



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 07 July 2023**  
**Judgment pronounced on: 21 August 2023**

+ W.P.(C) 8902/2021

NIDHI KAPOOR ..... Petitioner

Through: Mr. Nitin Ahlawat, Mr. Visesh  
Chaudhary, Mr. Sahil Dagar  
and Ms. Sonali Sardana, Advs.

versus

PRINCIPAL COMMISSIONER AND ADDITIONAL  
SECRETARY TO THE GOVERNMENT OF INDIA & ORS.

..... Respondents

Through: Mr. Tarun Gulati, Sr. Adv.  
Amicus Curie, Mr. Kishore  
Kunal, Mr. Kumar Sambhav,  
Advs.

Mr. Satish Kumar, Sr. Standing  
Counsel and Ms. Sonu  
Bhatnagar, Sr. Standing  
Counsel on behalf of  
respondent no. 2 & 3 along with  
Mr. Dhruv, Mr. Mandal, Advs.

AND

+ W.P.(C) 9561/2021

SUPRIYA ..... Petitioner

Through: Appearance not given

versus



ADDITIONAL SECRETARY TO THE GOVERNMENT OF  
INDIA AND ORS ..... Respondents

Through: Mr. Satish Kumar, Sr. Standing  
Counsel for respondent no. 2 &  
3 with Mr. Dhruv, Mr. Atul  
Mandal, Advs.

Mr. Sanjay Kumar, Ms. Easha  
Kadiyan, Ms. Hemlata Rawat,  
Advs. for R-4

Mr. Dev Bhardwaj and Ms.  
Anubha Bhardwaj, Advs with  
Mr. Sachin Singh, Ms.  
Divyanshi Srivastava, Advs.,  
for Union of India

AND

+ W.P.(C) 13131/2022, CM APPL. 11400/2023(Add. Document)  
SUDHA MURTHY ..... Petitioner

Through: Appearance not given

versus

JT COMMISSIONER OF CUSTOMS, IGI AIRPORT T-3  
DELHI ..... Respondent

Through: Mr. Akshay Amritanshu, Sr.  
Standing Counsel, Mr.  
Ashutosh Jain, Mr. Samyak  
Jain, Advs.

AND

+ W.P.(C) 531/2022, CM APPL. 1519/2022(Stay)



MR. JASMEET SINGH CHADHA ..... Petitioner

Through: Mr. Chinmaya Seth, Mr. A.K. Seth, Advs.

versus

COMMISSIONER OF CUSTOMS, IGI AIRPORT, NEW DELHI ..... Respondent

Through: Mr. Satish Kumar, Sr. Standing Counsel for respondent no. 2 & 3 with Mr. Dhruv, Mr. Atul Mandal, Advs.

AND

+ W.P.(C) 8083/2023, CM APPL. 31146/2023(Stay)

MS. SHANAZ MALIK ..... Petitioner

Through: Ms. Akanksha Mehra, Mr. Lakshay Saini and Mr. Himanshu Tyagi, Advs.

versus

UNION OF INDIA ..... Respondent

Through: Appearance not given.

**CORAM:**

**HON'BLE MR. JUSTICE YASHWANT VARMA**

**HON'BLE MR. JUSTICE DHARMESH SHARMA**

**DHARMESH SHARMA, J.**

1. In our country, 'gold' has always been symbolized as a pious material embracing the powers of the divine. Perhaps no one prizes



gold more than we Indians do. Such is the temptation to acquire and possess ‘gold’ that since it is much cheaper outside India in certain countries, people of our country travel to various foreign locations and attempt to bring ‘gold’ into India, *albeit* employing or deploying various kinds of clandestine and dubious measures, and inevitably landing up on the wrong side of the law in our country. Even foreign nationals are no exception. There is no gainsaying that bringing of ‘gold’ in an unauthorised or illegal manner causes a cascading effect on the economy of the country. As we shall discuss hereinafter, the customs authorities too have been dealing with issues of the importation of ‘gold’ in a manner that does not inspire confidence. It is our experience that at times the authorities concerned have manifestly exercised their powers arbitrarily in matters of assessment and levy of duty, imposition of fine and/or penalty besides release/redemption of the confiscated gold. Such arbitrariness leaves much to be desired in terms of transparency, equity and fair play in action, which does not augur well to realize the constitutional aim of maintaining rule of law in the country.

2. It is in the said background that the issues arise in the aforesaid five Writ Petitions as to the interpretation of certain provisions of the **Customs Act, 1962, as amended upto date**<sup>1</sup> as to whether bringing of gold into India falls within the ambit of a ‘prohibited’ article under **section 2(33)** read with Section 11 of the Act, and if so, to what legal

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<sup>1</sup> The Act



effect as to its release/redemption on payment of fine/penalty under section 125 besides 112<sup>2</sup> and 114 of the Act; and at the same time raising an issue as to whether bringing of gold into India without declaring it on arrival at Customs amounts to “smuggling” of gold into India in violation of Section 2(39) read with Section 111 of the Act and/or under any other analogous statutes inviting not only confiscation of the gold but also action in the nature of imposition of levy of fine/penalty. Suffice to state that the sequence of events espoused in the present writ petitions are more or less alike and relate to bringing in gold without a declaration on arrival at the Airport and

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<sup>2</sup> 112 Penalty for improper importation of goods, etc. —Any person,—

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,—

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty<sup>216</sup> [not exceeding the value of the goods or five thousand rupees], whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty<sup>217</sup> [not exceeding the duty sought to be evaded on such goods or five thousand rupees], whichever is the greater;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty<sup>219</sup> [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;]

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty<sup>220</sup> [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;]

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty<sup>221</sup> [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]



making an attempt to pass through **the Customs Green Channel** thereby raising common questions of law and can thus be disposed of conveniently by this common Judgment. However, it would be expedient to refer to the factual narrative of each Writ Petition in order to understand the context that gives rise to the legal issues reflected hereinabove.

### **FACTUAL BACKGROUND :**

#### **W.P. (C) No. 8902/2021 (Nidhi Kapoor v. Principal Commissioner & Additional Secretary to the Government of India & Ors.)**

3. The petitioner in this case arrived on 01 July 2015 from Dubai, UAE to India by Air Flight No.9W 545, which landed at **Indira Gandhi International Airport**<sup>3</sup>, New Delhi, and while attempting to pass through the ‘Customs Green Channel’, she was found in possession of three gold metal bars and two gold cut pieces (**hereinafter referred as the ‘subject goods’**), which as per the ***panchnama (P-1)*** was weighing 3100 grams with 995.0 purity valued at Rs. 76,44,011/-. She was detained and during investigation she in her statement recorded under Section 108 of the Act allegedly revealed that the ‘subject goods’ were handed over to her by a family friend, namely Deepak Bajaj, vide a Gift Deed, and to substantiate the same she provided a document dated 30.06.2015 (P-3). A Show Cause Notice dated 18 December 2015 was issued by the Additional

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<sup>3</sup> IGI Airport



Commissioner, Office of the Commissioner of Customs, calling upon her to justify why the subject goods should not be confiscated under Section 111 of the Act and why she should not be penalized under Section 112 read with Section 114AA of the Act (Annexure P-4). Such proceedings culminated in the Additional Commissioner of Customs/Adjudicating Officer passing an order dated 16 September 2016 whereby the subject goods were ordered to be confiscated under Section 111 of the Act with a further imposition of penalty of INR Rs. 15,00,000/- under Section 112 read with Section 114 AA of the Act (P-5).

4. The petitioner preferred an appeal (P-6) and the Commissioner of Customs (Appeals)/Appellate Authority vide order dated 19 February 2018 dismissed the appeal, upholding the original order in *toto* (P-7). Aggrieved, the petitioner preferred a Revision Petition before the Revisional Authority/Additional Secretary, Government of India, who vide the impugned order **dated 02 January 2020 (issued on 08 January 2020)** dismissed the application of the petitioner for redemption of the 'subject goods' in terms of **Section 129DD** of the Act upholding the impugned order for confiscation of the subject goods under Section 111 of the Act as also imposition of the penalty under Section 112 of the Act except setting aside the penalty under Section 114AA of the Act.



**W.P. (C) No. 9561/2021 (Supriya v. Additional Secretary to the Government of India & Ors.)**

5. The petitioner in this writ petition too, landed at T-3 of IGI Airport, New Delhi on 15 May 2015 travelling from Dubai, UAE by Air Flight No. EK 512 and on being intercepted, she was found in possession of two gold metal bars and two gold pieces (i.e., ‘the subject goods’) recovered from her body/clothes and as per *panchnama* (P-2) that weighed about 3000 grams with 995.0 purity valued at INR 75,86,865/- whereas market value of the ‘subject goods’ was estimated to be Rs. 83,67,000/- as per report of the jeweler appraiser (P-1). The statement of the petitioner was recorded under Section 108 of the Act (P-3), in which she allegedly revealed that she had purchased the jewelry from M/s. Motiwala Jewellers, Dubai on 13 May 2015 and produced the cash receipt (P-4) also stating that the subject goods were gifted to her by a family friend. A Show Cause Notice dated 03 November 2015 (P-6) was issued to her which ultimately culminated in an order dated 15 November 2017 passed by the Joint Commissioner/Adjudicating Officer thereby confiscating the subject goods under Section 111 of the Act and imposing penalty of Rs. 15,00,000/- under Section 112 and 114AA of the Act (P-7). Aggrieved thereby, the petitioner filed an appeal and on which the Commissioner of Appeals (Customs) allowed the appeal vide order dated 17 July 2018 thereby releasing the subject goods in terms of Section 125 of the Act on payment of penalty of Rs. 19,00,000/-



whereas the penalty under Section 112 read with Section 114AA of the Act was reduced to Rs. 8,00,000/- (P-8). The department/respondent No.2 preferred an appeal and the Revisional Authority/ Additional Secretary, Government of India passed the impugned order dated 09 July 2021 thereby sustaining the original order dated 15 November 2017 (P-7) upholding confiscation of the 'subject goods' and declining its redemption.

