

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL, NEW DELHI**

PRINCIPAL BENCH - COURT NO. IV

**Customs Appeal No. 50650 of 2020**

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

**Shri Rakesh Luthra, S/O Krishan Lal**

**Appellant**

R/O 347/12/3, New Kartar Nagar Salem Tabri,  
Ludhiana, Punjab-141008.

VERSUS

**Commissioner of Customs  
(Airport & General)**

**Respondent**

T-3, IGI Airport, New Customs House,  
New Delhi-110037.

**With**

**Customs Appeal No. 50651 of 2020**

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

**Ms. Sunita Luthra, D/O Mr. Mangat Rai**

**Appellant**

R/O 347/12/3, New Kartar Nagar Salem Tabri,  
Ludhiana, Punjab-141008.

VERSUS

**Commissioner of Customs  
(Airport & General)**

**Respondent**

T-3, IGI Airport, New Customs House,  
New Delhi-110037.

**With**

**Customs Appeal No. 50686 of 2020**

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

**Ms. Sonia Luthra, D/O Mr. Puran Parkash  
Nischal**

**Appellant**

R/O 6, Mathew Harrison Street,  
Brampton on Canada

VERSUS

**Commissioner of Customs  
(Airport & General)**

**Respondent**

T-3, IGI Airport, New Customs House,  
New Delhi-110037.

**APPEARANCE:**

Shri A.S. Hasija, Consultant for the Appellant

Shri M.K. Shukla, Authorized Representative for the Respondent

**And  
Customs Appeal No. 50156 of 2021**

(Arising out of Order-in-Original No. 25/Adj/2020 dated 26.02.2020 passed by the Commissioner of Customs (Airport & General), New Delhi)

**Commissioner of Customs  
(Airport & General), New Delhi**

**Appellant**

VERSUS

**Mr. Rakesh Luthra, Ms. Sonia Luthra,  
Mr. Mamik Luthra and Ms. Sunita Luthra**

**Respondent**

**APPEARANCE:**

Shri Girijesh Kumar, Authorized Representative for the Appellant

Shri A.S. Hasija, Consultant for the Respondent

**CORAM :**

**HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)  
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 04.10.2023  
Date of Decision : 08.01.2024**

**FINAL ORDER NOs. 50019-50022/2024**

**HEMAMBIKA R. PRIYA**

Shri Rakesh Luthra, Ms. Sunita Luthra, and Ms. Sonia Luthra (hereinafter referred to as the appellants) have filed the captioned appeals against the common Order-in-Original No. 25-ADJ-2020 dated 16.02.2020 passed by the Commissioner of Customs (Import & General), New Delhi wherein the gold recovered from them was allowed to be redeemed on payment of redemption fine or permitted for re-export and penalties were

imposed on the three of the appellants. The Department has also filed appeals against the decision of the adjudicating authority to permit Rakesh Luthra to redeem the gold, and the permission to re-export gold given to Sonia and Mamik Luthra.

2. The brief facts of the case are that Shri Rakesh Luthra along with Ms. Sonia Luthra, Shri Mamik Luthra and Ms. Sunita Luthra (hereinafter referred collectively as 'appellants') arrived on 08.06.2019 at T-3 IGI Airport, New Delhi by Air India Flight No. AI 335 from Bangkok and walked through Green Channel and they all were intercepted near the exit gate of Customs Arrival Hall. Shri Rakesh Luthra and Shri Mamik Luthra were carrying one hand bag only while Ms. Sonia Luthra and Ms. Sunita Luthra were carrying two hand bags each. All the said four persons were asked whether they were carrying any dutiable goods or gold to which they replied in the negative. They were diverted for scanning of their baggage through the X-Ray machine and nothing objectionable was noticed in their baggage. All the said four persons were made to pass through Door Frame Metal Detector installed in the arrival hall, wherein strong and long sound was heard when Shri Rakesh Luthra, Ms. Sonia Luthra and Shri Mamik Luthra walked through the metal detector. No sound was heard when Ms. Sunita Luthra passed through. Thereafter, personal search of Shri Rakesh Luthra and others was conducted in the Customs Preventive Room in the presence of two witnesses. The searches resulted in the recovery of the items from the appellants as indicated hereinafter.

