



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 467 OF 2023

1. Leyla Mohmoodi, through
Constituted Attorney Sandip D. Kadam.
 2. Mojtaba Ebrahim Gholami through
Constituted Attorney Sandip D. Kadam
- ...Petitioners

Versus

1. The Additional Commissioner of Customs
 2. The Commissioner of Customs (Appeals)
 3. The Principal Commissioner of Customs
 4. The Assistant Commissioner of Customs
 5. The Union of India.
- ...Respondents

Mr. Anil Balani a/w Mr. Jas Sanghavi, Mr. Prakash Shringrani, Ms. Priyasha Pawar, Mr. Alekshendra Sharma, Ms. Revati Nansi, i/b PDS Legal, for
Petitioner.

Mr. Devang Vyas, ASG a/w Ms. Neeta Masurkar and Mr. Ram Ochani for
Respondent.

Ms. Nithee Punde a/w Mr. Harshad Shingnapurkar for R. No. 2.

CORAM : G. S. KULKARNI &
JITENDRA JAIN, JJ.

Reserved on : DECEMBER 13, 2023.
Pronounced on : DECEMBER 21, 2023

Judgment: (Per G. S. Kulkarni, J.)

The judgment has been divided into the following parts:

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A. Preface:-

1. This petition under Article 226 of the Constitution of India raises an important issue as to whether the action of the respondents to sell / dispose of the gold jewellery of the ownership of the petitioners, as seized from them, without notice to the petitioners, and before an order of confiscation under Section 111 of the Customs Act, 1962 (for short '**the Customs Act**') can be said to be legal and valid.

2. The contention of the petitioners is that the impugned action of the respondents of seizure of petitioners' gold jewellery and its disposal was patently illegal being in breach of the provisions of not only the Customs Act, but the rights guaranteed to the petitioners under Article 300A read with Article 14 of the Constitution of India.

3. The prayers as made in the petition are required to be noted which read thus:-

(a) This Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction, ordering and directing the Respondents themselves, its officers, subordinates, servants, and agents to forthwith provide the records of seized gold jewellery and return gold equal to 1028 grams of gold of which was disposed by the Respondents to enable the Petitioners to re-export the same in terms of the order dated 19.09.2022, passed by the Revisionary Authority, Government of India.

(b) in the alternative to the Prayer Clause (a) above, this Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ or order or direction under Article 226 of the Constitution of India ordering and directing the Respondents themselves, its officers, subordinates, servants, and agents to forthwith pay the amount equivalent to the value of the seized/confiscated 1028 grams of Gold Jewellery as per the current market value.

(c) pending the hearing of the above Petition, this Hon'ble Court, by an interim order be pleased to direct the Respondents, to forthwith deposit an amount equivalent to the current market value of the seized 1028 grams of gold jewelry, with liberty to the Petitioners to withdraw the same on such terms and conditions as may deem fit to this Hon'ble Court.

(d) for ad-interim reliefs in terms of prayer clause (c) above;

(e) for costs of this Petition; and

(f) for such further and other reliefs as this Hon'ble Court may deem fit in the facts and circumstances of the case.”

B. Facts:-

4. It is the case of the petitioners that they are Iranian nationals. On 14 January 2018, they arrived at Chhatrapati Shivaji Maharaj International Airport , Mumbai by the Oman Air Flight. The petitioners were wearing gold ornaments (bangles) having net weight of 1028 grams. They were intercepted

by the Customs officials at Mumbai Airport and the gold bangles (for short ‘**the gold jewellery**’) worn by them, were seized by the Customs officials.

5. It appears that at the departmental level and which was not to the knowledge of the petitioners that the respondents initiated an action for disposal of the seized gold jewellery for which on 4 April 2018 a notice was issued by the Assistant Commissioner of Customs, Air Intelligence Unit, C.S.I. Airport, *inter alia* recording that the officers of the Commissionerate had seized assorted gold jewellery totally weighing 1028 grams valued at Rs.26,63,366/- from the petitioners who were holding Iranian passport, on their arrival from Muscat. It was recorded that the jewellery was seized under the panchanama in the reasonable belief that it was smuggled into India and hence, liable for confiscation under the provisions of the Customs Act,1962. Such notice was being issued without prejudice to any person(s) to bring on record the objection, if any, for disposal of the seized assorted gold jewellery totally weighing 1028 grams within fifteen days from the date of issue of the notice, failing which the same would be disposed of without further reference to the department. Such notice is stated to be forwarded to the petitioners, as also put up on the notice board of the C.S.I. Airport. It is alleged that it was also forwarded to Mr. Prakash Singrani and Mr. Prasad Kamble, Advocate. However, it appears that there is no record with the Customs of the same being received by the petitioners. Insofar as the notice being addressed to the Advocates was concerned, at the relevant time, the said Advocates were not the petitioners’ Advocate before the department. In this regard on 13 April 2018, Shri. Prakash K. Shingrani

informed the Assistant Commissioner of Customs that he had no instructions from the petitioners as after released on bail, the petitioners had not contacted him. He recorded that such fact of the notice be informed to the Consulate, and if no reply is received it may be disposed off according to law.

6. It appears that the Assistant Commissioner initiated proceedings under Section 110(1B) of the Customs Act so as to obtain an order from the Court of Metropolitan Magistrate for the identity of the gold jewellery for disposal of the gold jewellery. Such an application came to be allowed by the learned Metropolitan Magistrate, 66th Court by an order dated 18 May 2018 (page 132) which reads thus:-

“No. SD/INT/AIU/21/2018 APD

It is hereby Certified that the application U/Section 110(1B) was allowed and on 17/05/2018, I have personally verified the seized property listed below:-

File No.	Description of goods seized
SD/INT/AIU/21/2018 APD	Assorted Gold jewellery (from Pax no. 1 – 3 Crude Gold spiral Bangles – 24kt- 576 gms. Rs. 15,41,808/- and from pax no. 2- Crude Gold kada- 24kt. 320 gms- Rs. 8,56,560/- & Gold Kada- 18 Kt- 132 gms- 2,64,998/-) collectively weighing 1028 gms

- (i) The above listed property has been personally verified and found to be correct.
- (ii) The above property was photographed in my presence and the said photographs are attested by me.
- (iii) This certificate is not concerned with sealed condition of the above listed property.

Place: Mumbai
Date: 18/05/2018

sd/-
(I.R. Shaikh)
Metropolitan Magistrate,
66th Court, Andheri.

