

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 53680 of 2023 [SM]

[Arising out of Order-in-Appeal No. 03(RLM)CUS/JPR/2023 dated 17.02.2023 passed by the Commissioner of Central Excise & CGST (Appeals), Jaipur]

Suresh Chand Garg

S/o Shri Ramesh Chand Garg,
R/o 63, Wadi Wala Mohalla,
Near Chameli School, Kharepati Mohalla,
Ward No. 9, Teh Bharatpur,
Distt. Bharatpur, Rajasthan-301019

...Appellant

VERSUS

**Principal Commissioner of Central
Goods and Service Tax, Jaipur I**

NCR Building,
Jaipur, Rajasthan - 302005

...Respondent

APPEARANCE:

Shri Arun Goyal, Advocate for the Appellant
Ms. Tamanna Alam, Authorized Representative for the Respondent

CORAM:HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 05.06.2023
DATE OF DECISION: **02.08.2023**

FINAL ORDER No. 50979/2023

DR. RACHNA GUPTA

Present is an appeal against the Order-in-Appeal No. 03/JPR/2023 dated 17.02.2023. Vide which the absolute confiscation of seized gold weighing 999.940 grams of gold has been confirmed along with the imposition of penalty upon the appellant. Facts relevant for the impugned adjudication are as follows:

1.1 On the basis of a specific intelligence, one Innova car bearing registration no. RJ19FA 0369 was intercepted by the Officers of Directorate of Revenue Intelligence (DRI) Jodhpur and CGST,

Jodhur at Bilaraon 18.09.2020. When the intercepted vehicle was searched, 5514.8 grams of smuggled gold was recovered along with some slips issued for testing of gold by M/s. New Satyam Touch Centre, Jaipur. Following the address of said Touch Centre as mentioned in those slips, that a search was carried out by the Officers of DRI, Jaipur at the said Centre on 18.09.2020 itself. During the search, a gold bar weighing about 999.940 grams was recovered from one Shri Suresh Chand Garg who was found present at the said premises during the search proceedings.

1.2 On being enquired, he informed the DRI Officers that the said gold as has been obtained from melting the entire jewellery which belongs to his family and families of two other brothers. He had brought the said gold to M/s. New Satyam Touch Centre for getting checked the purity of melted gold. However, M/s. New Satyam Touch Centre, Jaipur issued the Invoice no. 25 dated 18.09.2020 in the name of Shri Mukesh Ji. Department formed an opinion that he could not produce any evidence in support of his claim nor he could give any satisfactory explanation about why the slip bears name of Shri Mukesh Ji instead of appellant's own name. Thus, on account of reasonable belief that the gold bar found in possession of Shri Suresh Chand Garg might have been the smuggled one that the officers detained the gold bar under Panchnama dated 18.09.2020 itself. The appellant submitted a letter dated 30.09.2020 through his Authorized Representative, Chartered Accountant Shri Neeraj Gupta conveying his defence.

1.3 Pursuant to the summons issued against him, he appeared and his statement was also got recorded under Section 108 of the Customs Act, 1962 wherein he reiterated the contents of the letter dated 30.09.2020, mainly deposing that the gold with him belongs to him and his family including family of his two brothers, as was obtained after getting the entire jewellery of said joint family, melted at M/s. Anil Galai Centre, Bharatpur, Rajasthan where all the females of the joint family accompanied him. The melted jewellery was returned to him in the form of a bar of 999.940 grams along with a piece of gold weighing 2.860 grams. With a view to get the purity checked through a professional that he, in a RSRTC Bus from Bharatpur to Jaipur had come to M/s. New Satyam Touch Centre. Department also got the purity of the said gold verified from government approved valuer Shri Lokesh Kumar Kasliwal on 14.10.2020. Vide his report of even date, the weight of gold bar was reported as 999.800 grams, however, purity was reported as 99.50%.

1.4 In the given circumstances, it appeared to the department that since the appellant has failed to produce any bill, invoice or any other document that may prove his ownership to the detained gold bar that Section 123 of the Customs Act, 1962 be invoked. Since the appellant could not satisfy that the gold recovered from him is not a smuggled gold that he was served with a show cause notice bearing No. 1295 dated 06/09.11.2020 proposing the absolute confiscation of 999.940 grams of gold valued at Rs.52,39,952/- as was seized vide seizure memo dated 26.10.2020. The penalty was also proposed to be imposed upon the appellant.