2.1 Personal search of Shri Rakesh Luthra resulted in:

- (1) 03 (three) pieces of yellow metal bars weighing 1000 gms each and one piece of Yellow metal weighing 225 gms appearing to be gold, total weighing 3225 gms.
- (2) Boarding pass of Air India Flight No. AI 335 dated 07.06.2019.
- (3) One used I phone XS phone having Vodafone SIM No. 9814465658.
- (4) Indian Passport No. SO377792 issued on 07.03.2018 at Chandigarh.
- (5) Indian currency Rs. 12,500/- and Thai Bhatt 1120, USD 1000.

2.2 Personal search of Ms. Sonia Luthra resulted in:

- (1) 01 (one) cut piece of Yellow metal bar appearing to be gold total weighing 900 gms.
- (2) Boarding Pass of Air India Flight No. AI 335 dated 08.06.2019.
- (3) One used iPhone 6 phone having Airtel SIM No. 9876121757.
- (4) Indian Passport No. L237766 issued on 30.09.2015 at Toronto.
- (5) Indian currency Rs. 9,100/- and Thai Bhatt 190, USD 700, CAD 225, UAE DIRHAM 1020.

2.3 Personal search of Shri Mamik Luthra revealed:

- (1) 01 (one) cut piece of yellow metal bar appearing to be gold total weighing 1000 gms.
- (2) Boarding Pass of Air India Flight No. AI 335 dated 08.06.2019.
- (3) One used iPhone 8 phone having traveller SIM (as informed by Noticee-3).
- (4) Canada Passport No. AA223049 issued on 06.06.2017 at Canada.

2.4 Personal search of Ms. Sunita Luthra resulted in:

- (1) Boarding Pass of Air India Flight No. AI 335 dated 08.06.2019.
- (2) One used Samsung phone having JIO SIM No. 7087493675.
- (3) Indian Passport No. SO385480 issued on 07.03.2018 at Chandigarh.

3. Consequent to the personal search, the weight, value and purity of the recovered five pieces of yellow bars was appraised, and the jewellery appraiser submitted his report dated 08.06.2019 as reproduced in the table below:

S.No.	Description of gold	Purity	Weight (in gms)	Value appraised IND
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Noticee -1 Shri Rakesh Luthra

1.	03 (three) pieces of gold bars	999	3000	87,24,011/-
2.	01 (one) cut piece of gold bar	995	225	6,51,681/-
<b>Sub-Total</b>			<b>3225</b>	<b>93,75,692/-</b>

Noticee-2 Ms. Sonia Luthra

1.	01 (one) cut piece of gold bar	995	993	28,76,086/-
<b>Sub-Total</b>			<b>993</b>	<b>28,76,086/-</b>

Noticee-3 Mamik Luthra

1.	01 (one) cut piece of gold bar	999	1000	29,08,004/-
<b>Sub-Total</b>			<b>1000</b>	<b>29,08,004/-</b>
<b>Grand Total</b>			<b>5218</b>	<b>1,5159,782/-</b>

4. One bill for 1225.4 gms of gold in the name of Ms. Sunita Luthra was produced by Shri Rakesh Luthra (one of the appellants). The recovered gold was seized under different seizure memos under Section 110 of the Customs Act, 1962 on the reasonable belief that the same were liable to be

confiscated under Section 111 of the Customs Act, 1962. The original adjudicating authority passed the impugned Order-in-Original No. 25-ADJ-2020 dated 16.02.2020 holding that Rakesh Luthra, Sunita Luthra, Sonia Luthra and Mamik Luthra were not eligible passengers to import gold. Hence the imported gold was confiscated but allowed redemption of the same on payment of fine, penalty and duty at baggage rate. The adjudicating authority also permitted re-export of gold in respect of two appellants, viz., Sonia Luthra and Mamik Luthra. The duty on gold said to be brought by them on their past visits was also confirmed.

5. The learned counsel for the appellant submitted that the said demand of customs duty under Section 28 of Customs Act, 1962 is based on the extracted statement of the appellant. It is settled law that unless the statement is corroborated by any other evidence, the same cannot be admitted as evidence. He contended that there is nothing in the impugned order or the show cause notice dated 19/20.11.2019 to show that the appellant Sunita Luthra had herself brought 2000 gms. of gold apart from 1965.4 gms. allegedly brought by her husband Rakesh Luthra. The statement has been mis-interpreted by the Commissioner to hold the appellant had herself brought gold in the past.