**W.P. (C) No. 13131/2022 (Sudha Murthy v. Jt. Commissioner of Customs, IGI Airport, T-3, Delhi)**

6. The petitioner left for Canada on 07 December 2019 to join her daughters and arrived back in India having landing at T-3 IGI Airport from Toronto by Air India Flight AI-188 on 29 September 2020; and on search, was found to be carrying 420 grams of assorted gold jewellery. She claimed that she had originally bought the items in India, much before her departure and was carrying the same back to India and for that reason she proceeded to walk through the 'Green Channel' but was detained vide memo dated 30 September 2020 (A-4). To cut a long story short, the subject goods, which were sealed vide detention memo dated 30 September 2020 were opened at CWC Warehouse on 07 October 2020 in her presence and the value of the gold items was assessed by the Jeweler Appraiser. It is, however, also borne out from the record that during the proceedings the petitioner allegedly removed two gold bangles weighing about 48 grams and on examination the Green Channel Violation Document, the matter was



reported to ACs (WH) and the petitioner along-with her husband Mr. Daya Nand Murti were handed over to Shift Officers for further investigation and the two gold bangles allegedly stolen were recovered and *panchanma* dated 07 October 2020 was drawn. Suffice it to state that FIR No. 213/2020 was lodged by the Customs Department against the petitioner under Section 379 of the Indian Penal Code, 1860. The petitioner was produced before the learned ACMM, Patiala House Courts Complex, New Delhi and in the consequent criminal proceedings vide order dated 21 January 2021 she pleaded guilty to the charges and explained that she was a ‘victim of circumstances’ and was remorseful of her conduct, upon which she was sentenced by the learned ACMM to pay fine of Rs. 15,000/- alongwith imprisonment for one day ‘till rising of the court’ (A-5).

7. In short, the plea of the petitioner is that the subject goods have been her family jewelry including ancestral property, and thus, she sent an email dated 18 November 2020 to the Additional Commissioner of Customs requesting for release of her gold items, upon which without issuing any Show Cause Notice and *sans* any public hearing, an order dated 01 January 2021 was passed. The petitioner applied for certified copies of her statement and the documents from Customs and thereafter preferred an appeal before Commissioner of Customs (Appeals) on 02 March 2021. The same was dismissed by the Adjudicating Authority without considering her



submissions and the 'subject goods' were confiscated and redemption was rejected.

**W.P.(C) No.531/2022 (Mr. Jasmeet Singh Chadha v. Commissioner of Customs, IGI Airport, New Delhi)**

8. In the instant petition, it is the case of the petitioner that on 07 September 2014, he visited Dubai to meet his relatives and on account of an upcoming marriage in the family, on 08 September 2014, he bought approximately 2000 grams of gold ('the subject goods') from his savings and also from the money borrowed from his relatives, the proof of which was provided vide Annexure P-2, but when he arrived at T-3 IGI Airport, New Delhi on 09 September 2014 by Flight No. 6E-024 from Dubai, he was detained despite the fact that he had duly declared the said gold at Dubai Airport before boarding the flight and while he was at the Aerobridge, Custom Officers approached him and made enquires, to which he truthfully replied acknowledging that he was carrying 2000 grams of gold and wanted to declare the same but was instead forced to sign multiple documents on the pretext that he would be released alongwith the 'subject goods', after such proceedings.

9. The grievance of the petitioner is that a Show Cause Notice dated 23 February 2015 was issued against him, and in order to show his *bona fides* he filed an application on the advice of his counsel on 03 June 2015 before the Settlement Commission, after depositing the amount of Rs. 18,47,202/- for the subject goods, which were valued to



Rs. 51,24,000/- vide TR-6 challan (P-4). The said application was dismissed by the Settlement Commission vide order dated 21.06.2016 holding that such application was not maintainable under the third proviso to Section 127(B)(1) of the Act and the matter was automatically reverted to the Adjudicating Officer, and the latter on 30 March 2016 passed an order directing confiscation of the two gold bars weighing 2000 grams under Section 111(d), 111(i), 111(j), 111(i) and 111(m) of the Act also imposing penalty of Rs. 11,00,000/- upon him under Section 112 and 114 AA of the Act. An appeal was preferred by the petitioner before the Appellate Authority i.e. the Commissioner (Appeals) but the same was dismissed vide impugned order dated 08 August 2017; and therefore, the petitioner was constrained to file a revision application before the Additional Secretary/Revision Authority, which was dismissed by the impugned order dated 22 September 2021.

**W.P. (C) No. 8083/2023 (Shahnaz Malik v. Union of India)**

10. The petitioner arrived at T-3, IGI Airport, New Delhi on 27 June 2015 from Dubai by Flight No. AI996; and likewise while passing through the Customs Green Channel, she was intercepted and *panchama* was drawn (P-2) bearing that from her personal baggage 100 gold coins and 4 gold bars of 10 tolas each, total weight being 1266.56 grams of 999.0 purity, amounting to Rs. 29,82,359/- were recovered. In her statement recorded under section 108 of the Act, she allegedly confessed that the gold had been brought at the instance of



one Mr. Vikram Devbrat and were to be taken away with the help of persons working with AI SATS. Consequent to a Show Cause Notice dated 18 December 2015 (P-3) calling upon her to justify why the material should not be absolutely confiscated under Section 111 of the Act, and penalties not be imposed as per Sections 112 (a), 112(b) and 114A of the Act<sup>4</sup>, she was afforded personal hearings held on 18 May

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<sup>4</sup> [114A. Penalty for short-levy or non-levy of duty in certain cases.—Where the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:]

[Provided that where such duty or interest, as the case may be, as determined under sub-section (2) of section 28, and the interest payable thereon under section 28AB, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the duty or interest, as the case may be, so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account: Provided also that where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AB, and twenty-five per cent. of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

Explanation.—For the removal of doubts, it is hereby declared that—

(i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under sub-section (2) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President\*;

(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]



2016 and 30 August 2016, and ultimately an order dated 30 December 2016 was passed by the Additional Commissioners of Customs, IG Airport – T3, New Delhi (P-4) vide which the goods were not only confiscated but also no option of payment of Customs Duty or redemption fine was afforded to her. Furthermore, penalties were imposed on Mr. Vikram Devbrat, and two others from AI SATS namely–Mr. Mithilesh Kumar Verma and Mr. Navin Kumar Abhimanyu, amounting to Rs. 10,00,000/-, Rs. 2,50,000/- and Rs. 1,50,000/- respectively, under Section 112 and 114AA of the Customs Act. A personal penalty of Rs. 75,000/- was also imposed on the petitioner. Aggrieved thereby, she filed an appeal before the Commissioner of Customs (Appeals) on 16 February 2017, which was rejected vide Order dated 24 August 2018 (P-5). Aggrieved thereof, the petitioner filed a Revision Application before the Central Government against the order dated 24 August 2018, which by the impugned order dated 14 July 2021 was dismissed (P-1), as per which the request for release of goods on payment of redemption fine under Section 125 of the Act was also rejected. The fines and penalties imposed were also found to be fair and just.

**COMMON CHALLENGE IN THE WRIT PETITIONS:**

11. In a nutshell, the impugned orders passed by the respective Adjudicating Officers in the aforesaid five Writ Petitions whereby the subject goods have been confiscated and redemption has been disallowed apart from visiting each one of them with the levy of



duty/fine, have been assailed on almost identical grounds in each of the Writ Petitions primarily to the effect that the authorities concerned failed to exercise the powers vested under Section 125 of the Act in a fair, reasonable and rational manner; and that the respective Adjudicating officers arbitrarily took extraneous factors into consideration while dismissing the application for release/redemption; and that there is 'patent unfairness' and 'lack of uniformity' in their decision making in as much as release/redemption of the subject goods have been allowed in other related cases having similar circumstances. It is further their grievance that no adequate opportunity of hearing was afforded to them by the authorities concerned and not only have the impugned orders been passed after inordinate delay but also that the fine/penalties imposed vide the impugned orders are oppressive, unconscionable and disproportionate to the offence committed. Lastly, that Section 114A of the Act was not even attracted in any of the cases. Hence, in each of the aforesaid petitions, quashing of impugned orders is sought apart from redemption/release of the 'subject goods'.

**REPLY/COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT NO.2/CUSTOMS**

12. The respondent No.2/Customs in each of the instant Writ Petitions has filed a reply towing an identical line of defence to the effect that each of the petitioners were acting as "carriers" and were not owners of the subject goods; and that they failed to discharge the



burden of proof in terms of Section 123 of the Act - that the subject goods were ‘smuggled goods’; and therefore that, ‘smuggled goods’ cannot be read into the category of ‘prohibited goods’ and further that release/redemption of the goods would result in the goods—eventually entering the market thereby having a cascading impact on the economy of the country; and that it cannot be overlooked that none of the petitioners has explained how they were able to procure the subject goods worth several lacs of rupees and in all probability payments had been made in the foreign currency of the country of origin or through hawala(money laundering); and that the subject goods were not meant for personal use but obviously for commercial gain; and that the bringing of subject goods into India or smuggling the same without declaration and passing through the ‘Green Channel’ was in violation of Section 7 of the **Foreign Trade (Development and Regulation) Act**<sup>5</sup> as it amounted to import of gold without authorization; and lastly that there was no violation of principles of natural justice and the petitioners were guilty of their own follies since they failed to appear despite notice for hearing and not satisfying the authorities about their actions in bringing the subject goods into India. Sh. Satish Kumar, learned Standing Counsel for the respondent No.2/Customs relied on decisions in **Sheikh Mohd. Omar v. Customs**<sup>6</sup>; **Om Prakash Bhatia v. Commissioner of Customs**<sup>7</sup>;

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<sup>5</sup> FTD&R Act

<sup>6</sup> 1970(2) SCC 728



**Garg Woolen Mills v. Customs<sup>8</sup>; and Union of India v. Raj Grow Impex<sup>9</sup>.**

**ARGUMENTS ADVANCED ON BEHALF OF THE PETITIONERS:**

13. Mr. Sholab Arora, learned counsel for the petitioners vehemently urged that the authorities concerned while passing the impugned orders had completely overlooked the fact that release/redemption of the subject goods had been allowed in similar circumstances in other related cases. The main plank of the submissions was that the importation of the ‘subject goods’ i.e. gold, is not ‘prohibited’ under the scheme of the Act or any other analogous statute; and that being the legal position, the Adjudicating Authority had no discretion but to allow the release/redemption of the subject goods. Firstly, in reference to Writ Petition (C) 8902/2021, it was pointed out that on the same day i.e. 01 July 2015 another passenger Ms. Ridhima Bajaj had flown in from Dubai to New Delhi and was found in possession of two gold bars and three gold cut pieces weighing about 2600 grams and valued about INR 64,61,455/- and although the proceedings resulted in the Commissioner of Customs (Appeals)/ the Appellate Tribunal passing an order dated 19 February 2018 (P-7) dismissing redemption under Section 129DD of the Act, subsequently, vide order dated 06 November 2020 passed by the

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<sup>7</sup> (2003) 6 SCC 161

<sup>8</sup> (1999) 9 SC 175

<sup>9</sup> 2021 SCC Online SC 429



Commissioner of Customs (Appeals) (P-9) and (P-10) the subject goods i.e., the gold items recovered from Ms. Ridhima Bajaj were directed to be released under Section 125 of the Act on payment of meagre redemption fine/penalty of Rs. 6,50,000/- and quantum of penalty was reduced under Section 111 of the Act to Rs. 6,50,000/-.