The said proposal was initially confirmed vide Order-in-Original no. 32/2021 dated 09.09.2021. The appeal against the said order has been rejected vide the order under challenge.

2. I have heard Shri Arun Goyal, learned Advocate for the appellant and Ms. Tamanna Alam, Authorized Representative for the department.

3. Learned counsel for the appellant has mentioned that DRI had an information about smuggling of gold in an Innova car which consequently was intercepted, resulting into recovery of 5514.8 grams of allegedly smuggled gold along with the recovery of some slips about testing of gold issued by M/s. New Satyam Touch Centre. It is impressed upon that the appellant has no connection with the referred case except that he was found present at the time when DRI officers searched the premise of M/s. New Satyam Touch Centre, Jaipur pursuant to aforesaid recovery. It is submitted that the gold which was lying in M/s. New Satyam Touch Centre was not detained, department wrongly detained appellant's gold who was present just as customer of M/s. New Satyam Touch Centre. The appellant has given the reasonable and proper reply that the gold is melted out of the jewellery owned by the joint family of the appellant being inherited from his grandfather Shri Badri Prasad Garg who was holding investment in gold jewellery/ornaments. After his death in the year 2014, those jewellery/ornaments were divided among his descendants including the appellant. To have the latest jewellery out of those inherited ornaments that the joint family decided to get the old jewellery

melted from M/s. Anil Galai Centre, Bharatpur who had issued a receipt also on 17.09.2020. After getting the melted gold in the form of a bar of 999.940 grams with a small piece of 2.86 grams that the appellant via bus travelled to Jaipur for getting the purity of the melted gold tested properly at M/s. New Satyam Tounch Centre. It is submitted that since it was an inherited gold, there was no question of any bill or invoice for the same, however, the proprietor of Galai Centre was got examined who acknowledged that the appellant along with his wife and the wives of his two brothers visited the said Galai Centre and got their old jewellery/ornaments melted into the form of that bar. The same has been stated by Shri Anil Kadam in his affidavit dated 22.10.2020. The affidavit was tendered by his brother Shri Sunil Kadam pursuant to the summons issued to Shri Anil Kadam.

3.1 Learned counsel further impressed upon that it is only because the receipt issued to appellant by M/s. New Satyam Tounch Centre bears the name of Mukesh instead of that of appellant, that the department initiated the impugned proceedings absolutely on the basis of presumptions. The findings of adjudicating authorities below are also nothing but an outcome of presumption and surmises. The said receipt is so insufficient a document to falsify the defence disclosed by the appellant. The defence rather nullifies any instance of reasonable belief due to which Section 123 of the Customs Act, 1962, which thus is wrongly invoked by the department. The only corroboration to that slip and to the fact that appellant wrongly identified him as Mukesh is the statement of Shri Ujjval Rakshit, the proprietor of M/s. New Satyam Tounch Centre.

It is impressed upon that statement is highly insufficient to prove anything against the appellant for the reason that Shri Ujval Rakshit was not at the centre at the time the invoice No. 25 dated 18.09.2020 issued in the name of Mukesh was generated. It is apparent from Panchnama that Shri Ujval Rakshit was called by the Raiding Officers after they conducted search of the M/s. New Satyam Touch Centre. Finally impressing upon that there is no iota of any evidence against the appellant, it is mentioned that the order of absolute confiscation of his hereditary gold and imposition of penalty upon him is liable to be set aside. Learned counsel has also relied upon CBDT instructions, 1994 dated 11.05.1994 according to which in the case of a person not assessed to wealth-tax gold jewellery and ornaments to the extent of 500 grams per married lady, 250 grams per unmarried lady and 100 grams per male member of the family, need not to be seized.