7. On 1 June 2018 a disposal order came to be passed to dispose of the petitioner's gold jewellery. The said order reads thus:

“DISPOSAL ORDER

To: The Dy. Commissioner of Customs, Disposal Unit.
Chhatrapati Shivaji International Airport, Sahar, Mumbai-99

The goods listed below may be disposed of at the earliest. After disposal, full particulars of disposal should be intimated to this unit with reference to this Disposal :

Sr. No.	File No.	PAX Name	W/H Entry No.	Description of goods	Value in Rupees	Remarks
01	SD/INT/AIU/21/2018 AP 'D'	Mrs. Leyla Mahmoodi and Mr. Mojtaba Gholami	DS-I/R2/76/2018 D Location- CBT-II	Assorted gold jewellery totally weighing 1028 grams	Rs.26,63,366/-	Certificate dated 18.05.2018 regarding completion of action u/s. 110 of the Customs Act, 1962, is enclosed herewith

Sd/- 01.06.18
(Girish Kumar Sharma)
I.O. AIU/'D' Batch

(R.B. Mishra)
ACS/AIU 'D' Batch

(Subrat Rout)
Asst. Commissioner of Customs
AIU,CSI Airport, Mumbai”

8. On 13 June 2018 the Deputy Commissioner of Customs issued a letter of authority, authorizing Shri. D. P. Kshirsagar, Air Customs Superintendent, Gold Disposal Section, *inter alia* to withdraw the gold jewellery packages from the strong room for the purpose of depositing in India Government Mint, Mumbai. The gold jewellery belonging to the petitioner was indicated under the following entry. The relevant contents of the said authority letter are required to be noted which read thus:-

“OFFICE OF THE COMMISSIONER OF CUSTOMS (AIRPORT)
TERMINAL-2, LEVEL-II, CHHATRAPATI SHIVAJI INTERNATIONAL AIRPORT
SAHAR, ANDHERI (EAST), MUMBAI – 400 099.”

F. No. AirCus/71-01/2018-19/Pt-I

Date 13.06.2018

AUTHORITY LETTER

I, J. P. Singh, Asstt. Commissioner of Customs, Gold Disposal Section, CSI Airport, Mumbai hereby authorize Shri D. P. Kshirsagar, Air Customs Superintendent-Gold Disposal Section, to withdraw the following packages, said to contain gold/gold jewellery from Strong Room for the purpose of depositing in the India Government Mint, Mumbai under escort of Shri R. M. Salvi, Head Hawaldar, under supervision of Shri D.P. Kshirsagar, ACS-Gold Disposal Section and Shri Prasad S. Pednekar, ACO-Gold disposal Section, CSI Airport, Mumbai

Sr. No.	File No.	No. of Pkg s.	Description	Weight (in gms)	Value (in Rs.)	Remarks
1					
9	SD/INT/AIU/21/2018 AP D	1	One sealed pkg stc Assorted gold jewellery totally weighing 1028 grams	1028	26,63,366.00	Action under section 110 completed on 18.05.2018. Disposal order dated 01.06.2018.

(emphasis supplied)

9. On 6 July 2018 a show cause notice is stated to have been issued to the petitioners calling upon the petitioners as to why the seized gold jewellery ought not to be confiscated and penalty imposed. However, it appears that before the show cause notice could be taken to its logical conclusion and an adjudication order to be passed thereon, on 1 August 2018 the said gold jewellery belonging to the petitioners was sold by State Bank of India and an intimation to that effect was issued by the State Bank of India vide letter dated 1 August 2018 addressed to the Commissioner of Customs (Airport). The contents of the said letter read thus:-

Date : 01.08.2018
Ref. No. BBM/2018-19/97

To,

The Commissioner of Customs (Airport)
Terminal – 2, Level-II
Chhatrapati Shivaji International Airport,
Sahar, Andheri (East),
Mumbai – 400 099.

Dear Sir,

**DISPOSAL OF 75,520 KG. CONFISCATED GOLD-AUCTION LO
NO-17, DATED 26.07.2018**

With reference to your letter no. F.No. Aircus/71-01/2018-19/Pt-1-Disposal, we sold your confiscated gold through auction dated 01.08.2018 of total 75520 gms gold of 995 purity deposited with us, as per average market price per gram based on closing market price reported in three economic dailies dated 01.08.2018, i.e. Rs.2967.50 per gram. The details are as under:

A			
1	Price of Gold (Highest bid price per gm. rate Rs.2967.5/gm)	75520 gms 2967.5	224105600.00
2	Add – CGST @ 1.5%	3361584.00	
3	Add – SGST @1.5%	3361584.00	
4	Total price of Gold (Inclusive of GST)		230828768.00
B			
1	Price of Gold (Highest bid price per gm. Rs.2967.5/gm)	75520 gms 2967.5	224105600.00
2	Less out of pocket expenses @ 1%	2241056.00	
	Less – CGST @ 9% on out of pocket expenses	201695.00	
	Less – SGST @ 9% on out of pocket expenses	201695.00	
	Net Amount Payable to Customs Authority vide DD No.- 319233 dated 02.08.2018		221461154.00

GST amount recovered as mentioned above has been deposited with the concerned Govt. authorities.

Yours faithfully,

Sd/-

For Asst. General Manager”

10. It may be observed that, as to whatever had happened within the department from the date of the seizure of the gold jewellery that is on 14 January 2018 till the disposal of the gold jewellery which had taken place on 1 August 2018, as informed by State Bank of India, the petitioners were never put to any notice whatsoever, much less, in a manner the law would mandate that the petitioners' gold jewellery as seized was disposed of / sold. Surprisingly the petitioners were kept in complete darkness either personally or through their country's consulate, in regard to the disposal of their gold jewellery.

11. On 18 January 2019 an order-in-original came to be passed by the Additional Commissioner of Customs. It clearly appears that before such orders could be passed, the petitioners were not heard, the petitioners were not furnished with the copy of the show cause notice in a manner known to law. By such order-in-original, for the reasons as recorded in such order, the Additional Commissioner of Customs ordered absolute confiscation of the gold jewellery as also imposed personal penalty of Rs.1,75,000/- of petitioner No.1 and personal penalty of Rs.1,25,000/- of petitioner No.2.

12. Significantly the order-in-original does not record that the gold jewellery belonging to the petitioner was already sold and disposed of.

13. The petitioners being aggrieved by the order-in-original dated 18 January 2019 preferred an appeal before the Commissioner of Customs (Appeal). In the

appeal, the petitioners stated that they have received a copy of the order through the Consulate of Iran on 27 February 2019. The petitioners categorically contended that they had no intimation of the proceedings of the show cause notice, as initiated by the Customs Officer, as also they were not aware of the order-in-original passed on the show cause notice. It was contended that the Consulate General of Islamic Republic of Iran, Mumbai was representing the petitioners who were based in Iran. The petitioners stated that they were the owners of the seized goods and also produced the purchase invoices dated 20 June 2017 and that the gold was dutiable and not prohibited and hence, re-export of the goods may be allowed. The petitioners were represented by the Vice Consul of the Consulate General of the Islamic Republic of Iran, who argued on the grounds as raised in the appeal. The Commissioner of Customs (Appeal) passed an order on the appeal (order-in-appeal) dated 28 January 2020 *inter alia* observing that the intention of the petitioner was nothing but to smuggle the gold jewellery. However, while confirming the order-in-original, the Commissioner (Appeals) reduced the penalty imposed on the petitioner from Rs.1,75,000/- to Rs.1,25,000/- for petitioner No.1 and from Rs.1,25,000/- to Rs.1,00,000/- to petitioner No.2 and to that extent, modified the order-in-original.

14. The petitioners being aggrieved by the order-in-appeal, approached the Revisional Authority namely the Principal Commissioner and Ex-officio Additional Secretary to the Government of India, by filing a revision application

under Section 129DD of the Customs Act. In the revision application, the petitioners contended that a panchanama was drawn in English, a language not familiar to them. They also sought an opportunity to cross-examine the panchas. The petitioners contended that the petitioners were tourists and were eligible to carry gold including personal jewellery for the stay in India. They contended that they were not involved in any smuggling activity in the past. The petitioners contended that the jewellery under absolute confiscation was not dutiable as personal gold jewellery was not prohibited items and were only restricted items. Another significant contention as urged by the petitioners was that they were not given reasonable opportunity to defend the proceedings of the show cause notice, which was in violation of the principles of natural justice. The respondents submitted their written reply.