14. It was then pointed out that likewise in Writ Petition (C) 9561/2021 on the same day i.e., on 14.05.2015 another passenger, namely Vinay Gupta had flown from Dubai (UAE) to New Delhi and was found in possession of two gold bars weighing 2000 grams valued at Rs. 50,57,910/-, redemption of the 'subject goods' was allowed under Section 125 of the Act on payment of redemption fine of Rs. 23,00,000/- along with applicable duty besides fine/penalty of Rs. 7,00,000/- under Section 112 and 114AA of the Act (P-9). It was vehemently urged that in the instant matters the decisions to disallow the release/redemption of the subject goods were passed in a mechanical manner so much so that the impugned orders in Writ Petition (C) Nos. 8902/2021 and 9561/2021 were almost *cut & paste orders* declining the relief *inter alia* on the premise that the importation of the subject goods i.e., the gold was in violation of **80:20 policy by the RBI**. It was pointed out that the 80:20 policy was introduced by the RBI on 14 August 2013 (P-11) which was modified on 21 May 2014 (P-12) but subsequently withdrawn much prior to the incident on 28 November 2014 (P-13).



15. Learned Counsel took us through the relevant chapters under the Customs Manual 2015, Foreign Trade Policy 2015-20 and ITC (HS), 2022-Import Policy. It was vehemently urged that the importation of the subject goods i.e., the gold, is not even prohibited under the FTDR Act. It was additionally canvassed that Section 125 of the Act deals with both 'prohibited' and 'non prohibited' items and that the importation of the gold is not prohibited as such and that being the case the Adjudicating Authority had no discretion but to allow or afford an option for the release/redemption of the 'subject goods' under Section 125 of the Act to the importer/owners. In his submissions, reliance was placed on the decisions in the case of **Sunshine International v. Collector of Customs<sup>10</sup>**; **Mohini Bhatia v. Commissioner of Customs<sup>11</sup>**; **Suresh Kumar Rasoni v. Commissioner of Customs<sup>12</sup>**; **Union of India v. Dhanak M. Ramji<sup>13</sup>**; **Commissioner of Customs v. Ashwini Kumar<sup>14</sup>**; **Rajaram Bohra v. Union of India<sup>15</sup>**, **Commissioner of Customs (Air) v. P.Sinnasamy<sup>16</sup>**; **Gordhanbhai N. Patel v. Commissioner of Customs<sup>17</sup>**; **Kader Mydeen v. Commissioner of Customs<sup>18</sup>**, **K.**

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<sup>10</sup> 1993 (42) ECC 282

<sup>11</sup> 1999 (106) ELT 485 Tri.-Mumbai

<sup>12</sup> 2004 SCC OnLine CESTAT 1116

<sup>13</sup> 2009 SCC OnLine Bom 2270

<sup>14</sup> 2020 SCC OnLine CESTAT 333

<sup>15</sup> 2015 SCC OnLine Cal 6049

<sup>16</sup> 2016 SCC OnLine Mad 22055

<sup>17</sup> 1999 SCC OnLine CEGAT 359

<sup>18</sup> 2000 SCC OnLine CEGAT 1662



**Baluchamy v. Commissioner of Customs<sup>19</sup>; Yakub Ibrahim Yusuf v. Commissioner of Customs<sup>20</sup>; Vijay Kumar Chaudhery v. Commissioner of Customs<sup>21</sup>; Rex Printing Press v. Commissioner of Customs<sup>22</sup>; Sai International v. Commissioner of Customs<sup>23</sup>; FL Smidth Pvt. Ltd. v. Asst. Commissioner<sup>24</sup>.** Further, reliance was placed on the decision in the case of **Commissioner of Customs v. Atul Automation (P) Ltd.**<sup>25</sup>

16. At this juncture, it must be indicated that having regard to issues raised in the Writ Petition that assume a larger public interest, Sh. Tarun Gulati, learned Senior Advocate, was appointed as *Amicus* by the Court vide order dated 03.02.2023 who in his erudite submissions took this Court through the relevant provisions of the relevant statutes. In reference to Section 2 (33) of the Act, it was countenanced that it provides for three categories of goods: *firstly* goods that are subject to any ‘prohibition’ under the Act, only when such goods are notified by the Central Government under Section 11 of the Act; *secondly* importation or exportation of goods which are subject to any provision under any other law for the time being in force; and *thirdly* importation or exportation of goods in violation of any conditions

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<sup>19</sup> 2007 SCC OnLine CESTAT 1873

<sup>20</sup> [MANU/CM/0425/2010]

<sup>21</sup> 2015 SCC OnLine CESTAT 2000

<sup>22</sup> 2004 SCC OnLine CESTAT 553

<sup>23</sup> [MANU/CB/0059/2017]

<sup>24</sup> [MANU/TN/0970/2021]

<sup>25</sup> (2019) 3 SCC 539



under which the goods are/were permitted to be imported or exported viz., under a licensee or permit etc.

17. Referring to Section 111 of the Act, it was urged that the concept of prohibited goods is different from goods liable for confiscation and it was strenuously urged that no notification has been issued by the Central Government under Section 11 of the Act thereby prohibiting import of gold as such. It was urged that violation of any conditions under the Act as to import or export, would not make such goods fall under the prohibitory category merely because it provides for consequences such as goods being subjected to confiscation, levy of fine/penalties etc. The attention of the Court was invited to provisions of Section 3 (2), (3) and (4) the FTDR and it was canvassed that a conjoint reading of such provisions would show that unless and until an order is passed by the Central Government prohibiting or restricting import or export of any goods, mere import or export of goods without any permit or license, would not result in shall not make such goods fall under the prohibited category. Reference was invited to the decisions in **Becker Gray and Co. Ltd. v. Union of India**<sup>26</sup>; **Sheikh Mohd. Omer v. CC, Calcutta**<sup>27</sup>; **Prayag Exporters Pvt. Ltd. v. Commissioner**<sup>28</sup>; and **Commissioner v. Prayag Exporters Pvt. Ltd.**<sup>29</sup>.

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<sup>26</sup> 1970 (1) SCC 352

<sup>27</sup> 1983 (12) ELT 1439

<sup>28</sup> 2000 (121) ELT 819 (Tribunal)

<sup>29</sup> 2003 (155) E.L.T. 4 (S.C.)



18. It was additionally canvassed that the decision in *Om Prakash Bhatia v. Commissioner of Customs (supra)*, was distinguishable since there was a specific Notification under Section 18 of the **Foreign Exchange Regulations Act, 1972**<sup>30</sup> and such distinction was brought out in the decisions of **Commissioner v. Suresh Jhunjhunwala**<sup>31</sup>; **CC, New Customs House' Mumbai v. Vishal Exports Overseas Ltd.**<sup>32</sup>, **Gurcharan Singh v. DRI**<sup>33</sup>.

19. Mr. Gulati, learned senior counsel then invited our attention to various notifications issued by the Central Government<sup>34</sup> and various departments viz., **DGFT**<sup>35</sup>, **RBI**<sup>36</sup> and **Customs**<sup>37</sup> from time to time besides referring to Chapter 71 of the **ITC (HS)** canvassing that import of gold had always been categorized as 'free goods' i.e., freely importable subject to the various RBI Regulations, and it was emphasized that there has never been imposed any absolute restrictions under the FTDR on import of gold as such. Reference was also invited to the Baggage Rules framed in terms of Section 81 in Chapter XI of the Act *reiterating that import of gold in violation of*

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<sup>30</sup> FERA

<sup>31</sup> 2006 (203) E.L.T. 353 (S.C.)

<sup>32</sup> 2007 (209) ELT 331 (SC)

<sup>33</sup> 2008 (224) ELT 497 (SC).

<sup>34</sup> Notification No. 1/34 dated 18.01.1964

<sup>35</sup> DGFT Notification No. 29/(RE-2004)/2002-2007 dated 28.01.2004; No. 45/2015-2020 dated 30.11.2018; No. 36/2015-2020 dated 18.12.2019; No. 49/2015-2020 dated 05.01.2022; DGFT Policy Circular No. 32/(RE-2004)/2002-2007 dated 16.04.2004; & No. 39 dated 19.08.2011

<sup>36</sup> RBI Circular No. 107 dated 04.06.2013; No. 103 dated 13.05.2013; No. 15 dated 22.07.2013; No. 25 dated 14.08.2013; No. 82 dated 31.12.2013; No. 103 dated 14.02.2014; & No. 133 dated 21.05.2014

<sup>37</sup> Notification No. 12/2012-Cus. dated 17.03.2012



*any conditions although would make such gold liable to confiscation, it would not make such goods fall under the 'prohibited category'. It was vehemently urged that smuggled goods do not per se become prohibited goods and the Custom authorities have no option but to allow redemption of goods upon levy of duty/fine in terms of Section 125 of the Act. Reference was also invited to the decisions in **Commissioner of Customs v. Sri Exports**<sup>38</sup>; **Bhargavraj Rameshkumar Mehta v. UOI**<sup>39</sup>; and in particular attention was invited to the observations in **Mohammed Haroon v. Addl. DRI**<sup>40</sup> & **Commissioner v. Uma Shankar Verma**<sup>41</sup>, that read as under:*

“that ‘smuggled’ gold stands on a different footing, which can be confiscated in exercise of powers under Section 111. However, while smuggled goods are liable to confiscation, such confiscation does not automatically lead to these goods becoming "prohibited. In the absence of any Notification issued under Section 11 of the Act or Section 3 of the FTDR Act, the smuggled goods cannot be treated as "prohibited".

20. Further, on the issue of redemption of confiscation of gold under Section 125 of the Act, reference was invited to the decision in the case of **CCE (Delhi) v. Achiever International**<sup>42</sup>, wherein it was held as under:

"14. Section 125 of the Act states that an officer adjudging may impose redemption fine in case importation or exportation has been prohibited under the Act or under any other law for the time being

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<sup>38</sup> 2021 (375) ELT 169 (Kar.).