3.2 Learned counsel further impressed upon that the gold of appellant was weighing 999.940 grams with the purity of 99.80%. Learned counsel has relied upon the decision of this Tribunal in the case of **Madhukar Sonaba Bhagat Vs. Commissioner of Customs (Prev.), West Bengal reported as 2019 (368) E.L.T 990 (Tri.-Kolkata)**, wherein it was held that when there is nothing on record to suggest that the pieces which were seized had any foreign markings, there seems no reasonable belief for the seizure and for invoking Section 123 of the Customs Act, 1962. The decision of this Tribunal, Kolkata Bench itself in another case titled as **Commissioner of Customs (Prev.), Shillong Vs. Manisha Devi Jain reported as 2019 (370) E.L.T 401 (Tri.-**

Kolkata), wherein it was held that Indian Origin remolten gold/gold ornaments could not be legally confiscated as its possession is not prohibited under any provisions of law. Learned counsel has also relied upon the decision of **Commissioner of Customs, Chennai III Vs. Shri Mohammed Ali Jinnah reported as 2023-TIOL-418-CESTAT-MAD** to impressed upon that when the report of expert does not contain any data, the opinion/report cannot be relied upon. With these submissions, the order under challenge is prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, learned DR has mentioned that the adjudicating authorities below had been meticulous while appreciating the entire evidence on record, prior holding that the defence taken by the appellant does not appeal to a reasonable prudence. It has rightly been observed that had there been any genuineness with the possession of gold with appellant, there was no need with him to mention a wrong name while getting its purity tested at M/s. New Satyam Tounch Centre. The plea of melting the family jewellery has rightly been alleged as concocted story as it is unbelievable that family as a whole will get the entire ancestral jewellery melted at one go and that the melted gold will coincidentally be in same shape, size, weight and purity as that of foreign gold. Impressing upon no infirmity in the order under challenge, appeal is prayed to be dismissed.

5. Having heard the rival contentions and perusing the entire record, I observe and hold as follows:

While issuing the show cause notice, the department has invoked Section 123 of the Customs Act, 1962. The section shifts the burden of proof that the goods are not the smuggled one upon the person from whom the gold have been seized. Hence foremost it need to be seen as to whether the section has rightly been invoked. The section reads as follows:

Section 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.

The perusal makes it clear that the theory of reverse burden under this provision can be invoked if there is a reasonable belief that the goods in question are smuggled one.

6. I observe that the show cause notice in the present case was issued in November, 2020 whereas the appellant had made his submission vide his letter dated 30.09.2020 mentioning that the gold recovered from his possession was the gold melted into bar/brick out of the jewellery and the ornaments belonging to the family of three brothers including the appellant. The said jewellery also included the jewellery inherited from their grandfather. The

appellant along with the said letter had produced pictures/photos of his family members wearing the gold jewellery. He even had given the letter issued by the person who had melted the said jewellery. It is department's admitted case that there were no foreign markings on the gold recovered from the appellant. It is also department's own acknowledgement that case against appellant is an accidental case which is not based on any pre-information.

7. I also observe that information was actually against an Innova car bearing registration no. RJ19FA 0369 for having smuggled gold in it. The said car was intercepted at Bilara, Jodhpur on 18.09.2020. 5514.8 grams of smuggled gold was recovered from the said car along therewith were recovered some slips issued for testing of gold by M/s. New Satyam Touch Centre, Jaipur. The appellant was found present along with the impugned gold bar in question in the said M/s. New Satyam Touch Centre. When those premises was searched on 18.09.2020 itself by the Officers of DRI, Jaipur, Pursuant to the recovery of aforementioned slips from the intercepted Innova. Admittedly none of those receipts had any connection with appellant. Admittedly Invoice No. 25 was not recovered from said Innova. To my opinion when the seizure is not even based on any information against the appellant, the detained/seized gold had no foreign marking, nothing incriminating against appellant was recovered from Innova. The mere fact that the gold has purity of 999.80 as good as that of foreign gold is opined to be highly insufficient a fact to form such reasonable belief as is required for invoking Section 123 of the Customs Act. The appellant had also pleaded about the Government's own circular

permitting the possession of certain quantity of gold with the married and unmarried male and female in a family. To my opinion that there is no single circumstance nor any evidence that may give the reasonable belief to the investigating team to invoke Section 123. I accordingly hold that the said section has wrongly been invoked by the department against the appellant. Resultantly, it was the burdened duty of the department to prove that the gold recovered from the appellant was the smuggled foreign gold. I rely upon the decision of this Tribunal, Kolkata Bench, in the case of **Nand Kishore Sumani Vs. Commr. of Cus., C.Ex. & S.T., Siliguri reported as 2016(333) E.L.T. 448 (Tri.-Kolkata)**, wherein it is held as follows:

6. *Regarding applicability of Section 123 of the Customs Act, 1962 it is relevant to go through the provisions of this Section reproduced below.*

"Section 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."*

7. *It is true that as per the above provisions of Section 123 of the Customs Act, 1962 it is not required that gold should contain foreign markings and even gold in primary form or jewellery could also be covered as per the language of the provision. But whether onus of Indian origin on any primary gold or jewellery bearer is cast upon the person in possession of such gold. It may be appreciated that when the provisions of Section 123 of the Customs Act, 1962 were enacted the Gold Control Act was also in operation and gold was considered to be a very sensitive commodity. There was subsequent liberalisation in import policy with respect to gold and even foreign marked gold was allowed to be imported through baggage and through Banks on fulfilling certain*

conditions. On licit import these foreign marked gold bars can be freely bought and sold in India. However, if any person is found to carry a foreign marked gold in India without a bill then by simply having foreign markings on the gold it cannot be said that the same is of smuggled nature. Once the holder of such gold produces a bill, subsequently, then also the confiscation made by Revenue has been held to be improper by CESTAT in the case of Kapildeo Prasad v. CCP, Patna (supra) decided by this Bench. Following observations have been made by this Bench in Paras 12, 13 & 14 of this case law :

"12. The gold biscuits seized from Shri Awadesh Kr. Thakur have been confiscated by the adjudicating authority after rejecting the documentary evidence produced by the appellants showing the legal purchase of the same from M/s. Chauhan Zevares Pvt. Ltd. and by referring to certain discrepancy in the said document of the seized gold biscuits. However, I find that the discrepancies referred to by the adjudicating authority are not real inasmuch as he has held that whereas the sale voucher shows the goods to be "T.T. Bars", the seized gold is biscuit. He has thus observed that such descriptive variation between the biscuits and the bars raises a reasonable doubt regarding the genuineness of the transaction. The appellants have contended that biscuits and the bars are synonymous terms used by the persons dealing in gold and are interchangeable "T.T. Bars" represent ten tola bars which are also referred to as biscuits. The Commissioner in his impugned Order has nowhere observed as to what is the difference between a biscuit and a bar. Similarly, as regards weight, I find that there is a variation of about 2 gms. in the weight of all the sixteen pieces of gold. The standard 10 tola bars weigh 116.640 gms., and as such, the total weight of 16 pieces of biscuits would come to 1866.240 gms., which is reflected in the sale voucher of M/s. Chauhan Zevares. Similarly, it is a matter of common knowledge that the standard purity of gold is 999.00. As such, as rightly contended by the learned consultant, the small variation in the weight or in the purity of gold is attributable to the human error and cannot be made the basis for rejecting the sale voucher of M/s. Chauhan Zevares who have admitted to have sold the goods to the appellants. This has also been observed by the Commissioner that M/s. Chauhan Zevares have subsequently stated that they were not sure that the gold under seizure was the same as was purchased from them. Naturally a person who has sold the gold, cannot confirm whether the gold seized by the Customs Officers from that person, is the same gold or not. But the said statement made by M/s. Chauhan Zevares further confirms that the sixteen pieces of gold were, in any case, purchased by Shri Kapildeo Prasad from the said M/s. Chauhan Zevares Pvt. Ltd.

13. The Tribunal in the case of S.K. Chains v. Commissioner of Customs (Prev.), Mumbai reported in [2001 \(127\) E.L.T. 415](#) (Tri. - Mum.) observed as under : -

"7. Thus, today there exists a very peculiar situation. On the one hand the Customs Act considers it necessary to ask a person to establish the legality of the origin of the gold seized from him while on the other hand in pursuance of the relaxations made in the Import Policy and the Baggage Rules framed under that very Act, there is a flood of foreign marked gold in the town. Such gold changes hands several times on importation. Since the repeal of the Gold (Control) Act in 1968, there is no legal requirement for the buyers and sellers of gold to maintain any register nor is there any requirement to issue invoices under any Central Act."