15. The Revisional Authority passed final orders on the petitioners' Revision Application dated 19 September, 2022 *inter alia* observing that the quantity of the gold jewellery was not large and that the petitioners were wearing the gold jewellery as seized. It was observed that there were no allegations that the petitioners were habitual offenders and of being involved in similar offences earlier. It was also observed that the quantity and facts of the case indicated that it was a case of non-declaration of gold jewellery and not smuggling. The Revisional Authority hence observed that in the facts and circumstances, the misdemeanour would be required to be kept in mind, while using discretion under Section 125 of the Customs Act and while imposing quantum of penalty.

The prayer of the petitioners that they, being foreign nationals, be allowed to re-export the gold jewellery, was also considered. The revisional authority observed that considering the individual case of the petitioners, the quantum of gold jewellery being small and considering the position in law, the absolute confiscation of the gold jewellery was harsh and not justified. It was thus held that in the facts of the case, the petitioners being foreign nationals, an option to re-export the gold jewellery, on payment of redemption fine should have been allowed. It was hence observed that the gold jewellery be permitted to be re-exported on payment of a redemption fine. Also it was observed that the reduced penalty was commensurate and was not required to be interfered. Accordingly, following order was passed by the revisional authority disposing of the petition:-

“18. In view of the above, the Government modifies the impugned order of the Appellate Authority to the extent of the absolute confiscation of the impugned gold jewellery detailed at Table No.1 above, collectively weighing 1028 grams and valued at Rs. 26,63,366/-. The impugned gold jewellery mentioned at Table No. 1 above, having total net weight of 1028 grams, and market value of Rs. 26,63,366/- is allowed to be re-exported on payment of a redemption fine of Rs. 5,25,000/- (Rupees Five Lakhs Twenty Five Thousand only). The reduced penalty imposed on A1 and A2 of Rs. 1,25,000/- and Rs.1,00,000/- respectively is proper and judicious and the Government upholds the same.

19. The OIA passed by the AA is modified in the above terms only to the extent of modifying the absolute confiscation and granting an option to the applicants to re-export the gold jewellery on payment of a redemption fine. The penalties imposed by AA are sustained.

20. Revision Application is disposed of on the above terms.”

16. In pursuance of the orders passed by the Revisional Authority, the petitioners through their Advocate approached the Principal Commissioner of Customs vide letter dated 23 January, 2022 requesting that the Revisional Authority, having granted redemption of gold jewellery in question 1028 grams valued on payment of Rs. 5,25,000/- for re-export, requested that necessary directions be issued to the concerned authority to inform the petitioners as to whether the gold jewellery is available with the Department for redemption to the petitioners. On 13 October, 2022, a reminder letter was addressed by the Advocate for the petitioner to the Joint Commissioner, that reply to the earlier letter was not received and the details were not furnished, so as to execute the orders passed on the revision application. However, as no reply was received, a detailed reminder dated 02 November, 2022 was addressed inter alia recording that Consulate General of Islamic Republic of Iran, Mumbai was following up the matter, and the correct position was required to be informed to the Embassy Officials, as no information in regard to the availability of the confiscated gold was being furnished. It was, therefore, requested that the authorities ought to look into the matter and inform whether the confiscated goods were available. As no reply was received, another letter dated 24 November, 2023 came to be addressed by the petitioners' Advocate to the Principal Commissioner of Customs. Making a reference to the earlier letters, it was requested that no sooner it is confirmed that the gold jewellery was available for re-export, the petitioners would deposit the redemption fine and the penalties failing which the petitioners would have no alternative, but to approach the High Court. As

no response was received to such letter, the petitioners have filed the present petition making the prayers as noted above.

(C) Reply Affidavits

17. The respondents have filed two reply affidavits. The first reply affidavit is of Mr. G. B. Tilve, Assistant Commissioner of Customs, which does not dispute that the petitioners were carrying the gold jewellery in question, when they reached Mumbai Airport by Oman Air Flight, on 14 January, 2018. The affidavit sets out the facts in relation to the adjudication of the show cause notice, the orders passed on the show cause notice, the appeal preferred by the petitioners, orders passed by the appellate authority and thereafter in regard to the orders passed by the revisional authority on the petitioners' revision. As the said facts are already discussed and subject matter of record, they need not be detailed any further, suffice it to observe that there is no dispute that the orders passed by the Revenue Authority would direct the Department to permit the petitioners to re-export the gold and such order has attained finality.

18. In so far as the availability of the gold is concerned, the challenge as raised to the approach of the Department in not reverting the petitioners' repeated queries that the gold be made available, so that the redemption fine can be paid, the case of the department can be noted. It is stated in the affidavit that Notification No.31 of 86 dated 05 February, 1986 as amended from time to time, issued under Section 110(1A) of the Customs Act authorizes the Central Government, to issue a notification for disposal of gold on considerations as

provided in sub-section (1A), namely having regard to the perishable, hazardous nature of any goods, depreciation in the value of goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, as soon as, may be after its seizure, by following the procedure prescribed under Section 110(1B) of the Customs Act, 1962. It is stated that the jewellery seized from both the petitioners fell under item No.AA specified under the said Notification No.31 of 86 as amended, which pertains to "gold in all forms including bullion, ingot, coin, ornament, crude jewellery". It is stated that in view of the said provision and as gold being a precious item having high value, there are constraints on the storage of the same in the office for longer duration. Hence, in view of the specific provision for disposal of goods, as soon as after seizure, after following due procedure, an action was taken by respondents to dispose of the gold jewellery belonging to the petitioners, which was justified and legal. It is stated that the ownership of the seized gold had stood vested with the Central Government post confiscation. Hence, there was no question of depriving the petitioners of their own property.

19. In paragraph 7 of the affidavit, it is contended that Section 110 of the Customs Act provides for a notice, such notice dated 04 April, 2018 was issued to both the petitioners and their Advocates Mr. Prakash Shingrani and Mr. Prasad Kamble, as also the same was put on the notice board at the airport. It is further contended that as per the provisions of Section 110(1B), an application was made before the Court of the learned Metropolitan Magistrate, for identification of the petitioners' gold jewellery, the same was allowed and

Certificate of verification was issued by the learned Metropolitan Magistrate on 18 May, 2018. It is stated that the jewellery was sold in auction through State Bank of India as per the procedure, and to that effect a letter dated 01 August, of State Bank of India was issued informing auction of the gold which contained the gold seized from the petitioners. In so far as the return of the gold to the petitioners is concerned, in paragraph 16 of the affidavit, it is stated as under:-

“16 With reference to Ground M, I submit that the sale proceeds of seized gold after adjusting the liabilities of the Petitioners i.e redemption fine and penalties can be returned to the Petitioners as the Revisionary Authority has upheld the confiscation of seized gold and penal action against the Petitioners. However interest is not applicable under the provisions of Section 27 A of the Customs Act, 1962 as the case does not pertain to duty.”

20. There is a second affidavit filed on behalf of the Department also of Mr. G. B. Tilve, Assistant Commissioner of Customs dated 07 October, 2023. The said affidavit is nothing but a replica of the first reply affidavit which seeks to justify the confiscation and disposal of the gold jewellery of the petitioners.