<sup>39</sup> 2018 (361) ELT 260 (Guj.).

<sup>40</sup> 2021 (378) ELT 754 (Ker.)

<sup>41</sup> 2000(120) E.L.T. 322 (Cal.)

<sup>42</sup> 2012 (286) ELT 180 (Del.)



in force. It is clear from the language that Section 125 applies to the goods, importation and exportation of which is prohibited under the Act or under any other law for the time being in force. It applies to prohibited goods. The contention of the Revenue that Section 125 does not apply to the prohibited goods is, therefore, misconceived and wrong.

17. The term "prohibited goods" under Section 2(33) of the Act, is much wider than Section 11(1) of the Act which gives power to the Central Government to issue notification prohibiting import or export of goods absolutely or subject to such conditions as may be specified Section 2(33) applies to the goods prohibited absolutely or subject to conditions stipulated under Section 11 of the Act and also to import or export of goods subject to any prohibition under the Act or any other law for the time being in force. The expression "prohibited goods" is much broader and wider and is not confined merely to goods import and export of which is prohibited absolutely or subject to conditions by a notification issued under Section 11(1). In fact, the said aspect is no longer res integra, in view of the decisions of the Supreme Court in Sheikh Mohd. Omer v. Collector of Customs, Calcutta & Ors. - (1970) 2 SCC 728 = 1983 (13) E.L.T. 1439 (S.C.), Toolsidass Jewraj v. Addl. Collector of Customs - (1991) 2 SCC 443 = 1991 (53) E.L.T. 578 (S.C.) and Om Prakash Bhatia v. Commissioner of Customs, Delhi- (2003) 6 SCC 161 = 2003 (155) E.L.T. 423 (S.C.) As the first two decisions have been considered in the Om Prakash Bhatia's case (supra), we are referring to the facts of the said case. In the said case, the appellant engaged in export of garments and had substantially over invoiced the export consignment.....

19. In view of the aforesaid position, it has to be held that the goods in question were prohibited goods within the meaning of Section 2(33) of the Act. However, Section 125 is applicable to prohibited goods and redemption fine can be imposed in case of import and export of prohibited goods instead of absolute confiscation.

20. Section 125 of the Act gives discretion to the authorities to impose redemption fine and gives an option to the person to pay the same in lieu of confiscation. The option/discretion is clear from the use of word 'may'. Quantum of the fine is again discretionary as is apparent from the last part of sub-section (1) which stipulates that such fine as the said officer thinks fit can be imposed. The proviso to sub-section (1) stipulates that it shall not exceed the



market price of goods confiscated less the duty chargeable thereon. Sub-section (2) clarifies that the duty imposable is in addition to the redemption fine."

21. Reference was also invited to the decision in the case of **Mohd. Fazil v. DCC (ACC)**<sup>43</sup>, wherein it was held that:

"On a bare reading of the statutory provision, it is clear that the competent officer is entitled to exercise the discretion permitting the owner or person in possession from whose custody the goods had been seized, an option to pay in lieu of confiscation a fine as the officer thinks fit. However, such an exercise of option is not mandatory in the case of goods, the importation of which is prohibited under the Act or any other law for the time being in force. If there is no such prohibition, the exercise of option is mandatory.

11. Therefore, the only question to be considered is whether the contravention of Baggage Rules, 2016 and breach of the prohibition imposed by the Foreign Trade (Development and Regulation) Act, 1992 amounts to a prohibition under any other law for the time being in force. It is true that various authorities had exercised the discretion to permit release of confiscated goods on payment of redemption fine. But such exercise of discretion is not mandatory if the import is prohibited under the Act or any other law in force. Even in such cases, discretion can be exercised which will depend upon the manner in which the authority approves the transaction. Section 7 of the Foreign Trade (Development and Regulation) Act clearly indicates that no person shall make any import or export except under an importer-exporter code number granted by the Director General or the officer authorised by the Director General in that behalf and in accordance with the procedure specified. The rules also clearly prescribe the procedure under how the import or export is to be carried out by preparation of a Bill of Entry."

22. In the end, learned Senior Advocate referred to certain observations in the cited cases viz., in **Sheikh Mohd. Omar v.**

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<sup>43</sup> 2017 (349) ELT 75 (Ker.)



*Customs (supra), Om Prakash Bhatia v. Commissioner of Customs (supra), Garg Woolen Mills v. Customs (supra) and Union of India v. Raj Grow Impex (supra)*, and distinguishing such decision it was strenuously urged that import of gold in excess of Baggage Rules under the Customs Act was not prohibited but only restricted; and that the same can be brought or imported into India subject to fulfillment of certain conditions, and thus, it was urged that under section 125 of the Act the Adjudicating Authority has no option but to exercise the option of release/redemption of the ‘subject goods’ on payment of penalty and the exercise of power to confiscate the goods in entirety with penalty is arbitrary, harsh and not constitutionally permitted.

#### **ARGUMENTS ADVANCED ON BEHALF OF RESPONDENT**

23. Ms. Sonu Bhatnagar, learned Senior Standing Counsel for **Central Board of Indirect Taxes and Customs**<sup>44</sup> submitted that although there may have been no notification under Section 11 of the Act prohibiting import of gold, however, import of gold is subject to various mandatory conditions and stringent restrictions, and violation of such legal requirements would render the import of gold as ‘prohibited goods’. Reference was invited to various notifications issued by the DGFT, RBI and Customs, upon which we shall dwell later in this judgment. In short, it was harped upon that although in such notifications, gold in all its forms or kinds falls under the tariff

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<sup>44</sup> CBIC



item/head as 'Free' but subject to various RBI/Customs/DGFT Regulations, and it was pointed out that duty free import of gold has only been allowed through nominated agencies and banks, and that such concession has never been afforded to individual passengers bringing gold into India without submitting a declaration on arrival at the Customs. Our attention was also invited to the **Customs Baggage Declaration Regulations, 2013** and **Baggage Rules, 2016** vis-à-vis Section 79 and 81 of the Act and it was urged that *bona fide* baggage cannot contain gold in any form other than jewelry and that too within the prescribed limit. It was vehemently urged that goods which are imported contrary to any prohibition under the Custom Act or any other law would also be considered as 'prohibited goods' within the scope and ambit of Section 2(33) of the Act, and therefore, liable to absolute confiscation in terms of Section 111 (d) of the Act. It was very strongly canvassed that for the purpose of invoking the discretionary part of Section 125 of the Act, absolute or *per se* prohibition is not the sole criteria and prohibition arising from illegal importation contrary to or in breach of conditions or restrictions, of any law for the time being in force shall be sufficient. Reference has been invited to **Commissioner of Customs (Prev) v. M. Ambalal & Co.**,<sup>45</sup> apart from referring to decisions in the cases of *Sheikh Mohd. Omar v. Collector of Customs (supra)*; *Om Prakash Bhatia v. Commissioner of Customs (supra)*; *Garg Woolen Mills v. Customs*

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<sup>45</sup> (2011) 2 SCC 74



(*supra*) and *Union of India v. Raj Grow Impex (supra)* and lastly to the decision in *Abdul Rajak v. UOI*<sup>46</sup>.

24. Mr. Satish Kumar, learned Senior Standing Counsel for the respondent/Customs by all means echoed the line of submissions advanced by Ms. Bhatnagar and additionally referred to the decision in the case of **Commissioner of Customs (AIR) v. Samynathan Murugesan & CESTAT**<sup>47</sup> reciting the relevant paragraphs about legislative intent behind the promulgation of Section 125 of the Act. In this regard, it was vehemently urged that smuggling of gold by itself is a prohibited act and a conjoint reading of Section 2 (25) 11, 111 and 112 of the Act would amply demonstrate the intention of the Legislature in prohibiting ‘smuggling’ which has larger ramifications for the entire economy of the country, and thus, the discretionary part under Section 125 of the Act is not attracted in the case of smuggling of goods.

25. Suffice to state that Mr. Akshay Amritanshu, learned counsel for the respondent in W.P.(C) 13131/2022 also towed the same line of arguments in canvassing the plea that import of gold in the nature of smuggling was *per se* prohibited within the meaning of Section 125 of the Act.

### **DECISION**

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<sup>46</sup> 2012 (275)ELT 300 (Ker.)

<sup>47</sup> 2009 (4) TMI 77 – Madras High Court



26. We have given our thoughtful consideration to the elaborate submissions advanced by the learned counsels for the rival parties at the Bar as also by the learned amicus curie. We have meticulously gone through the voluminous written submissions filed on the record as also the heavy load of case law cited at the Bar.

### **ANALYSIS AND REASONS**

27. Having regard to the broad facts and circumstances emanating from the aforesaid batch of Writ Petitions and the legal submissions addressed, this Court had apprised parties of the principal questions which arise and they being the following:-

- I. In respect of Scope of 'prohibited goods' under Section 2 (33) of the Customs Act, 1962 ('Act')
  - i. Whether the definition of prohibited goods under the Act includes goods which are subject to conditions?
  - ii. Which category of goods will be non-prohibited but nonetheless liable to confiscation?
- II. Whether Gold is a prohibited item?
- III. What is the scope of redemption under Section 125 of the Act?