6. The learned counsel further contended that there is nothing in the impugned order or the show cause notice dated 19/20.11.2019 to show that any investigations to corroborate

the veracity of the statements of the appellants with regard to the allegation of past clearances of gold without payment of duty was done by the Department. Consequently, the admission of past clearances of gold without payment of customs duty is not sustainable under the law. The learned counsel placed reliance on the following case laws:-

- (i) In the case of **Centurian Laboratories Vs. Commissioner of Central Excise, Vadodara – 2013 (293) 689 (Tri.-Ahmed.)**, it was held “Mere confessional statement not enough to conclude assessee engaged in clandestine removal as held in the case of **Tejal Dyestuff Industries – 2009 (234) ELT 242 (Guj.)** – Clandestine removal of goods not proved in absence of corroborative evidence – impugned order set aside – Section 11A and 11AC of Central Excise Act, 1944”.
- (ii) In the case of **Debu Saha Vs. Collector of Customs (Preventive) – 1992 (59) ELT 442 (Tribunal)** it was held “evidence – confession of one co-accused not to be corroborated by another co-accused – corroboration to come from independent source.

7. The learned Authorised Representative submitted that the claim of the appellants is without any merit. As per Baggage Rules, 2016, on arrival at an international airport in India, passengers should proceed to Red channel and make a declaration to the customs officers in case they carry any prohibited/controlled items or any dutiable commodities. Passengers with bonafide baggage, as permissible under Baggage Rules, 2016, can opt for exit through the Green

Channel. Passengers walking through the Green Channel with dutiable/prohibited goods when apprehended are liable to prosecution/penalty and confiscation of goods. The learned Authorised Representative further stated that import of 'Gold' is permissible for the 'eligible' passenger subject to fulfilment of condition 41 of Notification No. 50/2017-Cus dated 30.06.2017, as amended vide Notification No. 25/2019-Cus dated 06.07.2019, that includes the conditionality of stay abroad (with permissible short visits). However, in the instant case, the appellants were frequent fliers and had visited India almost every month. Consequently, they did not satisfy the condition of being an 'eligible passenger'. As per the explanation to Notification No. 50/2017-Cus dated 30.06.2017:

"Eligible passenger" means a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967, 915 of 1967), who is coming to India after a period of not less than six months of stay abroad."

7.1 In the instant case, the customs officers intercepted the appellants while crossing the Green Channel and approaching towards the exit gate of arrival hall. The appellants did not report at the Red Channel for declaration for dutiable/prohibited goods which were in the possession of the appellants. Had the appellants not been intercepted near the exit gate by the customs officers, the appellants would have exited from Customs Area, i.e. from arrival hall without making any declaration oral or otherwise. Therefore, appellant's submission holds no merit.



7.2. As regards the appellant's contention that they were not evading customs duty, the learned Authorised Representative contended that on the basis of suspicion, the appellants' bags were scanned. Thereafter, the appellants were subjected to personal search which is a normal procedure adopted by customs officers in all such cases. He submitted that it is a matter on record that the seized gold was recovered from the appellant's pocket after they passed through the metal detector door frame. Had they not been diverted for personal search, they would have exited the customs area without payment of duty and successfully smuggled the gold.

7.3. The learned Authorised Representative also submitted that based on the statements, summons dated 22.06.2019 were issued to the alleged buyers Mr. Sonu (M/s M.K. Jewellers) and Mr. Surinder (M/s S.S. Jewellers) but same were not received back by customs authorities. Thus, it appears that the same had been delivered to the concerned persons. Thereafter, summons dated 8.7.2014 were issued again to Mr. Sonu (M/s M.K. Jewellers) and Mr. Surinder (M/s S.S. Jewellers). However, this summons remained undelivered, as per the remarks dated 12.7.2019 of the Postal Authorities reason for non-delivery was mentioned as 'incomplete address' for Mr. Sonu and 'no such person on address' in case of Mr. Surinder. The learned Authorised Representative contended that the names and addresses of the alleged buyers were provided by the appellants and summons were sent accordingly at the addresses as disclosed by the appellants in their statements. In

view of the above, the learned Authorised Representative prayed for dismissing the appeals.