21. A rejoinder affidavit has been filed by the Constituted Attorney of the petitioners, reiterating the contentions as urged in the petition. The contentions are *inter alia* that the sale of the petitioners jewellery is illegal being contrary to the provisions of the Customs Act and Article 300A of the Constitution.

D Submissions on behalf of the petitioners:-

22. Having considered the pleadings, we now turn to the submissions as advanced on behalf of the petitioners. It is submitted that in the present case gold jewellery was seized by the respondents from the petitioners, exercising

powers under the Customs Act. It is submitted that when the gold jewellery was seized, there was a legal obligation on the part of the respondents to preserve the property of the petitioners and keep the same intact. Also there was an obligation to take reasonable care of the seized jewellery so as to enable the respondents to return the gold jewellery to the petitioners, in the same condition in which it was seized. The position was that the government was a bailee until the confiscation order attained finality. It is submitted that the order passed by the adjudicating authority in adjudicating the show cause notice is not a final order, as it is subject to an appeal and revision. There is a likelihood that, in such further proceedings, the confiscation order in a given case may be reversed or modified, in such event the seized gold could no longer be retained. It is hence submitted that there would be a statutory obligation on the respondents to return the goods to the owner. It is next submitted that once it was decided in favour of the petitioners who are the owners of the gold jewellery that the same be returned either for re-export or otherwise and the said order is not stayed by any Court, it becomes an absolute liability of the respondents to return the goods to the petitioners. In such case, the petitioners being the owners of the goods, have the right to demand the seized jewellery. It is submitted that the respondents would not have any legal right to dispose of the goods without following due procedure in law. It is further submitted that an order for its disposal passed by the Magistrate would not in any manner extinguish the right of the owner to demand the return of the property and the obligation of the respondents to return the gold jewellery to the petitioner and

in its absence, the respondents are liable to pay the market value of the seized gold jewellery to the petitioner. It is submitted that applying the provisions of Section 110(1A) of the Customs Act was illegal as gold does not fall within the meaning of perishable or hazardous goods. Therefore, any action on the part of the respondents to dispose of the said goods under Section 110 would amount to illegality. In this context, it is submitted that it is held by the Delhi High Court in the case **Zhinat Banu Nazir Dadany Vs. Union of India**¹ that in case of seizure of gold or gold ornaments / items, such goods are neither perishable nor hazardous as per Section 110(1A) of the Customs Act and that such goods are required to be disposed of only after issuing a notice to the person from whom the gold was seized. It is next submitted that without admitting that Section 150 was applicable in the present facts, no notice under Section 150 of the Customs Act was issued to the petitioners before the disposal of the gold jewellery. It is strongly contended that the fact of disposal of seized confiscated goods, was also not brought to the knowledge of the appellate authority or the Revisional Authority at any point of time.

23. It is next submitted that the Revenue's Circular Reference F.No.711/4/2006-Cus.(AS) New Delhi dated 14 February 2006, the Board had stressed upon the requirement of issuing notice to the owner of the goods, under any provision of the Customs Act before the disposal of the confiscated goods in respect of which appeals / legal remedies have not been exhausted by the owner of the goods. It is submitted that such instruction was issued by the Board realising that the seized goods were disposed of without issuing notice to the

¹ 2019(367) ELT 385 (Del.)

owner of the goods, which resulted in a loss to the exchequer on failure to comply with the requirements of Section 150 of the Customs Act. It is submitted that the customs authorities have failed to adhere to the instructions issued by the Board in regard to issuance of a notice before the disposal of the gold jewellery in question, which has resulted in undue financial loss and serious prejudice to the petitioner. It is submitted that in the present case, the order passed by the Revisional Authority has attained finality which is required to be implemented in its letter and spirit. The respondents cannot be heard to say that such order would not be complied with and/or that the petitioners' gold jewellery would not be returned and made available to the petitioners for re-export. It is submitted that the petitioners in the present case have been put to undue loss and are deprived of their property, apart from serious harassment. Such actions on the part of respondents is violative of the petitioners right guaranteed under Article 300A of the Constitution.

24. It is next submitted that the Circular dated 6 September 2022 is misconceived as the said circular is not binding on the petitioner. It is submitted that such circular cannot override the statutory provisions. In support of such contentions, reliance is placed on the decision of the Madras High Court in the case **Carista Herbal Products (P) Ltd. vs. Commissioner of Central Excise, Pondicherry²**; **Union of India Vs. Amalgamated Plantations (P) Ltd.³**; **Kalyani Packaging Industry Vs. Union of India⁴**.

² 2019(370)ELT 223(Mad.)

³ 2016(340)ELT 310 (Gau.)

⁴ 2004(168) ELT 145 (S.C.)

25. In support of the submissions on illegal disposal of the gold and that the petitioners have become entitled to return of the jewellery and / or for payment of market value of the goods, reliance is placed on the decisions in **Union of India Vs. Shambhunath Karmakar**⁵; **State of Gujarat Vs. M.M.Hazi Hasan**⁶.

E. Submissions on behalf of the respondents:-

26. On the other hand Mr. Devang Vyas, learned ASG has made the following submissions:

At the outset Mr. Vyas has fairly submitted that the gold jewellery subject matter of the proceedings in the present case, after its seizure was disposed of / sold. He however submits that the provisions of Section 150 of the Customs Act are not applicable as in the facts of the present case, the gold was already sold although later on confiscated. It is however submitted that proper procedure was followed inasmuch as after seizure a show cause notice was issued to the petitioners and an order adjudicating the show cause notice came to be passed on 6 July 2018 whereby the goods were directed to be confiscated. It is his submission that Section 110 with its sub-sections are applicable so as to justify the orders passed by the respondents to dispose of the petitioners gold jewellery. Mr. Vyas has placed reliance on the Notification dated 22 December 1997 (Notification No.72/97-Cus.(N.T.), to submit that as per the provisions of Section 110(1A) of the Customs Act, by such notification, gold, in all forms including bullion, ingot, coin, ornament, crude jewellery, has been notified

⁵ 1986(26) ELT 719 (Cal.)

⁶ AIR 1967 SC 1885

under the said provision. It is submitted that Section 110(1B) of the Customs Act confers an absolute power on the department to dispose of the gold jewellery in the manner as set out in the said provision which would include power to dispose of even prior to adjudication. It is his submission that the department has strictly followed the provisions of Section 110. It is next submitted that disposal of the gold jewellery in question would not amount to sale. Mr. Vyas would next submit that the power conferred on the Customs Authorities to dispose of gold has not been assailed by the petitioners. The notifications as issued by the Customs Authorities are fully applicable. He has further submitted that neither the circular nor the statutory provisions are assailed by the petitioners and on this count, the petition ought not to be entertained. In support of such submissions, reliance is placed on a decision of this Court in **Shabir Ahmed Abdul Rehman vs The Union Of India**⁷.

F. Analysis and Conclusion

27. We have heard learned Counsel for the parties, we have also perused the record.

28. At the outset, we may note some of the admitted facts. It is not in dispute that on 14 January 2018 the petitioners arrived in India and were apprehended at the Mumbai Airport. The jewellery belonging to the petitioners which were gold bangles came to be seized by the Customs officials.