14. In the case of Sri Samir Kumar Roy & Others v. C.C. (Prev.) West Bengal, Calcutta - decided by the Tribunal in Order No. A-475-478/Kolkata/2001, dated 4-7-2001 [[2001 \(135\) E.L.T. 1036](#) (T)], the Tribunal has considered the effect of liberalised policy as

regards the import and dealing in gold and thereafter, concluded that onus as placed under Section 123 was discharged when the appellants produced the sale/purchase vouchers showing the sale of the goods from the gold dealer who has admitted having sold the same. In the absence of any requirement of law requiring the gold dealers enjoying the sale/purchase of foreign-marked gold in India, to indicate the brand names of the same in the sale/purchase vouchers, the sale documents produced by the appellants cannot be dismissed on the said ground. In the instant case also, we find that the entire chain of sequence starting from importation of gold biscuits of M/s. Kan Karan Impex, its sale to M/s. Chauhan Zevares and further sale to Shri Kapildeo Prasad, is established. As such, taking the said factor into accounts, I am of the view that the onus cast upon the appellants under the provisions of Section 123 stands fully discharged. The confiscation of the gold biscuits is not called for. Accordingly, I set aside the same.

15. Inasmuch as the confiscation of the gold biscuits has been set aside, the confiscation of the truck is not called for. For the similar reasons, there is no warrant for imposition of penalties upon the various persons. The same is, accordingly, set aside."

7.1 *In the light of the above relied upon case law in the case of foreign marked gold also it was held by this Bench that appellant has discharged the onus when the bills covering the foreign marked gold bars are furnished. In the present case the seized gold bars do not bear foreign markings, do not have uniform weight/purity and appellant has shown the purchase bills covering the said gold bars having assorted size, weight and purity. The person who sold the seized goods has also confirmed to have supplied the same to Shri Nand Kishore Somani. In his statement, reproduced in Para (23) on Page 16 of the Order-in-Original dated 6-2-2014, Shri Ajay Kr. Saraff of M/s. Saraff Jewellers has confirmed to have supplied the gold bars made out of jewellery, purchased by him. Minor mismatching of difference in weight as calculated by the Adjudicating authority will not make the bills as an afterthought. There could be non-observance of provisions of some other enactments like income-tax or sales tax laws but the same cannot be grounds for confiscation of goods under Section 111 of the Customs Act, 1962 when there is no iota of evidence that seized gold bars are of foreign origin or smuggled into India. Suspicion/presumption howsoever strong cannot take the place of an evidence.*

I also rely upon the decision of Hon'ble Bombay High Court in the case of **Union of India Vs. Imtiaz Iqbal Pothiawala reported as 2019 (365) E.L.T. 167 (Bom.)**, wherein it is held as follows:

"The Supreme Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple - (2003) 8 SCC J752 has observed as under :-

"However as held in A. Raghavamma v. A. Chenchamma [AIR 1964 (SC) 136] there is an essential distinction between the burden of proof and onus of proof : burden lies upon a person who has to prove the facts and never shifts onus of proof shifts. Such a shifting is a continues process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof, the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff title."

Therefore, the principle laid down in R.V.E. Venkatachala Gounder (supra) is applicable to adjudicating proceedings under the Act. By virtue of Section 123 of the Act, the burden to prove that the gold is not smuggled, is on the person found in possession of the gold. Thereafter, the onus keeps shifting. The impugned order holds the absence of the Revenue being able to discharge the onus on it after the respondent No. 1 has discharged the primary onus by showing the source of its purchase of gold. In fact, respondent No. 1 has also shown the source of its source. Thus, shifting the onus upon the Revenue. In the absence of the Revenue discharging its onus, it must follow that in the present facts, the respondent has discharged the burden of proof imposed upon him under Section 123 of the Act.