7.4 As regards the Departmental appeals, the learned Authorised Representative submitted that as the passengers do not satisfy the condition No. 41 of Notification No. 50/2017 dated 30.06.2017, which requires that a declaration be made by such eligible passenger. In the instant case, the appellants had denied carrying gold in person and the same was discovered only when they were made to pass through the metal detector. Consequently, the court seized from the appellant does not qualify as bonafide baggage. The learned Authorised Representative relied of the Madras High Court judgement in the case of **Commissioner of Customs (AIR) Vs. Abdul Azeez [2020 (371) ELT 224 (Mad)]** which held that there is no option or distraction with the Commissioner for redemption of gold.

8. We have heard the rival contentions and perused the appeal records. In order to appreciate the arguments, it is important to recount the facts of the case. The appellants, viz., Rakesh Luthra, Sonia Luthra, Sunita Luthra and Mamik Luthra arrived in India from Thailand. They were intercepted near the exit gate of the customs baggage hall, having chosen to walk through the green channel. Personal search of these passengers resulted in recovery of 5218 gms of cut gold pieces valued at Rs. 1,5159,782/-. It is pertinent to note here that the allegations are that appellants did not opt for red channel to

declare the gold nor did they file any declaration as required under the Notification. In order to appreciate the arguments of the learned counsel, and the learned Authorised Representative, it is pertinent to reproduce the condition no 41 of the aforesaid notification, which reads as under;

- "41. If,-
- 1.(a) the duty is paid in convertible foreign currency;  
(b) the quantity of import does not exceed one kilograms of gold and ten kilograms of silver per eligible passenger; and
  2. the gold or silver is,-
    - (a) carried by the eligible passenger at the time of his arrival in India, or
    - (b) the total quantity of gold under items (i) and (ii) of Sr. No. 356 does not exceed one kilogram and the quantity of silver under Sr. No. 357 does not exceed ten kilograms per eligible passenger; and
    - (c) is taken delivery of from a customs bonded warehouse of the State Bank of India or the Minerals and Metals Trading Corporation Ltd., subject to the conditions 1 ;

Provided that such eligible passenger files a declaration in the prescribed form before the proper officer of customs at the time of his arrival in India declaring his intention to take delivery of the gold or silver from such a customs bonded warehouse and pays the duty leviable thereon before his clearance from customs.

Explanation.- For the purposes of this notification, "eligible passenger" means a passenger of Indian origin or a passenger holding a valid passport, issued under the Passports Act, 1967 (15 of 1967), who is coming to India after a period of not less than six months of stay abroad; and short visits, if any, made by the eligible passenger during the aforesaid period of six months shall be ignored if the total duration of stay on such visits does not exceed thirty days and such passenger has not availed of the exemption under this notification or under the notification being superseded at any time of such short visits."

8.1 In the instant case, it is on record that the four passengers had gone to Bangkok on 05.06.2019 and had returned on 08.06.2019. Therefore, the appellants did not satisfy the requirements of the aforesaid notification in order to be eligible to import the gold legally. It is also on record that the appellants were intercepted near the exit gate. The

argument that they were prevented from making the declaration is clearly an afterthought. The gold was recovered from their person. It is also noted that the appellants, in their respective statements have accepted that they were aware of the Customs procedures for passenger clearance, and that Gold was dutiable. Consequently, the argument that there is no of concealment or attempt to smuggle cannot be accepted. As regards the argument of the appellants that Gold is not a prohibited item, we note that the High Court of Gujarat in the case **Bhargavraj Rameshkumar Mehta Vs. Union of India [2018 (361) E.L.T. 260 (Guj.)]** held that attempt to smuggle by concealing the same, and breaching the condition for the import of such goods would make them 'prohibited goods' in terms of Section 2(33) of the Customs Act, 1962. The relevant paras of the aforesaid decision is reproduced hereinbelow:

**"15.** We may recall, the contention of the Counsel for the petitioner in this respect was that the gold at the relevant time was freely importable. Import of gold was not prohibited. Case of the petitioner would therefore, fall under clause (ii) of Section 112 and penalty not exceeding 10% of the duty sought to be evaded would be the maximum penalty imposable. Such contention shall have to be examined in the light of the statutory provisions noted above. As noted, Section 111 of the Act provides for various eventualities in which the goods brought from a place outside India would be liable for confiscation. As per clause (d) of Section 111, goods which are imported or attempted to be imported or are brought within the Customs quarters for import contrary to any prohibition imposed by or under the Act or any other law for the time being in force, would be liable for confiscation. Similarly, for dutiable or prohibited goods found concealed in any manner in any conveyance would also be liable to confiscation. As per Section 2(39) the term 'smuggling' would mean in relation to any goods, any act or omission which will render such goods liable to confiscation under Section 111 or Section 113. Thus, clearly Section 111 of the Customs Act prohibits any attempt at concealment of goods and bringing the same within the territory of India without declaration and payment of prescribed duty. Term 'prohibited goods' as defined under Section 2(33) means any goods, the import or export of which is subject to any prohibition under the Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been

complied with. This definition therefore, comes in two parts. The first part of the definition explains the term 'prohibited goods' as to mean those goods, import or export of which is subject to any prohibition under the law. The second part is exclusionary in nature and excludes from the term 'prohibited goods', in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with. From the definition of term 'prohibited goods', in case of goods, import of which is permitted would be excluded subject to satisfaction of the condition that conditions for export have been complied with. By necessary implication therefore in case of goods, import of which is conditional, would fall within the definition of prohibited goods if such conditions are not complied with.

**16.** Further clarity in this respect would be available when one refers to the term 'dutiable goods' as to mean any goods which are chargeable to duty and on which duty has not been paid. We refer to this definition since Section 112 makes the distinction in respect of goods in respect of which any prohibition is imposed and dutiable goods other than prohibited goods. When clause (ii) of Section 112 therefore, refers to dutiable goods other than prohibited goods, it shall necessarily have the reference to the goods, import of which is not prohibited or of which import is permissible subject to fulfilment of conditions and such conditions have been complied with. Condition of declaration of dutiable goods, their assessment and payment of customs duties and other charges is a fundamental and essential condition for import of dutiable goods within the country. Attempt to smuggle the goods would breach all these conditions. When clearly the goods are sought to be brought within the territory of India concealed in some other goods which may be carrying no duty or lesser duty, there is clear breach of conditions of import of goods though *per se* import of goods may not be prohibited."

8.2 Further, in the case at hand, the facts are the appellants were carrying gold in their person and were intercepted near the exit gate of the Customs Baggage Hall, which clearly establishes their intention to smuggle the Gold. In this regard, we note that the Supreme Court in the case of **Om Prakash Bhatia Vs. Commissioner of Customs, Delhi reported in [2003 (155) E.L.T. 423 (S.C.)]** and in case of **Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and others reported in [1983 (13) E.L.T. 1439 (S.C.)]** held that smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of Section 112(a) of the Act,

which states omission to do any act, which act or omission, would render such goods liable for confiscation under Section 111 of the Act, and clause (b) to Section 111 of the Act covers the persons involved.

9. We now address the issue of the duty demanded on past such smuggling of gold by the appellants, which is based on the statement of one of the appellants, Ms Sunita Luthra. It is noted that Ms Sunita Luthra in her statement dated 08.06.2019 stated that she along with Sonia Luthra, Mamik Luthra and her husband Rakesh Luthra collectively brought 5218 gms of gold from Bangkok to Delhi via flight AI335. She also confessed that she had previously also visited Dubai with husband on 15.3.19, 03.04.19, and 01.05.19 and had brought gold totally about 2000 gms. Similar statement was made by Rakesh Luthra in his statement admitting of having brought gold on three occasions from Dubai, collectively weighing 1965.4 gms. The relevant extract of the statements are reproduced hereinafter:

**Statement dated 08.06.2019 of Ms Sunita Luthra under Section 108 of the Customs Act, 1962**

Q.No. 11. What was your purpose of visit to Dubai on 15.03.2019, 03.04.2019 and 01.05.2019. Have you brought gold in India earlier also?

Ans. I visited Dubai with my husband on 15.03.2019, 03.04.2019 and 01.05.2019 to bring gold.

Q.No. 12. How much gold you your husband bring in your past visit?

Ans. Around 2000 gms. I don't remember the exact quantity.