⁷ 2009(235) ELT 402(Bom)

29. The power of the Customs Authorities to seize the goods is conferred by Section 110 of the Customs Act and its application was subject matter of debate in the present proceedings. We thus note the said provision which reads thus:-

“110. Seizure of goods, documents and things.—

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to remove, transport, store or take physical possession of the seized goods for any reason, the proper officer may give custody of the seized goods to the owner of the goods or the beneficial owner or any person holding himself out to be the importer, or any other person from whose custody such goods have been seized, on execution of an undertaking by such person that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that where it is not practicable to seize any such goods, the proper officer may serve an order on the owner of the goods or the beneficial owner or any person holding himself out to be importer, or any other person from whose custody such goods have been found, directing that such person shall not remove, part with, or otherwise deal with such goods except with the previous permission of such officer.

(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under subsection (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1B) Where any goods, being goods specified under subsection(1A), have been seized by a proper officer under subsection(1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

(1C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application.

(1D) Where the goods seized under sub-section (1) is gold in any form as notified under sub-section (1A), then, the proper officer shall, instead of making an application under sub-section (1B) to the Magistrate, make such application to the Commissioner (Appeals) having jurisdiction, who shall, as soon as may be, allow the application and thereafter, the proper officer shall dispose of such goods in such manner as the Central Government may determine.

(2) Where any goods are seized under sub-section(1) and no notice in respect thereof is given under clause(a)of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified:

Provided further that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section(3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs.

(5) Where the proper officer, during any proceedings under the Act, is of the opinion that for the purposes of protecting the interest of revenue or preventing smuggling, it is necessary so to do, he may, with the approval of the Principal Commissioner of Customs or Commissioner of Customs, by order in writing, provisionally attach any bank account for a period not exceeding six months:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform such extension of time to the person whose bank account is provisionally attached, before the expiry of the period so specified.”

(emphasis supplied)

30. On a plain reading of Section 110 of the Customs Act, it is quite clear that it is a provision in relation to seizure of goods, documents and things. It provides that if the proper officer has a reason to believe that any goods are liable to confiscation under the Customs Act, he may seize such goods. Sub-section (1), sub-sections (1A), (1B) and (1D) are required to be cumulatively read inasmuch as Section (1A) is the the power of Central Government to issue a notification in the Official Gazette to specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1) be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure as specified in the said provision. This having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations. Sub-section (1B) provides that any goods specified under sub-section (1A), having been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, marks, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under the

Customs Act and shall make an application to a Magistrate for the purpose *interalia* of certifying the correctness of the inventory so prepared; or taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or allowing to draw representative samples of such goods, in the presence of the Magistrate and certifying the correctness of any list of samples so drawn. Sub-Section (1C) provides that when an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application. Sub-section (1D) provides that when the goods seized under sub-section (1) is gold in any form as notified under sub-section (1A), then, the proper officer shall, instead of making an application (1B) to the Magistrate, make such application to the Commissioner (Appeals) having jurisdiction, who shall, as soon as may be, allow the application and thereafter, the proper officer shall dispose of such goods in such manner as the Central Government may determine.

31. The question is as to how and in what manner Section 110 of the Customs Act would be applicable to the seizure of the petitioners' gold jewellery as seized on 14 January 2018.

32. Considering the effect of the provisions of sub-section (1A) to (1C) of Section 110 of the Customs Act, even assuming that such provisions apply to the seizure in question, we may observe that there is no reason available on record which would justify that there was a need to dispose of/sell the gold jewellery of

the petitioners, merely because a Notification dated 22 December, 1997 under sub-section (1A) of Section 110 of the Customs Act was issued to include gold. Section 110 when permits disposal of a seized item like gold, it cannot be without subjective satisfaction to be recorded in writing specifying the reason, the gold required to be disposed of, for any reason as specified in sub-section (1A). We would test this proposition. Sub-section (1A) provides for eventualities which would empower the Central Government to specify the goods or class of goods which can be disposed of by the proper officer as soon as may be after its seizure having regard to the nature of such goods, namely in the event the goods are perishable or hazardous or there is likely to be depreciation in the value of the goods with the passage of time, or there are constraints of storage space for the goods and/or any other relevant considerations. This can be done by the Central Government by issuing a notification to be published in the Official Gazette specifying such goods. Thus, each of such eventualities as contemplated under sub-section (1A) necessarily would be required to be applied to the goods seized, so as to test, as to which of such stipulations become applicable to the category of goods. The reason being that a particular class of goods may invite all the ingredients/eventualities whereas another category of goods may attract only one of the ingredients. In the event if only one of the ingredients is to become applicable, then at the place of the seizure, such an eventuality is required to have factually existed and ascertained, and the proper officer would be required to record reasons, that a factual situation as falling under sub-section (1A) existed at such place of seizure and the place of the

seized goods, and hence, it would be imperative to dispose of the goods. In short, such reasons are required to be present and recorded by the proper officer before any steps are taken to deal with the goods to be disposed of, as per the procedure as set out in sub-sections (1B), (1C) or (1D) of the Customs Act.

33. Mere issuance of a notification under sub-section (1A) of Section 110 of the Customs Act would not suffice and enable the proper officer to have instant disposal of the goods unless a subjective satisfaction as noted by us is eminently present on any of the eventualities for such action to be resorted and the owner of the goods is informed in that regard. To take a situation converse to what we have observed, namely mere issuance of notification under sub-section (1A) of Section 110 would suffice and enable the proper officer to dispose of the goods, would be a difficult proposition to be accepted, in as much as, it would certainly lead to patent arbitrariness as also may defeat the other provisions of the Act. We are thus, of the opinion that even after recourse to the provisions of sub-sections (1A) to (1D) is to be taken, the same would be required to be taken only after a subjective satisfaction is reached by the Customs officers and the same is brought to the knowledge of the owners of the goods that the goods are required to be disposed of. Failing this, the action to dispose of the goods would be unilateral action leading to an unguided and arbitrary exercise of powers by the customs officials. Such is not intention of Section 110 read with its sub-sections. It is well settled that any action of the government officials is required

to be supported by cogent reasons as borne out by record, failing which it would be arbitrary and illegal and more so when it deals with the property of persons.

34. Now applying such legitimate requirements to the facts of the present case, we find that no reasons whatsoever are placed on record, much less brought to our notice, as to why it was felt necessary by the proper officer that the petitioners' gold was required to be disposed of hurriedly on 1 June, 2018 even prior to the issuance of show cause notice, which was issued on 6 July, 2018, i.e. one month and 5 days after the disposal order.

35. Insofar as the applicability of sub-section (1D) is concerned, in the present case, sub-section (1D) was not applicable, as an application was made to the Magistrate and no such application was made, as provided under sub-section (1D), to the Commissioner (Appeals).

36. There is something more fundamental in the present proceedings inasmuch as on 14 January, 2018 the gold jewellery in question was seized from the petitioners. Sub-section (2) of Section 110 provides that where any goods are seized under sub-section (1) and no notice in respect thereof is issued under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. Thus, the seizure having taken place on 14 January, 2018, six months period was to end on 14 July, 2018, however, what is significant is that a show cause notice for

confiscation of such gold came to be issued to the petitioners on 6 July, 2018, however, the same was never served on the petitioners in a manner known to law.