28. In order to answer the aforesaid issues, we need to examine the scheme of the Act as a whole. First things first, the Customs Act, 1962 is an act to consolidate and amend the law relating to customs. As per the Statement of Object and Reasons for promulgation of the Act, it attempts to fill the lacuna of the previous customs legislations viz. the Sea Customs and the Land Customs Act. Admittedly, the object of



the Act is to regulate the import and export of goods, into and from the shores of India or otherwise by land, air or sea, and further provides for a detailed mechanism to determine the customs duty payable on import and export of goods. The Act defines expression “dutiable goods”, “duty”, “import”, “imported goods”, “importer” and “smuggling” in the following manner:

“2.(14) ‘dutiable goods’ means any goods which are chargeable to duty and on which duty has not been paid;

(15) ‘duty’ means a duty of customs and leviable under this Act;

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(23) ‘import’, with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

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(25) ‘imported goods’ means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

(26) ‘importer’, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer;

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29. Chapter V of the Act provides provisions for levy of, and exemption, from customs duty besides refund of duty paid including the interest thereupon as also period of limitation for processing the claims. Chapter VA of the Act incorporating Section 28 (c) (d) provides for amount of duty in the price of goods, etc., for purpose of refund; while Chapter VAA provides for administration of rules of origin under trade agreement. Section 28E in Chapter VB of the Act provides for Advance Rulings meaning thereby a written decision on any question referred to in Section 28H by the applicant in his



application in respect of goods prior to importation or exportation and a detailed mechanism in the nature of appeal and powers of Appellate Authority in respect thereof. Chapter VI in the Act lays down provisions relating to conveyance that is, carrying of imported and exported goods. It is pertinent to mention that Section 47 of the Act enables *clearance of goods for human consumption provided the same are not prohibited goods and the importer has paid import duty*, if any, assessed thereupon. Chapter VII of the Act provides for payment through electronic cash ledger and electronic duty credit ledger. Chapter VIII regulates imposition of duty for goods in transit while Chapter IX provides for provision with regard to warehousing of goods imported or to be exported and clearance thereupon. Chapter X provides provisions to claim duty draw back and mechanism to make assessment thereupon. Chapter XI enumerates special provisions regarding baggage, goods imported or exported by post, courier and stores, and also providing for requisite declarations to be made by the owner to the proper officer for the purposes of clearance of goods imported with or without duty. It would not be out of place to mention that in the latter part of this judgment we shall delve upon the Baggage Rules framed under Section 79 read with Section 81 of the Act<sup>48</sup>. Chapter XIII provides for powers and mechanism for

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<sup>48</sup> 81. Regulations in respect of baggage.—The Board may make regulations,—

- (a) providing for the manner of declaring the contents of any baggage;
- (b) providing for the custody, examination, assessment to duty and clearance of baggage;
- (c) providing for the transit or transshipment of baggage from one customs station to another or to a place outside India.



conducting searches, seizures and arrests. Chapter XIV lays down provisions for confiscation of goods and conveyances and imposition of penalty with regard to import and export and in this judgement we shall be delving into the scope and ambit of Section 111, 113, 123, 124 and 125 of the Act which arise in the instant matters.

30. On such a *bird's eye view* of the provisions of the Act *albeit* partially up to the relevant chapters that come for consideration in the instant matters, it is also relevant to allude to certain specific provisions that must be borne in our mind for a decision in these matters. Section 12 of the Act is the charging section and dutiable goods are goods whose import is permitted by the Act or any other law in force. Needless to point out that the term 'Duty' is the tax leviable on the goods occasioned by their import into India or their export out of India. Under this section, all goods imported into or exported from India are liable to customs duty unless the Customs Act itself or any other law for the time being in force provides otherwise. The rate of duty is fixed by the Customs Tariff Act, 1975.

31. The valuation of the imported goods is done as provided under Section 14 of the Act. Section 25 of the Act empowers the Central Government to issue notifications exempting either absolutely or subject to such conditions as specified in a notification, goods of any specified description from the whole or any part of the duty under the



Customs Act leviable thereon “import” and “imported goods” mean that if goods are brought into India, meaning thereby into the territory of India from outside, there is import of goods and the goods become imported goods and become chargeable to duty, up to the moment they are cleared for home consumption. The word ‘importer’ has been defined in the Act as importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption and includes any owner or any person who holds himself out to be an importer. Section 2(33) of the Customs Act, 1962 needs to be re-produced that reads as under:-

(33) “prohibited goods” means any goods the import or export of which is subject to any prohibition under this 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;

32. A bare perusal of Section 2(33) of the Act would show that ‘prohibited goods’ are defined as goods, the import or export of which is prohibited by virtue of any prohibition under the Act or any other law for the time being in force. Though at first blush there appears to be a deviation to the effect that it does not include any goods which are not prohibited and such goods in respect of which certain conditions are provided thereby permitting import/ export, however, there is more to the *legal text* than what meets the *eyes*.

33. Since it has been vehemently proffered that no notification has ever been issued by the Central Government prohibiting importation



of gold, we need to examine Section 11 of the Act, which provides as under:-

“11. Power to prohibit importation or exportation of goods.—

(1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.

(2) The purposes referred to in sub-section (1) are the following:-

- (a) the maintenance of the security of India;
- (b) the maintenance of public order and standards of decency or morality;
- (c) the prevention of smuggling;
- (d) the prevention of shortage of goods of any description;
- (e) the conservation of foreign exchange and the safeguarding or balance of payments;
- (f) the prevention of injury to the economy of the country by the uncontrolled import or export of gold or silver;
- (g) the prevention of surplus of any agricultural product or the product of fisheries;
- (h) the maintenance of standards for the classification, grading or marketing of goods in international trade;
- (i) the establishment of any industry;
- (j) the prevention of serious injury to domestic production of goods of any description;
- (k) the protection of human, animal or plant life or health;
- (l) the protection of national treasures of artistic, historic or archaeological value;
- (m) the conservation of exhaustible natural resources;
- (n) the protection of patents, trade marks and copyrights;
- (o) the prevention of deceptive practices;
- (p) the carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India;
- (q) the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security;



- (r) the implementation of any treaty, agreements or convention with any country;
  - (s) the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India;
  - (t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige;
  - (u) the prevention of the contravention of any law for the time being in force; and
  - (v) any other purpose conducive to the interests of the general public.
- (3) Any prohibition or restriction or obligation relating to import and export of any goods or class of goods or clearance thereof provided in any other law for the time being in force, or any rule or regulation made or any order or notification issued thereunder, shall be executed under the provisions of that Act only if such prohibition or restriction or obligation is notified under the provisions of this Act, subject to such exceptions, modifications or adaptations as the Central Government deems fit.

34. A meaningful perusal of Section 11 of the Act would show that the Central Government by notification may provide for goods the import or export of which is prohibited *either absolutely or subject to such conditions* that may be *fulfilled before or after clearance of the goods from the customs*. It empowers the Central Government to specify the goods which are subject to such conditions either absolutely or its import or export is subject to conditions to be fulfilled. The purpose for which such notifications may be issued are *inter alia*, the prevention of smuggling, conservation of foreign exchange and safeguarding balance of payments, *for prevention of an injury to the economy of the country by the uncontrolled import of*



*gold or silver*, prevention of deceptive practices and prevention of contravention of any law for the time being in force and such other purpose conducive to the interest of the general public. However, it is pertinent to mention here that Section 11(3) of the Act which was brought by way of the Finance Act, 2018, is yet to come into force.

35. As it has been vociferously canvassed by learned counsel for the respondents that illegal importation of gold amounts to smuggling, it would be relevant to reproduce Section 2 (39) of the Act which defines “smuggling” as under:

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;

36. Again, a careful perusal of the definition would show that ‘smuggling’ means any act or omission which would render any goods liable to confiscation under Section 111 or 113 of the Act. The words ‘act’ or ‘omission’ are not defined under the Act. However, such words are reflected upon under Section 33 of the Indian Penal Code to denote acts meaning a series of ‘acts’ or as also ‘omissions’ denoting series of omissions. This brings us to Section 111 of the Act which reads as under: -

“111. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:—

(a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;



- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;
- (c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;
- (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any dutiable or prohibited goods found concealed in any manner in any conveyance;
- (f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;
- (g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;
- (h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;
- (i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;
- (j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;
- (k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;
- (l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;
- (m) 1[any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 2[in respect thereof or in the case of goods under transshipment, with the



declaration for transshipment referred to in the proviso to sub-section (1) of section 54];

(n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer; 3[(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]”

Note: section 113 of the Act is omitted as it is applicable in case of exportation of goods and not relevant for decision in the present matter.

37. Section 2 (39) of the Act read in conjunction with sub clauses (e) (f) (i) (j) & (m) to Section 111 of the Act clearly bring out that import of any ‘dutiable’; or ‘prohibited’ goods which are not declared at the customs when imported, would be an act or omission amounting to smuggling, and would therefore subject the goods to confiscation. As much is canvassed as to whether ‘smuggling’ of goods can be read or not into the definition of “prohibited” goods, and further that its confiscation and release/redemption are severable course of actions, we reach to the crucial issue of interpreting Section 125 of the Act, which provides as under:-

**“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 1[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, 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.]

38. During the course of arguments, much had been urged at the behest of the petitioners that if the importation or exportation of the goods is prohibited under this Act or any other law for the time being in force, the adjudicating officer *may allow or afford* an option to pay such fine in lieu of confiscation, as the officer thinks fit; whereas in case of any other non-prohibited goods, *an option 'shall be' mandatorily* given to the owner of the goods or where such owner is not known, the person from whom possession or custody of such goods had been seized, an option to pay fine or penalty in lieu of confiscation.

39. At the outset, there is indeed no notification issued by the Central Government declaring importation of gold in the category of "prohibited" goods such as narcotics, armoured cars, arms & ammunition, endangered species, live stock etc. However, that alone is no closure to the issue. As the instant writ petitions involve individual passengers who were found bringing in gold, it is expedient to examine the entire scheme of the Act to ascertain not only the



legislative intent as also how prohibited and/or smuggled goods are to be treated under the Act.

40. It would be relevant to point out special provisions regarding baggage, goods imported or exported have been provided under Chapter-XI of the Act. Section 77 of the Act<sup>49</sup>, which clearly stipulates that owner of any baggage shall make a declaration of its contents to the proper officer which is then made amenable for determination of rate of duty. Section 79 of the Act<sup>50</sup> then provides for rules enabling baggage of any passenger being exempted from duty or tariff.

41. For the purpose of a decision in the instant matters, suffice it to point out that by virtue of Section 81 (a) of the Act, the **Central Board of Excise and Customs**<sup>51</sup> framed the Baggage Rules, 1998 (as

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<sup>49</sup> 77. Declaration by owner of baggage.—The owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer.

<sup>50</sup> 79. **Bona fide baggage exempted from duty.**—(1) The proper officer may, subject to any rules made under sub-section (2), pass free of duty—

(a) any article in the baggage of a passenger or a member of the crew in respect of which the said officer is satisfied that it has been in his use for such minimum period as may be specified in the rules;

(b) any article in the baggage of a passenger in respect of which the said officer is satisfied that it is for the use of the passenger or his family or is a *bona fide* gift or souvenir; provided that the value of each such article and the total value of all such articles does not exceed such limits as may be specified in the rules.

(2) the Central Government may make rules for the purpose of carrying out the provisions of this section and, in particular, such rules may specify—

(a) the minimum period for which any article has been used by a passenger or a member of the crew for the purpose of clause (a) of sub-section (1);

(b) the maximum value of any individual article and the maximum total value of all the articles which may be passed free of duty under clause (b) of sub-section (1);

(c) the conditions (to be fulfilled before or after clearance) subject to which any baggage may be passed free of duty.

