

> *'…One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs, absolute certainty is a myth…..The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the*

probabilities of the case.

…..It will be sufficient to reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personem which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their licit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person was proceeded against was concerned in the smuggling.

….

> *"……..This also disposes of the first point. As we have said, the burden was on the Customs Authorities which they discharged by falsifying in many particulars the story put forward by the appellant…. It cannot be disputed that a false denial could be relied upon by the Customs Authorities for the purpose of coming to the conclusion that the goods had been illegally imported."*

In the case before us, the circumstantial evidence suggesting the inference that the goods were illicitly imported into India, was similar and reasonably pointed towards the conclusion drawn by the Collector. There was no violation of the rules of natural justice. The Collector had given the fullest opportunity to Bhoormull to establish the alleged acquisition of the goods in the normal course of business. In doing so, he was not throwing the burden of proving what the Department had to establish, on Bhoormull. He was simply giving him the fair opportunity of first rebutting the first and foremost presumption that arose out of the tell-tale circumstances in which the goods were found, regarding their being smuggled goods, by disclosing facts within his special knowledge…..'

32. Learned Special Counsel has been selective in extracting from the judgement in *re D Bhoormull* to urge as the authority for even remote evidence to suffice in departmental proceedings; no greater disservice could be rendered to rule of law for the enduring framework of adjudicatory responsibility spelt out by the Hon'ble Supreme Court as obligations on the part of customs authorities and the persons charged are, often and thus, conveniently glossed over. The sequential logic that found favour in the decision in *re D Bhoormull* has been stood on its head here; while there, it was the goods that were shown to have been smuggled with the person concerned obligated to establish his lack of illicit association thereto, here the attempt has been to impute that Ms Vihari Sheth is a smuggler, abetted by Mr Jiten Sheth, of the goods associated with them which, unable to defend themselves, are assumed as having been smuggled. The distinct cleavage from the harmonious construct in the decision in *re D Bhoormull* cannot be more glaring.

33. Licit possession in the course of domestic transaction having been satisfactorily furnished, without being controverted by the lower authorities, on the part of owners of the impugned goods, the arbitrary arrogation of empowerment to subject the sellers to the presumption of having been in possession of 'smuggled goods' *sans* authority of law to do so deprives the finding of liability to penalty under section 112 of Customs Act, 1962 of legal sanctity. Without evincing illicit

trafficking, in the form in which it was recovered from customers, from outside the country, even by the stretched framework of preponderance of probability, there is no onus on the appellants to establish that the conjectures entertained by customs authorities are incorrect.

34. Consequently, the impugned order is set aside and appeals allowed with consequential relief, if any.

(Order pronounced in the open court on 10/11/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*