37. Be that as it may, it is surprising as to how such notice to confiscate the gold jewellery could be issued, when the gold jewellery stood disposed of by the Assistant Commissioner by an order dated 1 June, 2018, which was preceded by notice dated 4 April, 2018 as noted above, although all this was not to the knowledge of the petitioners. Once the gold itself was not available for confiscation, it is surprising as to what was the need and purpose for issuing such notice. This inasmuch as the confiscation of the gold jewellery in question would be required to be understood in terms of what Chapter XIV of the Customs Act would provide, which contains provisions in relation to confiscation of goods. In the said Chapter, provisions of Section 124 would have significant bearing on the facts of the present case, inasmuch as Section 124 provides for issuance of show cause notice before confiscation of goods. Section 124 reads thus:

124. Issue of show cause notice before confiscation of goods, etc.

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person—

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing] him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice

against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.

Provided further that notwithstanding issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed.”

38. On a plain reading of Section 124 what would be implicit is that an order confiscating any goods or imposing any penalty can be passed only after the owner of the goods is issued a notice in terms of the said provisions *interalia* informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty and an opportunity of making a representation in writing is given to him within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty and a reasonable opportunity of being heard. The object of the provision making an allowance of representation is to permit such person who has been issued such notice to show cause against non-confiscation. In the event, the case of the noticee is to be accepted, the only consequence which the law would recognize would be that the confiscation of goods, subject matter of show cause notice, itself would be dropped. The corollary to this would be that the seized goods are required to be released to the owner. If they are not to be released, then Chapter XIV makes another provision, namely, in Section 125 which provides for ‘Option to pay fine in lieu of confiscation’. Section 125 reads thus:

125. Option to pay fine in lieu of confiscation.

1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

Explanation.—For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received.”

39. Now applying such provision to the facts of the case, the situation is quite alarming, inasmuch as, on one hand, the Assistant Commissioner had already disposed of the gold jewellery of the petitioners before the period of six months as contemplated under sub-section (2) of Section 110 would come into play, that is, almost at the fag end of such period of six months would come to

an end (8 days before such period would expire), the petitioners were purportedly issued a show cause notice under section 124 as to why the gold jewellery of the petitioners ought not to be confiscated. As noted above such show cause notice in effect was meaningless as the gold jewellery itself was not available for confiscation.

40. It is quite glaring that the respondents have failed to follow the basic procedure, the law would recognize, namely, that knowing well that the petitioners are foreign nationals, no attempt was made to serve show cause notice on the petitioners through the Consulate General of the Islamic Republic of Iran, when the respondents were fully aware that the petitioners were not available in India. The concerned officer nonetheless proceeded to adjudicate the show cause notice and passed an Order-in-Original on 18 January, 2019 without hearing the petitioners.

41. Be that as it may, as noted above, now the proceedings which had arisen under the show cause notice dated 6 July, 2018 issued to the petitioners have attained finality in view of the Revisional Authority passing an order on 19 September, 2022, whereby it has been held that absolute confiscation was not justified in the present case and the petitioners be permitted to re-export the gold jewellery on payment of a redemption fine. Such order as seen from the facts as noted above is incapable of compliance, inasmuch as, the gold jewellery itself is not available for the petitioners to re-export it. This more significantly as

the Revisional Authority having observed that this was not the case where the petitioners have attempted to smuggle the gold.

42. As rightly urged on behalf of the petitioners, the Assistant Commissioner who disposed of the gold never informed either the Appellate Authority or the Revisional Authority that the seized gold jewellery of the petitioners itself was not available and was disposed of. This, in our opinion, is something which raises a serious doubts on the method and manner in which the Custom officers discharge their duties under the Act. In our opinion, even if there is a power to dispose of the gold, it has to be exercised fairly, reasonably and transparently. Disposal of the property belonging to the persons like the petitioners and / or to sell the seized goods at the *ipse dixit* of the officers, is not what the law would recognise. The procedure to dispose of such valuable commodities is required to withstand the test of law and more particularly, the constitutional requirement of reasonableness, non-arbitrariness, fairness and transparency as enshrined under Article 14 of the Constitution coupled with safeguarding the valuable rights of property recognized by the Constitution, under Article 300A. It cannot be otherwise, as Section 110(1A) would be required to be read, interpreted and applied only in a manner the basic law of land under the provisions of Articles 14 and 300A of the Constitution of India, would permit the department to so apply.

43. As noted above sub-section (1A) of Section 110 cannot be read as as absolute entitlement or authority with the proper officer to dispose of the items

like gold in the absence of any cogent reasons, which would attract the ingredients of sub-section (1A) of Section 110. Such reasons as falling under sub-section (1A) are required to be intimated to the owner of the goods for the reason that ultimately the disposal of the goods would entail serious consequences of affecting the constitutional rights of the owner of the goods guaranteed under Article 300A of the Constitution, as the owner would be deprived of his property. This would be the basic requirement of law the proper officer dealing with any goods, which are merely seized and not confiscated would be required to be followed. This for the reason that prior to the goods being confiscated, rights in the goods, the corporeal ownership of the goods remain with the owner of the goods and such rights do not stand vested and/or transferred in favour of the Customs department / Government.

44. Now applying such basic principles to the case in hand, we find that in the notice dated 4 April 2018 albeit not received by the petitioners, no reason whatsoever was set out as to why a decision is being taken to dispose of the goods. The contents of the said notice are required to be noted which read thus:-

“OFFICE OF THE COMMISSIONER OF CUSTOMS (AIRPORT)
TERMINAL-2, LEVEL-II, CHHATRAPATI SHIVAJI
INTERNATIONAL AIRPORT, SAHAR, ANDHERI (EAST), MUMBAI
– 400099.

F.No.SD/INT/AIU/21/2018 AP-D

Date: 04.04.2018

NOTICE

The officers of this Commissionerate had seized assorted gold jewellery totally weighing 1028 grams valued at Rs.26,63,366/- from Mrs. Leyla Mahmoodi and Mr. Mojtaba Gholami, holding Iranian Passport No. M42123461 and F29961431, on their arrival from

Muscat by flight no.WY203 on 14.01.2018. The same was seized under panchanama in the reasonable belief that it was smuggled into India and hence liable for confiscation under the provisions of Customs Act, 1962.

Further, in terms of Section 110 of the Customs Act, 1962, a notice is being issued without prejudice to any person(s) to bring on record the objection, if any, for disposal of the seized assorted gold jewellery totally weighing 1028 grams within fifteen (15) days from the date of issue of this Notice, failing which the same will be disposed off without any further reference to them.

(SUBRAT ROUT)
ASSTT. COMMISSIONER OF CUSTOMS,
AIR INTELLIGENCE UNIT
C.S.I. AIRPORT.

To,

1. Mrs. Leyla Mahmoodi,
Mottahari 28, Hosslenzadeh 5,
Palak 86, Mashhad, Iran
2. Mr. Mojtaba Gholami,
Mottahari 28, Hosslenzadeh 5,
Palak 86, Mashhad, Iran.
3. Notice Board of C.S.I. Airport (through CHS)
4. Mr. Prakash Singrani & Prasad Kamble, Advocate.”