(xiii) Being of the view that the above observations would apply to the present facts, we enquired of the Revenue of its stand in respect of the applicability of the above principle to the present facts. Mr. Sethana, Learned Counsel for the Revenue responded by stating that it will not apply to the present facts as it does not deal with Section 123 of the Act. It is submitted that in terms of Section 123 of the Act, the burden is upon the respondent and that has to be discharged up to the hilt. We are unable to understand the above submission. Section 123 of the Act, statutorily imposes a reverse burden of proof i.e. not upon the person (Revenue) who assert that the gold in possession of the respondent No. 1 is smuggled gold but on the person (Respondent No. 1) who is found in possession of goods notified under Section 123 of the Act. However, this reverse burden of proof does not do away with the manner of discharging the burden of proof. Thus, the manner of discharging the burden of proof by shifting of the onus would be as applicable to all other civil proceedings. Mr. Sethna, placed reliance upon Nizam Institution of Medical Sciences v. Prasantha S. Dhananka & Others - (2009) 6 SCC 1 in particular, paras 77 and 78 thereof. We find that this decision, in fact, reiterates the general principle laid down by the Apex Court in R.V.E. Venkatachala Gounder (supra) about the shifting onus. Besides, one must not lose sight of the fact that the Nizam Institution of Medical Sciences (supra) decision dealt with Medical negligence, where the doctors would be best able to explain the circumstances leading to a particular result. In fact, in some cases of medical negligence, the maxim 'Res ipsa loquitur' i.e. the thing speaks for itself would also apply."

8. From the order under challenge, I observe that the findings of original adjudicating authority have been upheld. I observe that the most of the findings of the authority are the outcome of the presumption. While rejecting the plea of gold being melted out of family jewellery, the authority has simply held the said submission to be the concocted one, without any cogent proof or reasoning except on the presumption that it cannot be a coincidence that three of the brothers will decide at the same time to get the jewellery in their possession to be melted that too to into one common piece. There is no rebuttal to the submission that three of the brothers including the appellant had inherited the ancestral

jewellery. The subsequent findings that the size and purity of the melted gold exactly matched with the world's most widely traded small gold bar, cannot be a coincident, are also presumptive. It cannot be denied that whenever jewellery gets melted the impurities get separated from the gold resulting into a best purity piece of gold. Once the melted gold is intended for purchase of latest jewellery as has repeatedly been the submission of the appellant, the melted gold free from impurities is generally collected.

9. The said defence of appellant is duly corroborated from the affidavit of Shri Anil Kadam who is the proprietor of M/s. Anil Galai Centre, Bharatpur wherein he had stated that on the request of appellant, his wife and the wives of his two brothers, he had melted several jewellery articles brought by all of them and had given the melted pure gold in the form of a bar of 999.940 grams along with a small piece of 2.860 grams to the appellant vide invoice no. nil dated 17.09.2020. Though this invoice was not produced by the appellant at the time his gold was detained but the factum of getting jewellery melted was immediately brought to the notice and vide letter dated 30.09.2020, the said receipt was produced. Thus it is clear that the relevant document was provided prior the show cause notice could be issued. The adjudicating authority has presumed the aforesaid invoice issued by M/s. Anil Galai Centre to be fake and manipulated only for the reason that Shri Anil Kadam despite opportunity escaped himself to tender his statement under Section 108 of Customs Act, 1962. On the contrary, I observe that pursuant to the summons, Shri Anil Kadam authorized his brother

Shri Sunil Kadam to appear before the authority along with his own affidavit acknowledging the issuance of the said invoice/bill. I also observe that the officers investigated Shri Sunil Kadam but they did not still record his statement except mentioning the outcome of initial investigation from Shri Sunil Kadam in the letter dated 29.10.2020 as was issued to Shri Anil Kadam, still requiring Shri Anil Kadam only to appear for further investigation on 02.11.2020 itself. I also observe that this letter never reached Shri Anil Kadam as it was dispatched on 02.11.2020 i.e. on date when Shri Anil Kadam was asked to appear. Hence, there was no possibility for Shri Anil Kadam to appear on 02.11.2020. No further opportunity was ever given to him to appear. Resultantly, I find that there is no evidence on record to show that Shri Sunil Kadam/Shri Anil Kadam had avoided their appearance before the authorities to prove that they had manipulated the said bill invoice and that the bill is fake.