(3) Different rules may be made under sub-section (2) for different classes of persons.

<sup>51</sup> CBEC



amended up to date) that initially allowed an individual passenger coming from abroad to be free from levy of custom duty if carrying jewelry upto an aggregate value of Rs.10,000/- in case of a gentleman and Rs.20,000/- in case of a lady passenger. However, in a later Notification: 12/2012-Cus. dated 17 March 2012 the Government relaxed the conditions as to enable 'eligible passengers' to carry gold not exceeding 10 kgs provided declaration is filed in the prescribed form before the proper officer at Customs at the time of arrival in India but directing the customs officials to rigorously follow the following guidelines:

- (i) The engraved serial number of gold bars must be invariably mentioned in the baggage receipt issued by Customs.
- (ii) In case of gold in any other form, including ornaments, the eligible passenger must be asked to declare item wise inventory of the ornaments being imported. This inventory, duly signed and duly certified by the eligible passenger and assessing officer, should be attached with the baggage receipt.
- (iii) Wherever possible, the field officer, may, *inter alia*, ascertain the antecedents of such passengers, source for funding for gold as well as duty being paid in the foreign currency, person responsible for booking of tickets etc. so as to prevent the possibility of the misuse of the facility by unscrupulous elements who may hire such eligible passengers to carry gold for them.

42. The CBEC then brought the Customs Baggage Declaration Regulations, 2013 vide notification dated 10 September, 2013, whereby the customs duty-free allowance is made applicable to an individual passenger where such individual has been residing abroad



for over a year bringing gold jewelry: for a gentleman upto Rs.50,000/-and for a lady upto Rs.1,00,000/-.

43. There came further Notification No. 520 of 2004/2014-Cus.VI dated 06 March 2014, whereby ‘eligible passengers’ were allowed import of gold in the form of gold bars and ornaments on payment of 10% custom duty, provided that the ‘eligible passenger’ is of an Indian origin or passenger holding a valid Indian passport coming to India after staying abroad for a period not less than six months.

44. Likewise, the Baggage Rules, 2016 as amended w.e.f. 01 March 2016 also provided certain relaxation to the ‘eligible passengers’ of Indian origin or having Indian passport, to bring gold in any form other than ornaments subject to certain conditions. Further, vide Notification No. 31/2016-Customs (N.T) by the Govt. of India, Ministry of Finance, Department of Revenue, the custom duty-free allowance has been allowed to Indian passengers residing abroad for over one year for bringing gold jewellery upto 20 grams with a value cap of Rs.50,000/-in case of a gentleman and 40 grams with a value cap of Rs.1,00,000/- in case of a lady.

45. Reverting to the instant matters, there is no gainsaying that neither any of the petitioners in the instant matters was an ‘eligible passenger’ nor had any one filed the requisite declaration as per the prescribed proforma and each one attempted to pass through the ‘Customs Green Channel’ to avoid payment of customs duty. That being the legal position broad factual position, at this juncture we need



to delve further into Section 2(33), 11 and 125 of the Act to examine how importation of gold is dealt with in other enactments, and thus embark on a short detour to the relevant provision of the FTD&R Act.

### **THE FTDR ACT**

46. Section 2 (e) of the FTDR Act defines ‘import’ and ‘export’- “meaning in relation to goods, bringing into, or taking out of, India any goods by land, sea or air”. Chapter-II enables Central Government to make orders and announce Foreign Trade Policy and the relevant provisions go as under:-

**“3. Powers to make provisions relating to imports and exports.—**(1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.

(2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the [import or export of goods or services or technology]:

[Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.]

(3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.

[(4) Without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder.]



1. **Continuance of existing orders.**—All Orders made under the Imports and Exports (Control) Act, 1947 (18 of 1947), and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the provisions of this Act, continue to be in force and shall be deemed to have been made under this Act.
2. **Foreign Trade Policy.**—The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy:  
Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.]

47. Thus, Section 3 of the FTDR Act empowers the Central Government with a discretion to make provisions for the development and regulations of Foreign Trade by facilitating imports and increasing exports. The Central Government by order published in official gazette, may make provisions for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to just exception, any orders for the import or export of goods, services or technology. Section 3(3) of the FTDR Act stipulates that any order of prohibition made under the Act shall apply *mutatis mutandis* as deemed to have been made under Section 11 of the Customs Act. Sub-Section (4) to Section 3 starts with a *non obstante* clause thereby putting provisions for import or export under the FTDR Act as enforceable notwithstanding anything contained in any other law, rules, regulations, notifications or order. Section 18-A of the



FTDR Act states that the provisions of the Act are in addition to and not in derogation of other laws. It is also pertinent to mention that Sections 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provide for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. **However, it again begs the question as to whether such relaxation would apply to importation of gold in the nature of smuggling?**

#### **NOTIFICATIONS AND CIRCULARS BY THE GOVERNMENT DEPARTMENTS**

48. In order to answer the above question, let us now scan through the various notifications/circulars issued by the Government regulating importation of gold into India. Firstly, it would be expedient to extract the relevant notifications and circulars issued by the DGFT issued from time to time, that go as under:

(i) **DGFT Notification No. 29/(RE-2004)/2002-2007 dated 28.01.2004** issued under Section 5 of the FTDR, Act read with para 2.1 of Export & Import Policy, 2002-2007, amended the ITC (HS) classification of certain goods, including gold. As per this Notification, and gold in all its forms, falling under the Tariff Item Head 7108 and 7118 was “Free” but ‘subject to RBI regulations’.

(ii) **DGFT Policy Circular No. 32/(RE-2004)/2002/2007 dated 16.04.2004** notified that that import of gold was made free subject to RBI regulations vide Notification No. 29 dated 28.01.2004. It also stated that the policy of duty-free imports through Nominated Agencies and 15 Nominated Banks details in Chapter-4 of the EXIM Policy and Handbook of Procedures will continue to be operational. It was further mentioned in the said Circular that as gold and silver are used as currency and are surrogate for foreign



exchange, and the RBI could regulate the import of gold as per the EXIM Policy from time to time.

**(iii). DGFT Policy Circular No. 39 dated 19.08.2011** formulated consolidated guidelines for import of precious metals by the Nominated Agencies. Further, the said Circular clearly stipulated that the policy and procedure for imports of precious metal shall be as per the guidelines stated in the Foreign Trade Policy (hereinafter referred to as 'FTP') and the relevant RBI guidelines.

**(iv) DGFT Notification No.45/2015-2020 dated 30 November, 2018** brought out amendment of import policy of items under HS code 7108 12 00 under ITC (HS), 2017, Schedule -I (Import Policy), in exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends import policy of items under HS code 7108 12 00 under ITC (HS), 2017 Schedule-1 (Import Policy), so as inter alia allow import of gold dore, the extracts of which are tabulated as under:

Exim Code	Item Description	Policy	Policy Conditions	Revised Policy Condition
7108 12 00	Other unwrought forms	Free	Subject to RBI Regulations.	Subject to RBI Regulations.  <b>However, import policy of Gold Dore is "Restricted"</b>



**(v) DGFT Notification No. 36/ 2015-2020** Dated: December, 2019, brought out amendment in import policy conditions of gold and silver under Chapter 71 of ITC (HS), 2017, Schedule-1 (Import Policy) in exercise of powers conferred by Section 3 of FT (D&R) Act 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, thereby providing necessary conditions for the importation of gold any form, other than monetary gold and silver in any form revising the policy from “free” to “restricted” in terms Chapter 71 of ITC (HS), 2017, Schedule-1 (Import Policy), which conditions are extracted as under:

Exim Code	Item Description	Present Policy	Revised Policy	Existing Policy Condition	Revised Policy Condition
71061000	Powder	Free	Restricted	Subject to RBI Regulations	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies)
71069100	Unwrought	Free	Restricted	Subject to RBI Regulations	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for



					other agencies)  Silver dore can be imported by refineries against a licence with AU condition
71081100	Powder	Free	Restricted	Subject to RBI Regulations	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies)

**(vi) DGFT Notification No. 49/2015-2020 Dated: 5<sup>th</sup> January, 2022, brought out amendment in import policy conditions of gold under Chapter 71 of Schedule - I (Import Policy) of ITC (HS), 2017** in exercise of powers conferred by Section 3 read with Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time. In addition to nominated agencies as notified by RBI (in case of banks) and by DGFT, qualified jewellers as notified by **International Financial Services Centres Authority (IFSCA)** were permitted to import gold under specific ITC(HS) Codes through India International Bullion Exchange IFSC Ltd. (IIBX). The relevant conditions are extracted as follows:



ITC (HS) Code	Item Description	Policy	Existing Policy	Revised Policy Condition
71061000	Powder	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).	No change in existing Policy Condition
71069100	Unwrought Grains	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).	No change in existing Policy Condition
71069190	Unwrought Grains		Silver dore can be imported by refineries against a licence with AU condition.	
71069210	Sheets, plates, strips, tubes	Restricted	Import is allowed only	



	and pipes		through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).	No change in existing Policy Condition
71081100	Powder	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).	No change in existing Policy Condition
			Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies)	Import is allowed only through nominated agencies as notified by RBI (in case of banks), DGFT (for other agencies) and IFSCA (for qualified jewelers through India International Bullion Exchange)  Gold Dore can be



71081200	Other unwrought forms	Restricted	Gold dore can be imported by refineries against a license with AU condition.	imported by refineries against an import license with AU condition.
71081300	Other semi-manufactured forms	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies)	No change in existing Policy Condition
71189000	Other	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies)	Import is allowed only through nominated agencies as notified by RBI (in case of banks), DGFT (for other agencies) and IFSCA (for qualified jewelers through India International Bullion Exchange).

### **RBI CIRCULARS**

49. A careful perusal of the aforesaid DGFT notifications brings out that the government policy for import has been by and large in



“restricted “category and import of gold has been highly regulated with it being allowed through nominated banks and agencies only. We then take cognizance of the various Circulars issued by the RBI from time to time regulating the import of gold into India, relied upon by the Id counsels for the respondents, the extracts of which read as under:

(i). Circular No. 107 dated 04.06.2013 issued by the Government of India, Ministry of Finance (Department of Revenue), CBEC permitting import of gold on consignment basis by banks for genuine needs of the exporters of gold jewellery simultaneously extended the benefit to all nominated agencies / premier / star trading houses who have been permitted by the Government of India to import gold. The said Circular was issued under Section 10 (4) read with Section 11 (i) of the FEMA.