45. It is abundantly clear from the record that the gold jewellery belonging to the petitioners was not merely disposed of but sold by the respondents, which is clear from the respondents’ own showing in the reply affidavit as also compounded by a letter of the State Bank of India dated 1 August 2018. Once the property of the ownership of the petitioners was being disposed of and / or sold, in our opinion, certainly the provisions of Article 300A of the Constitution would stand attracted. Article 300A of the Constitution reads thus:-

“300A Persons not to be deprived of property save by authority of law – No person shall be deprived of his property save by authority of law.”

46. It is well settled that the provisions of Article 300A of the Constitution are available to any person including a juristic person and not confine to only citizen and that the illegal seizure would amount to the owner being deprived of his right of property as contained under Article 300A of the Constitution of India. (See: Paragraph 55 of **Dharam Dutt & Ors vs Union Of India & Ors.**⁸; paragraph 25 of **State Of West Bengal And Ors vs Sujit Kumar Rana**⁹).

47. In the present case the gold jewellery belonging to the petitioners has been dealt, disposed of and sold in patent disregard to the basic principles of law as Articles 14 and 300A of the Constitution would ordain. This apart, even the provisions of the Customs Act, which we have discussed, stand violated not only in taking away the substantial statutory rights as the law would guarantee to the petitioners, on seizure of the petitioners gold jewellery but also in the manner in which the gold jewellery has been disposed of. If such is the consequence of the actions, as taken by the respondents and the same cannot be recognized in law on any parameters, then the only conclusion to be reached by the Court is that the disposal / sale of the gold jewellery belonging to the petitioner, is *per se* illegal, void, *ab initio* and unconstitutional. Once such action on the part of the respondents is being regarded as a brazen illegality, the mandate of law would be to restore to *status quo ante* which is the legitimate corollary to remedy such illegality. The legal principle in this regard can be discussed.

8 (2004)1 SCC 712

9 (2004) 4 SCC 129

48. In **State of Gujarat Vs. Memon Mahomed Haji Hasam**.¹⁰ involved an issue in regard to illegal seizure of the vehicles as belonging to the respondents therein, leading to an order of confiscation being finally set aside and a claim for return of the vehicles being made. It so transpired that the vehicles were sold and the amounts were paid to the creditors of the respondents. It is in such context the Supreme Court observed that the order of confiscation was not the final order and was subject to appeal / further proceedings and if the appellate authority found that there was no good ground for exercising of power of confiscation, the property could no longer be retained under the Act and was required to be returned to the owner, which was the statutory obligation to return the property. It was held that there was a legal obligation to preserve the property in tact, also an obligation to take reasonable care of the same so as to enable the property to be returned in the same condition in which it was seized. It was held that the respondent was entitled to return of the property or to the value of the property. The observations of the Supreme Court in such context are required to be noted, which read thus:-

“6. There can, therefore, be bailment and the relationship of a bailor and a bailee in respect of specific property without there being an enforceable contract. Nor is consent indispensable for such a relationship to arise. A finder of goods of another has been held to be a bailee in certain circumstances.

7. On the facts of the present case, the State Government no doubt seized the said vehicles pursuant to the power under the Customs Act. But the power to seize and confiscate was dependent upon a customs offence having been committed or a suspicion that such offence had been committed. The order of the Customs Officer was not final as it was subject to an appeal and if the appellate authority found that there was no good ground for the exercise of that power, the property could no longer be retained and had under

¹⁰ AIR 1967 SC 1889

the Act to be returned to the owner. That being the position and the property being liable to be returned there was not only a statutory obligation to return but until the order of confiscation became final an implied obligation to preserve the property intact and for that purpose to take such care of it as a reasonable person in like circumstances is expected to take. Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure and confiscation were not sustainable. There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. This was precisely the cause of action on which the respondent's suit was grounded. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it. The order of disposal in any event was obtained on a false representation that the property was an unclaimed property. Even if the Government cannot be said to be in the position of a bailee, it was in any case bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by any act of its agents and servants. In these circumstances, it is difficult to appreciate how the contention that the State Government is not liable for any tortious act of its servants can possibly arise. The decisions in *State of Rajasthan v. Mst. Vidhyawati*, (AIR 1962 SC 933) and *Kasturi Lal v. The State of U.P.* (AIR 1965 SC 1039), to which Mr. Dhebar drew our attention, have no relevance in view of the pleadings of the parties and the cause of action on which the respondent's suit was based.”

49. In “**Union of India Vs. Shambhunath Karmakar & Ors.**” (supra) the Division Bench of the Calcutta High Court on a plea of the respondents therein for return of the gold ornaments, which were seized from them which were forwarded for melting, it was observed that the owner of the goods was entitled to claim damages for disposal of the seized gold. It was observed that the cause

of action for return of the gold accrued on the date the confiscation order was set aside and the owner became entitled to obtain return of the seized gold. It was observed that the seized gold was not sold to a third party for value and that if the seized gold has been forwarded for melting to the Government of India, it really amounted to appropriation of the gold by another department of the Government. It was also observed that if the gold and gold ornaments were melted, the same resulted only in the change of form. The Court observed the Government would continue to hold the melted gold in some form or other and therefore, the Government was bound to return the said gold or the value. It was also observed that at the time when the confiscation order was set aside, both in equity and law *status quo ante* prior to the passing of the confiscation order ought to be restored.

50. In **Zhinet Banu Nazir Dadany** (*supra*) a Division Bench of the Delhi High Court was dealing with a similar situation, as in the present case, wherein the gold as seized by the respondent was disposed of when the same was neither perishable nor hazardous. In such context, the Division Bench held that the gold could not have been hurriedly disposed of and in the absence of a show cause notice being served on the petitioners. It was held that there was no reason to proceed to the disposal of the seized gold without notice, and that too without passing any order on adjudication and accordingly set aside the seizure of the gold with a direction that the proceeds which were collected in the auction which were equal to the value of the gold ought to be refunded to the petitioner

with interest. The relevant observations of the Court in para 22 and 23 which reads thus:

“22. There is no explanation offered by the Respondents as to why they were constrained to dispose of the seized gold, when it was neither perishable nor hazardous. Also, there is no answer why it had to be disposed of without notice being issued to the person from whom it was seized. This irrespective of whether the SCN was served or not. The SBEC has issued a circular dated 14th February 2006 in this regard where it was impressed upon the field formations as under:

“An instance has recently been brought to the notice of the Board where seized goods were disposed of without issuing notice to the owner of the goods. The seizure having been set aside by the adjudicating authority, the owner of the goods sought their return but was advised to obtain the sale proceeds, which were significantly lower than the seizure value. In subsequent proceedings, the High Court has directed the refund of an amount higher than the Sale proceeds, as well as payment of interest. The loss of the exchequer has resulted from a failure to comply with the requirements of Section 150 of the Customs Act, 1962.

2. It is impressed upon field formations that where any goods, not being confiscated goods, are to be sold under any provision of the Customs Act, they shall be sold by public auction or by tender or in any other manner after notice to the owner of the goods.

3. It is further clarified that the requirement to issue notice to the owner of the goods shall also obtain in case of goods that have been confiscated but in respect of which all appeal/legal remedies have not been exhausted by the owner of the goods.”

23. In the present case with the seized material not being perishable, being gold bars there was no reason for the Respondents to have hurriedly disposed it off and that too without notice to the Petitioner. When it was plain that even the SCN was not served upon the Petitioner, there was no reason to proceed with disposal of the seized gold without notice. It also appears that the Respondents hurriedly went ahead and passed an adjudication order more than four years after the gold was seized only after the present petition was filed.”