**Statement dated 08.06.2019 of Sh Rakesh Luthra under Section 108 of the Customs Act, 1962**

Q. No. 6: What is the purpose to visit Dubai on three occasions and did you bring gold in India and how much?

Ans: I went to Dubai to bring Gold and I want to state that I had brought gold weighing 465.4 grams(04 bars of each 10 tola) on returning from Dubai on 16.03.2019 on first visit: gold weighing 500 gms on returning from Dubai on 04.04.2019 on second visit and gold weighing 1000 gms on returning from Dubai on 02.05. 2019 on third visit. On being asked I state that I had brought gold collectively weighing 1965.4 gms in the past.

The learned counsel has argued that the Department has not led any corroborative evidence and the demand is based merely on the statement of Ms Sunita Luthra. We are unable to accept this contention. A perusal of the statements of the appellants including the extracted portions above clearly establishes a modus operandi adopted by the appellants for smuggling gold. This is further corroborated in the statement dated 08.06.2019 of Ms Sonia Luthra. In addition, the appellant Mamik Luthra has also admitted in response to question no. 6 that he had been to Dubai along with his mother but he did not bring back gold. However, his mother had brought gold weighing 500 gms. We note that each of the appellant in their individual statements recorded under section 108 of the Customs Act, 1962 have admitted to smuggling of gold during their earlier visit to Dubai. We take recourse to the observation of the Supreme Court in **Naresh J. Shukawani Vs. Union of India [1996 (83) ELT 258 (SC)]** that the statement made before Customs officials is

not a statement recorded under section 161 one of the Criminal Procedure Code, 1973 and therefore, it is a period piece of evidence collected by Customs officials under Section 108 of the Customs Act. It was further stated by the court that if such a statement increased incriminates the accused, inculcating him the contravention of the provisions of the Customs Act, it can be considered as substantive evidence to connect the accused with the contravention of the provisions of this Act. Para 4 of the said judgement is reproduced:

"4. It must be remembered that the statement made before Customs officials is not a statement recorded under section 161 of the criminal procedure code, 1973. Therefore it is a material piece of evidence collected by the Customs officials under section 108 of the Customs Act. That material incriminates the petitioner inculcating him in the contravention of provisions of the Customs Act. Material can certainly be used to connect the petitioner the contravention inasmuch as Mr Dudani's statement clearly inculcates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India....."

It is also seen that once there is an admission by the appellant himself, nothing further is required to be proved to the contrary. The Supreme Court in **Surjeet Singh Chhabra Vs. Union of India [1997 (89) ELT 646]** held that confession made by the appellant binds him. We also place reliance on another decision in **Commissioner of C. Ex. Vs. M/s Systems and Components Pvt. Ltd. [2004 (165) ELT 136 (SC)]** where it has been held that it is a basic and settled law that what has been admitted need not be proved. In view of the above, we are convinced that there is sufficient corroborative evidence to demand the duty on gold said to have been brought



by the appellants during the previous visits. Consequently, the demand is confirmed for the extended period.

10. We now take up the appeal filed by the Department wherein the adjudicating authority had in the impugned order had permitted redemption of gold on payment of fine to appellant Rakesh Luthra, and permission to re-export the gold to 2 other appellants Sonia and Mamik Luthra, and have prayed for absolute confiscation of the gold. We note that all the four appellants collectively brought 5218 gram of gold (in the form of bars, not in the form of ornaments) from Bangkok. It is also established that all the appellants attempted to smuggle the gold with an intention to evade Customs Duty by not declaring the non-bonafide baggage which was commercial in nature. It is also established that the appellants were 'ineligible passengers' to import gold in terms of Notification No. 50/2017- Cus dated 30.06.2017 and also provisions of Foreign Trade (Development and Regulation) Act 1992, Foreign Trade (exemption from application of rules in certain cases) Rules, 1993 and Foreign Trade Policy 2015-20. We also note that Section 80 of Customs Act, 1962 provides for '**temporary detention of baggage**', which is applicable in respect of only those goods for which a true declaration has been made under Section 77. Under Section 80, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India. In the instant case, though the appellants had not declared the gold and the fact remains that the passengers