(ii). RBI Circular No. 103/2012-13/499 dated May 13, 2013 by the Foreign Exchange Department reiterated that nominated banks / agencies were permitted to import gold on loan basis.

(iii). Circular No. 7 by the Exchange Control Department, RBI dated March 6, 1998 whereby certain nominated agencies had been permitted to import gold viz. MMTC, HHEC, STC, SBI and other agencies authorized by the Reserve Bank for sale of jewellery manufacturers, exporters, NRIs, holders of Special Import Licences and domestic users. There were detailed guidelines for import of gold on loan / credit basis providing for period of loan, rate of interest and quantity besides consignment basis as also outright purchase basis which were issued in terms of Section 73 (3) of the Foreign Exchange Regulations Act, 1973.

(iv). Circular No. 15 RBI/2013-14/148 dated July 22, 2013 issued under Section 10 (4) r/w Section 11 (1) of the FEMA, provided for import of gold for the purposes of exports or to import of gold by units in SEZ exclusively for the purposes of exports providing *inter alia* also providing that the nominated banks / nominated agencies shall ensure that at least one fifth of every lot of import of gold (in any form/ purity including import of gold coins / dore) is exclusively made available for the purposes of export.

(v). Circular No. 25 issued by RBI 2013-14/187 dated August 14, 2013 referred to the earlier Circular No. 15 dated July, 22, 2013



and specifically prohibited import of gold in forms the coins and medallions providing for other stringent conditions in terms of 20 / 80 principle and quantifying the amounts of gold to be imported by the nominated agencies as also the banks.

(vi). Circular No. 82 RBI/ 2013-14 /423 dated December 31, 2013 referred to the earlier Circulars allowing refineries to import gold dore up to 15 % of their gross average viable quantity based on their licence entitlement in the first two months for making the same available to the exporters on first in first out basis. Further, providing not more than 80% would be allowed to be sold domestically.

(vii). It is further demonstrable from Circular No.103 RBI/2013/14/493 dated February 14, 2014 and Circular No. 133 RBI/2013-14/600 dated May 21, 2014 that import of gold beyond 100 kg was allowed only routed through Custom bounded warehouses only by nominated agencies and export houses or individuals.

(viii). Further, Guidelines were given vide Circular No. 79 RBI/2014-45/474 dated Feb 18, 2015 under Section 10 (4) read with Section 11 (1) of FEMA vide which import of gold coin and medallions were no longer prohibited but restrictions on banks in selling gold coins and medallions were not removed.

(ix). Circular No. 04 RBI/2022-2023/57 dated May 25, 2022 issued under Section 3 read with Section 5 of FTDR Act r/ w paragraph 1.02 and 2.01 of Foreign Trade Policy 2015-2020 ,allowed import of gold by qualified jewellers as notified by the International Financial Services Centres Authority (IFSCA). It provided detailed mechanism by the resident qualified jeweller to import gold through IIBX i.e., India International Bullion Exchange IFSC Ltd. or in terms of any other regulations issued by IFSCA and DGFT.

50. The aforesaid circulars leave no iota of doubt that the RBI has also been stepping in from time to time regulating the importation of gold. While winding up this part of the narrative, there is no gainsaying that the rate of customs duty on import of gold has been modified from time to time under Customs Tariff Act,1975, and it is but obvious that smuggling of gold is undertaken not only to profit



from the price difference in gold items as also to avoid payment of customs duty.

51. Without further ado, we have no hesitation in holding that smuggling of **gold is per se restricted by virtue of Section 111 as also** in terms of various notifications issued under the FTDR Act and under the RBI Act discussed herein above. The aforesaid discussion raises a strong disposition to the effect that the importation of gold into India is highly regulated and bulk importation of gold item could only be affected by the nominated banks, agencies or business houses in the manner laid down by various DGFT regulations as well as the RBI circulars or by the “eligible passengers” in the manner provided by the relevant Regulations discussed hereinabove. There is no gainsaying that one of the main objects of the Customs Act is to prohibit smuggling of goods and sternly deal with the same, as could be plainly gathered on a conjoint reading of Sections 2(25), 11(2)(c), 111 and 112 of the Act. In the cited case of *Commissioner of Customs (Preventive) v. M. Ambalal & Co. (supra)*, it was categorically observed that the Customs Act “*aims to counter the difficulties that have emerged over the years due to the changing economic and financial conditions; amongst them it proposes to tackle the increasing problems of smuggling both in and out of the country. The Act aims to sternly and expeditiously deal with smuggled goods, and curb the dents on the revenue thus caused. In order to deal with the menace of smuggling, the authorities are enabled to detect,*



*conduct search and seizure, and if necessary, confiscate such smuggled goods, within the territory of India.” A fortiori, smuggled goods can never be categorised as “imported goods” as observed in the case of **M. Ambalal and Co. (supra)**, and it would be antithetical to consider that “smuggled goods” could be read within the definition of “imported goods” for the purpose of the Act. As an inevitable corollary, it would be contrary to the purpose of exemption notifications to accord the benefit meant for imported goods on ‘smuggled’ goods.*

52. It is significant to understand the magnitude of smuggling of gold into India. As per Directorate of Revenue Intelligence annual report for 2019-2020<sup>52</sup>, 120 tonnes of gold were smuggled into India whereas as per annual report for 2021-22, 836 kgs of gold were seized by the department during 2021-22. The report also reads as under:

“Gold has proved to be an attractive vehicle for money laundering for criminals due to the reasons that it remains stable in value, is easily transformable and interchangeable for other assets. From mining to retailing, lucrative proceed generating opportunities are presented by this precious metal especially for those who are inclined to engage in illegal activities. Gold continues to offer opportunities for arbitrage due to differential prices internationally. It also remains vulnerable to be used in trade based money laundering operations as it permits high values to be moved across borders in a relatively convenient way with a product that can be transformed to be concealed easily. This quality of gold to move value quickly and easily, renders it also susceptible to be used in funding terrorism.”

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<sup>52</sup> As published on the official website of Directorate of Revenue Intelligence , obtained from [https://dri.nic.in/writereaddata/dri\\_report\\_dat\\_1\\_12\\_20.pdf](https://dri.nic.in/writereaddata/dri_report_dat_1_12_20.pdf)



53. It would further be relevant to refer to the report by the Indian Gold Policy Centre (IGPL)<sup>53</sup> that reads as under:

“It is estimated that up to one-fourth of the total volume of gold entering India arrives here through illicit trade. India imports around 800-900 tonnes of gold every year while the annual consumption is around 1,000 tonnes. This suggests that up to 200 tonnes of gold is being smuggled into the country. This illicit trade represented over \$1 billion in value and at least \$20 million in lost tax revenue to governments. The World Gold Council (WGC) estimates 65-75% of smuggled gold comes by air, 20-25% by sea, and 5-10% by land. One important factor that encourages the smuggler is the customs duty levied on the gold import. History shows that there is a considerable percent increase in the customs duty. PR Somasundaram, Managing Director for the region at the WGC said that the propensity to smuggle now is very high because every time you increase the tax rate, you give that much more incentive to smugglers. As per the present market value of gold in India, 1 kg of the smuggled yellow metal would fetch more than a profit of Rs 5 lakh on import duty alone. (Pg. 3 of the Report)

54. The aforesaid report also provides information given in the Lok Sabha, in response to a question put to the Ministry of Finance (Pg. 4 of the Report), which was answered to by the Minister of State in the Ministry of Finance and has been reproduced below:<sup>54</sup>

### **Table 1 – Gold Smuggling in India.**

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<sup>53</sup> Report published by the Indian Gold Policy Centre, IIM-Ahmadabad – IGPC has been sent up under a grant from the World Gold Council and was closely with the Government and the Industry for providing meaningful policy advisory. Report on ‘Gold Smuggling in India and its Effect on Bullion Industry’, as obtained from <https://www.iima.ac.in/sites/default/files/2023-06/Maria%20Immanuvel.pdf>

<sup>54</sup> Lok Sabha, Unstarred Question No. 28 titled “Gold Smuggling Cases” , as on Session IV answered on September 14, 2020 as obtained from <https://sansad.in/ls/questions/questions-and-answers>.



Year	Number of Cases of gold at various airports	Quantum of gold seized (in kg)	Number of People booked	Value of Gold Seized (Rs. in Lakhs)
2015-16	2696	2452.147	1408	60667.29
2016-17	1453	921.805	788	24375.62
2017-18	2911	1996.930	1525	53133.32
2018-19	4855	2946.097	2141	83354.89
2019-20	4444	2629.549	2339	85795.50
2020-21	196	103.165	200	4955.566

Upto August, 2020

55. In reaching our conclusions, we derive support from the case law relied upon by the learned counsel for the respondents. In the cited case of *Sheikh Mohd. Omar v. Customs (supra)*, the petitioner was a dealer in horses and was breeding out Mares owned by him, who imported two Stallions and the Customs confiscated the Mare ‘Jury Maid’. In the decision rendered by the Hon’ble Three Judges of the Supreme Court, referring to Section 111(d) read with Section 2(33) of the Act besides Section 3(1) of the Imports and Exports (Control) Act, 1947, promulgated w.e.f. 07 December 1955, it was held that import of live stocks and animals was prohibited and the word ‘any prohibition’ in Section 111(d) of the Act ***meant complete as well as partial prohibition*** and merely because Section 3 of the Imports and Exports (Control) Act, 1947 ***used three different expressions “prohibiting”, “restricting” or otherwise “controlling” was not to cut down the amplitude of the word “any prohibition” in***



*Section 111(d) of the Act*, and therefore, the decision by the Adjudicating Authority not permitting release/redemption was upheld.