51. In our opinion, the petitioners would also be correct in contending that the impugned action of the respondents in the present case was in the teeth of

the CBEC instructions dated 14 February 2006. The relevant extract as relied on behalf of the petitioners reads thus:

“8. As per CBEC instructions vide letter **F. No. 711/4/2006-Cus. (AS), dated 14.02.2006**, before selling the goods Notice must be given to the owner/importer. The text of the circular is reproduced herewith-

As instance has recently been brought to the notice of the Board where seized goods were disposed of without issuing notice to the owner of the goods. The seizure having been set aside by the adjudicating authority, the owner of the goods sought their return but was advised to obtain the sale proceeds, which were significantly lower than the seizure value. In subsequent proceedings, the High Court has directed the refund of an amount higher than the sale proceeds, as well as payment of interest. The loss to the exchequer has resulted from a failure to comply with the requirements of Section 150 of the Customs Act, 1962.

It is impressed upon filed formations that where any goods, not being confiscated goods, are to be sold under any provision of the Customs Act, they shall be sold by public auction or by tender or in any other manner after notice to the owner of the goods.

It is further clarified that the requirement to issue notice to the owner of the goods shall also obtain in case of goods that have been confiscated but in respect of which all appeal/legal remedies have not been exhausted by the owner of the goods.”

52. We are also of the opinion that the concerned officer of the respondents in the present case has completely overlooked that the gold jewellery in question was sold / disposed of at the stage of the seizure, in fact, prior to the issuance of a show cause notice under Section 124 of the Customs Act, being issued to the petitioners, much less prior to any order of confiscation being passed, which came to be passed on 18 January 2019. Such order was certainly subjected to an appeal as per the provisions of Section 128 of the Customs Act, before the Appellate Authority and thereafter, a revision being maintainable under the provisions of Section 129DD before the Central Government. It was thus an

obligation on the concerned Customs officials as conferred by law to preserve the gold jewellery belonging to the petitioner unless the circumstances for justified reasons or otherwise were against preservation of the said goods that for no reason whatsoever the goods ought not to be preserved, till the proceedings attain finality. In the present case there are none.

53. We may also sound a note of caution that it would be travesty of justice, as also a patent illegality if in the teeth of the well settled principle of law and constitutional provisions conferring right to property, any authority being conferred on the Customs officials purportedly under Section 110 to dispose of the seized goods, can be recognized, merely because the goods are seized under the Customs Act. The Customs official without recording cogent and acceptable reasons and without a prior notice being issued to the owner of the goods or the persons from whom the goods are seized, would not wield a power / authority to sell and/or dispose of the seized goods, and more particularly, valuable items like gold. Such unbridled power cannot be recognized under the provisions of Section 110 of the Customs Act, and if any action contrary to the legitimate principles of law as applicable and discussed by us hereinabove, is sought to be taken, the same would be rendered illegal.

54. In other words, the scheme as envisaged under Section 110 cannot be read to mean that mere seizure of the gold by the Customs Officer can be construed to confer any power, authority to sell the goods without following the due procedure in law namely of a prior notice of hearing being granted to the

owner of the goods, or to the person from whom the goods are seized, when the property of the ownership of a person is sought to be deprived to him by sale or disposal of the goods. It would be fallacious to read into the scheme of Section 110(1) read with (1A) to (1D) any power to be exercised by the Customs officials which is not based on cogent reasons and which can be exercised without due procedure being not followed, apart from such action satisfying the test of lack of any illegal motives, non arbitrariness, reasonableness and fairness, on the part of the Customs Officials.

55. In the present case, it is difficult to imagine as to what could be the reason for the Customs Officers to dispose of the goods hurriedly and with such lightening speed and by throwing to the wind the norms of fairness and reasonableness. This is not acceptable even from the reading of the provisions of Section 110. Any reading of Section 110 otherwise than what has been discussed above, would amount to foisting draconian, reckless and/or unfettered authority on the Customs Officers conferring a licence to commit illegality. In fact the recognition of any such power with the Custom Officers would lead to an anomalous situation of the substantive provisions and procedure for confiscation and the appellate/revisional remedy being rendered meaningless, only to be realized that any order for return of property at any stage of such proceedings, would merely remain a paper order, impossible of implementation/execution. Thus, such substantive provisions of the Customs Act cannot be rendered nugatory, by recognizing unguided and unfettered powers being

conferred under Section 110 on the Customs Officers, to dispose of the seized property, till the orders of any confiscation attains finality, unless there are strong reasons which would justify any such action when tested on such constitutional and legal parameters, and that too on the satisfaction of the officers to be reached only after hearing the owner of the property.

56. In so far as the reliance on on behalf of the respondents on the decision of this Court in the case of **Shabbir Ahmed Abdul Rehman (supra)**. In our view, the said decision does not take the case of the respondents any further for more than one reason. The Court in para 9 of such decision has observed that the Revenue Authorities were not justified in selling the gold, during the pendency of the appeal. In the present case, we have held that action of the respondent in selling gold pending the appeal/revisional proceeding was bad in law. Secondly, in such case, the revenue had informed the assessee that gold has been handed over to the New House of Customs for disposal, which is not the case before us, inasmuch as no such notice was given to the petitioner before disposal of the gold. Thirdly, on the issue as to whether the assessee was justified in claiming the market value of the said gold, this Court observed that the market value of gold was diminishing, at the relevant time, hence in the fact situation, the claim of the petitioner in seeking market value of the gold was not accepted. Whereas in the proceedings before us there is no such contention that the value of the gold is falling. Lastly the said decision did not decide on the petitioners entitlement to the return of the gold, but decided the claim with respect to

market value of the gold when prices were going down. In the case before us there is specific prayer for return of gold.

57. For the aforesaid reasons, we have no manner of doubt that the petition needs to succeed. The question, however, is as to what can be the relief which can be granted to the petitioners in these circumstances, when there is no iota of doubt, in regard to illegality which has been committed by the respondents in depriving the petitioners of their valuable rights to property. In such circumstances, in our considered opinion, the principles of law which would be required to be applied, is that once the action of the respondents is held to be void, *ab initio*, illegal and unconstitutional, there can be no second opinion that the rights of the petitioners in regard to illegal seizure would be required to be restituted. In such context, we also cannot be oblivious to the directions as issued by the Central Government in passing the orders dated 19 September 2022 on the petitioners' revision, whereby the Central Government has permitted the petitioners to re-export the gold jewellery.

58. In the light of the above discussion, interest of justice would require that the petition be allowed by granting the following reliefs to the petitioners:-

ORDER

(i) It is declared that the action on the part of the Assistant Commissioner of Customs in disposing of / selling the gold jewellery belonging to the petitioners subject matter of the present proceedings, is illegal and unconstitutional.

(ii). The respondents are directed, to restore to the petitioners, equivalent amount of gold namely 1028 gms. and / or to compensate the petitioners by making payment of amounts equivalent to the market value of the said gold, as on date.

(iii) The above directions be complied by the respondents within a period of three weeks from today.

(iv) In the event the petitioners are granted payment of the amounts as directed in (iii) above, the amount of redemption fine and penalty as directed by the Revisional Authority in its order, be deducted.

59. The petition is accordingly, disposed of in the above terms. No costs.

[JITENDRA JAIN, J.]

[G. S. KULKARNI, J.]