10. The another ground to book the appellant who admittedly was accidentally trapped, is that the receipt with the appellant issued by M/s. New Satyam Tounch Centre was not in the name of appellant but was in the name of one Shri Mukesh. I observe that appellant had explained this ambiguity by saying that it was COVID time and he was wearing mask while disclosing his name, it is because of mask that the name disclosed as Suresh was heard a Mukesh. The authority has ignored the said explanation on the basis of assumption and surmises only. There is no evidence on record nor any investigation to enquire as to whether there is anyone called Mukesh or as to who actually is the person from whom the appellant acquired possession of the foreign smuggled gold. I

observe that to corroborate his movement from M/s. Anil GalaiCentre to M/s. New Satyam Tounch Centre, the appellant in addition has placed on record the bus tickets of state roadways, showing his movement on the relevant date from Bharatpur to Jaipur. It is appellant's submission that since he got his jewellery melted on 17.09.2020 and the melter informed him about 99.8% purity of the gold that for cross checking the purity and that there was no such advanced mechanism in Bharatpur for the testing that he via the bus, reached Jaipur on the next date i.e on 18.09.2020 at M/s. New Satyam Tounch Centre.

11. From the above discussion, it is got confirmed that there was no reasonable belief with the DRI officers at the time of detaining/seizing the gold from appellant, the onus was upon the department to prove that the gold in the hands of the appellant was the foreign smuggled gold. Apparently and admittedly, there was no foreign marking. No doubt, in case the gold is acknowledged to be melted, there remains no possibility of any marking on the melted piece of gold. However, it is still for the department to prove that the gold with the appellant is from the illicit source. As already discussed above, I find no such evidence by the department. The defence taken by the appellant is held to have been rejected on the basis of assumptions and surmises. In the absence of any evidence by the department but a reasonable corroborative evidence by the appellant that the gold bar in his hand was the melted gold out of his joint family entire jewellery. I hold that the gold in question is not proved to be the smuggled gold of foreign origin. Mere purity thereof being equivalent to the purity

of foreign gold is wrongly held to be the criteria to hold the melted gold as the gold of foreign origin. Investigation rather is observed to be faulty.

12. I also observe that the purity and value of gold bar as was detained from appellant under Panchnama dated 18.09.2020 was also got examined by the Government approved valuer on 14.10.2020 who determined the weight of gold bars as 999.800 grams as contrary to 999.940 grams. However, with the purity of 99.5% as contrary to 99.8% as has been acknowledged not only by M/s. Anil Galai Centre but also by M/s. New Satyam Tounch Centre, thereby causing difference of 0.14 grams of the gold. The examination by government approver was got done in the absence of the appellant. Department has produced nothing to support the findings of this report, on the contrary, documents produced by the appellant in the form of invoice from M/s. Anil Galai Centre as well as M/s. New Satyam Tounch Centre falsify this report. The appellant was denied the opportunity to cross examine the valuer also. Thus I hold that there is the violation of principle of natural justice. The benefit whereof again goes in favour of the appellant.

13. I rather observe that the entire proceeding is miserably silent about the huge quantity of 5514.8 grams gold which from the Innova car bearing registration no. RJ19FA 0369 was intercepted at Bilar in Jodhpur. Pursuant to the intelligence with the department, there is nothing on record about the persons who were found in possession of said huge quantity of the gold and said car. There is also no mention about the slips for testing of gold issued by M/s.

New Satyam Tounch Centre, Jaipur which were recovered from the said Innova car. Apparently and admittedly those slips have no connection with the appellant. The only slip discussed in the entire order is the slip which was recovered from the appellant who was accidentally found present in M/s. New Satyam Tounch Centre when a search was effected in the said centre pursuant to recovery of its slips from the Innova car about along with a huge quantity of gold (five times the gold detained from the appellant).

14. Since department, despite query raised, was unable to inform about any other proceedings/prosecution with respect to the said recovery of 5514.8 grams of gold, an intimation is hereby given to the Chairman, Central Board of Indirect Taxes and Customs (CBIC) to enquire about the proceedings, if any, pursuant thereto and to take appropriate action about the recovery of that huge quantity of gold, if no action found taken. Copy of this order accordingly be forwarded to the Chairman, CBIC. The chairman is also required to send the report of said enquiry to this Tribunal.

15. With these observations, I hold that the order under challenge is not at all sustainable. Same is hereby set aside. Consequent thereto, appeal stands allowed.

[Order pronounced in the open Court on **02.08.2023**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)