were intercepted by the officers of customs at the exit gate. This clearly establishes the intent was to walk away with the gold without payment of duty that was lawfully due to the Government. This is also corroborated by their statements that similar modus operandi was adopted when they had returned from Dubai. In this regard, the decision of the High Court of Gujarat in the case **Bhargavraj Rameshkumar Mehta Vs. Union of India** (supra) held that attempt to smuggle by concealing the same, and breaching the condition for the import of such goods would make them 'prohibited goods' in terms of Section 2(33) of the Customs Act, 1962. Once it is established that the goods are prohibited, then there cannot be an option for either redemption or re-export, and such goods are liable for absolute confiscation. In this context, we note that the Tribunal in the case of **Sunny Kakkar Vs. Principal Commissioner of Customs (Preventive), New Delhi [2023 (385) E.L.T. 258 (Tri.-Del)]** upheld the absolute confiscation of Gold. The relevant paras of this decision is reproduced hereinafter:

**"32.** As per Section 2(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113. Therefore, if the gold bars in dispute are held liable for confiscation under section 111 they will fall under the category of smuggled gold as per Section 2(39). Another important section in this regard is Section 123 which 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.

**33.** Section 123 shifts the burden of proof from the Department to the person from whom the goods have been seized in respect to gold and certain other goods which are notified. Undisputedly, the bars in question were of gold and they had foreign markings and were packed in a bag with the address of the jeweller in Dubai. The bars were examined by an expert and were held to be foreign origin gold of 995 purity. All these gave the officers reasonable belief that the gold bars were of foreign origin. Since import of gold is restricted, if foreign origin gold bars were legally imported it was incumbent upon the importer and any other person to whom they may have been sold to show documents that the gold was legally imported. This responsibility is cast upon the appellant as per Section 123. The gold was seized and after its assessment, statements of the appellant were recorded in which he explained that he procured the gold from one Shri Harish of Dubai who told him that Shri Ahadees would contact him and give him the gold bars and accordingly, he was waiting at Rajeev Chowk Metro Station whether transaction took place. He had, at no point of time, produced any document to show that the gold was legally imported. According to his statement, the arrangement which he had with Shri Harish was that he would send gold through one of his persons (Shri Ahadees in this case) and after selling the gold he would pay Shri Harish. At the time of receiving the gold he would pay only some amount to the person handing over the gold. In this case, the amount which he paid in a pink polythene bag was Rs.5,45,000/- to Shri Ahadees. These statements were corroborated by the statement of Shri Ahadees. Neither Shri Ahadees nor the appellant have at any point of time produced any document to show that the gold was legally imported by them or that it was purchased by them from somebody who had legally imported it.

**34.** Learned counsel for the appellant submitted that on 8-12-2015 the appellant had retracted his statement and, therefore, it cannot be relied upon. We have gone through the statements made before the learned CMM by the appellant in his application for bail which is at page 109 to 112 of the appeal book. The application only states that the statement was not made by the appellant. However, there is nothing in the statement made before the learned CMM explaining the nature of the gold seized from the appellant. In the absence of any other explanation, the statements made by the appellant and Shri Ahadees before the officer must be accepted as correct. These statements corroborate each other and with the panchnama. The cross-examination of Shri Ahadees by the learned counsel for the appellant also confirm the facts pertaining to this seizure and also that on previous two occasions smuggled gold was transacted between the appellant and Shri Ahadees. The mobile phone recovered from the appellant and which was used to communicate with Shri Ahadees was also obtained in the name of Shri Kaskyrbayev a Kazakhi national who was not even in India at the time the SIM card was issued which corroborates the clandestine nature of the transaction in the confiscated gold."

10.1 As per the facts of the case, the seizure of gold from the appellants, as recorded in the panchnama and admitted in their respective statements is undisputed. It is also established that the gold was of foreign origin. It is also established that the appellants were attempting to smuggle the gold without payment of duty. We also note that legal import of gold is governed by certain conditions which the appellant do not fulfil. Therefore, we are of the considered opinion that the gold recovered from the appellants is liable for absolute confiscation.

11. In view of the above discussions, we modify the impugned order to the above extent and reject the appeals filed by the appellants (Customs Appeal Nos. 50650 of 2020, 50651 of 2020 and 50686 of 2020 ) and allow the Appeal No. 50156 of 2021 filed by the department.

(Pronounced in the court on 08.01.2024)

**(DR. RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

**(HEMAMBIKA R. PRIYA)**  
**MEMBER (TECHNICAL)**

RM