56. In the case of *Om Prakash Bhatia v. Commissioner of Customs (supra)*, the petitioner attempted to export prohibited goods under Section 113(d), who was found guilty of intentional over-invoicing of the exported goods in violation of Section 18(1) (a) of the FERA, 1973, Section 14 of the Act read with Rule 11 of the Foreign Trade (Regulation) Rule, 1993 read with Section 11(1) of the FT(D&R) Act, 1992. The crux of the matter is that the exporter failed to fully disclose the true sale consideration. Examining the scope and ambit of section 2(33) read with section 11 & 113 of the Act, it was observed as under:

10. From the aforesaid definition, it can be stated that: (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. **This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either "absolutely" or "subject to such conditions" to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2).** Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Sk. Mohd. Omer v. Collector of Customs*, wherein it was contended that the expression "prohibition" used in



Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus: (SCC p. 732, para 11)

"What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to 'any prohibition imposed by any law for the time being in force in this country' is liable to be confiscated. 'Any prohibition' referred to in that section applies to every type of 'prohibition'. *That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition.* The expression 'any prohibition' in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions '*prohibiting*', '*restricting*' or '*otherwise controlling*', we cannot cut down the amplitude of the word 'any prohibition' in Section 111(d) of the Act. '*Any prohibition means every prohibition.* In other words all types of prohibitions. Restriction is one type of prohibition. From Item (I) of Schedule I Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

**{bold italics emphasized}**

57. Thus, it was categorically held that wherever the conditions prescribed for import or export of goods are not complied with, such goods shall fall in the category of 'prohibited' goods within the scope and meaning of section 2(33) of the Act. At this stage there is a twist in the tale since it is relevant to take note that the *ratio* in the aforesaid two cases (the latter decided by the two Hon'ble Judges of the Supreme Court) was not referred to or perhaps overlooked in a decision by three Hon'ble Judges of the Supreme Court in the cited



case of *Commissioner of Customs v. Atul Automation (P) Ltd. (supra)*. *Atul Automation* was a case where the appellant in October-November, 2016 imported MFDs without requisite permission viz., Multi-Function Device, Digital Photocopiers and Printers, which incidentally were also classified as ‘other wastes’ under Rule 3 (1) (23) of the Hazardous Waste Management Rules, and the goods were confiscated with penalty imposed, declining relief of release/redemption. The challenge was upheld observing that: -

“8. Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Sections 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provide for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply *mutatis mutandis* as deemed to have been made under Section 11 of the Customs Act also. Section 18-A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorization upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what is restricted. We, therefore, find no error with the conclusion of the Tribunal affirmed by the High Court that the respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the Customs Authorities with fine under Section 112(a) of the Customs Act, 1962.”



58. All said and done, the decision in *Atul Automation (P) Ltd. (supra)* was distinguished in the subsequent case by three Hon'ble Judges of the Supreme Court titled *Union of India v. Raj Grow Impex (supra)*, wherein the decision by the Bombay High Court was assailed by the Government whereby the imported goods were ordered to be released/redeemed on payment of fine. It was not in dispute that the import of food items by various parties had been done in violation of notification issued by the Central Government under the FTDR as also consequential trade notices issued by the DGFT restricting the import of certain beans, peas and pulses. The Hon'ble Judges of the Supreme Court relied on the decision in *Sheikh Mohd. Omar v. Customs (supra)* and it was observed that restrictions had been imposed not only due to increased quantities of imports but to also to prevent panic disposal by farmers since prices of grams would have come down. Primarily two questions were posed as to whether the goods were falling in 'prohibited category' and 'liable to absolute confiscation'. It was observed as under:

“154. The present case is of an entirely different restriction where import of the referred peas/pulses has been restricted to a particular quantity and could be made only against a licence. The letter and spirit of this restriction, as expounded by this Court earlier, is that, any import beyond the specified quantity is clearly impermissible and is prohibited. This Court has highlighted the adverse impact of excessive quantity of imports of these commodities on the agricultural market economy in the case of *Agricas (supra)* whereas, it had not been the case in *Atul Automations (supra)* that the import was otherwise likely to affect the domestic market economy. In contrast to the case of *Atul Automations*, where the



goods were permitted to be imported (*albeit* with authorisation) for the reason that they were not manufactured in the country, in the present case, the underlying feature for restricting the imports by quantum has been the availability of excessive stocks and adverse impact on the price obtainable by the farmers of the country. The decision in *Atul Automations* (*supra*), by no stretch of imagination, could be considered having any application to the present case.

***155. Thus, we have no hesitation in holding that the goods in question, having been imported in contravention of the notifications dated 29.03.2019 and trade notice dated 16.04.2019; and being of import beyond the permissible quantity and without licence, are 'prohibited goods' for the purpose of the Customs Act***

***156.*** The unnecessary and baseless arguments raised on behalf of the importers that the goods in question are of 'restricted' category, with reference to the expression 'restricted' having been used for the purpose of the notifications in question or with reference to the general answers given by DGFT or other provisions of FTDR Act are, therefore, rejected. The goods in question fall in the category of 'prohibited goods'. **{bold italics emphasized}**

59. It is pertinent to mention a distinguishable aspect that in the case of *Atul Automation (P) Ltd. (supra)*, the consignment was ordered to be released for re-export as well. Further, on the issue of whether or not the goods were liable to be confiscated, it was observed in the case of *Raj Grow Impex (supra)* as under:-

***“164.*** Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and *such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power.* The requirements of reasonableness,



rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

**165.** It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

**166.** It is true that the statutory authority cannot be directed to exercise its discretion in a particular manner but, as noticed in the present case, the exercise of discretion by the Adjudicating Authority has been questioned on various grounds and the Appellate Authority has, in fact, set aside the orders-in-original whereby the Adjudicating Authority had exercised the discretion to release the goods with redemption fine and penalty. Having found that the goods in question fall in the category of ‘prohibited goods’ coupled with the relevant background aspects, including the reasons behind issuance of the notifications in question and the findings of this Court in *Agricas* (supra)<sup>55</sup>, the question is as to whether the exercise of discretion by the Adjudicating Authority in these matters, giving option of payment of fine in lieu of confiscation, could be approved? *It is true that, ordinarily, when a statutory authority is invested with discretion, the same deserves to be left for exercise by that authority but the significant factors in the present case are that the Adjudicating Authority had exercised the discretion in a particular manner without regard to the other alternative available; and the Appellate Authority has found such exercise of discretion by the Adjudicating Authority wholly unjustified.* In the given circumstances, even the course adopted in the case of *Hargovind Das K. Joshi*<sup>56</sup> (of remitting the

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<sup>55</sup> The case of **Union of India v. Agricas LLP, (2020) SCC OnLine SC 675** was one where the constitutional validity of the notification issued by the Central Government under Section 3 of the FTD&R Act was assailed for imposing quantitative restrictions on import of Peas and Pulses.

<sup>56</sup> The case of **Hargovind Dass K. Joshi v. Collector of Customs** was one where the appellants had imported a consignment of ‘Zip Fastners’, which goods were confiscated imposing penalty and no option was given to the appellants for redeeming the goods on payment of such fine as may be determined by the Collector of Customs in lieu of confiscation. It is not clear from the reading of the Judgment as to what the alleged violation was. However, the matter was remanded back to the Collector of Customs for a limited purpose to decide whether to give an option to the appellants to redeem the confiscated goods on payment of fine.



matter for consideration of omitted part of discretion) cannot be adopted in the present appeals; and it becomes inevitable that a final decision is taken herein as to how the subject goods are to be dealt with under Section 125 of the Customs Act.

**176.** As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally and cautiously and has to be guided by law; has to be according to the rules of reason and justice; and has to be based on relevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act, when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall be weighed before taking a final decision for release or absolute confiscation of goods.

**179.** The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. *When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter.* Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of *bona fide* and the only proper exercise of discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.

**{bold italics emphasized}**



60. In the cited case of *Commissioner of Customs (Prev) v. M. Ambalal & Co. (supra)*, the Customs department on receiving specific information, conducted search and seizure in the office of respondent firm unearthing a large quantity of rough diamonds regarding which partner of the Firm was neither able to afford any satisfactory explanation nor produced any documents in relation to import of diamonds. The said goods were seized, later confiscated and application for redemption/release was declined under Section 125 of the Act. On being challenged, the High Court allowed the redemption/release but on challenge by the department, the decision of the High Court was set aside. It was held that the goods which had been seized in the matter could not have been imported into India without a license under Import Control Act and same did not amount to imported goods within the meaning of Section 2(25) of the Act, and therefore, importation of such goods i.e., rough diamonds were prohibited by law and the respondent firm was not entitled to its redemption/release.

61. The case of *Abdul Razak v. Union of India (supra)* was one where an attempt was made to smuggle gold by concealing the same in emergency lights, mixie-grinders and car horns weighing about 8 kg. It was held that “*although gold as such is not a prohibited item and can be imported, such import is subject to a lot of restrictions including necessity to declare the goods on arrival at the customs station and make payment of duty at the rate prescribed*”. It was



further held that “*goods brought by indulging in smuggling would amount to importation of prohibitory goods and the appellant was not entitled as a matter of right to claim release of gold on payment of redemption fine and duty*”. It is pertinent to mention that the above referred decision was challenged by the appellant / assessee in SLP (Civil) CC 5192/2012 before the Supreme Court of India and the same was dismissed.

62. The case of *Abdul Hussain Saifuddin Hamid v. State of Gujarat (supra)* was one where the appellant / importer attempted to smuggle aluminium coated gold wires and it was held that smuggling was nothing but importing goods clandestinely without payment of duty and where the conditions of import were not complied with, the said goods have to be treated as prohibited from being imported and the goods were liable to be confiscated under Section 112 B of the Customs Act and no right of redemption was available with the importer.

#### **ANALYSIS OF CASE LAW RELIED UPON BY THE PETITIONERS:**

63. As regards the case law heavily relied upon by the ld. counsels for the petitioners, the same to our mind do not commend acceptance for the following reasons. The cited case of *Sunshine International v. Collector of Customs (supra)*<sup>57</sup>, was one where the petitioners imported ‘Cassia’ without any license and the Adjudicating Officer

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<sup>57</sup> Madras High Court



ordered absolute confiscation, imposed penalty without addressing the question of an option being given to the petitioners to redeem the goods on payment of fine. The petitioners urged that the import of Cassia had been going on in the same manner without any license for several years and in similar situations, the items had been allowed to be released/redeemed on payment of fine, and therefore, they had a legitimate expectation that the goods shall not be confiscated and would be released/redeemed on payment of fine but on the contrary, they have been arbitrarily singled out and meted out a different treatment. Upholding such plea, it was held that not releasing or /redeeming the item would offend Article 14 of the Constitution of India, and therefore, the Adjudicating Authority was held to have passed the order of confiscation with penalty contrary to the letter and spirit of Section 125 of the Act. In the case of *Mohini Bhatia v. Commissioner of Customs (supra)*<sup>58</sup>, the petitioner arrived from Singapore and when she attempted to pass through the ‘Customs Green Channel’, was asked if she was carrying any gold, to which she replied in the negative. However, on searching her, 40 gold bars, each weighing 10 tolas were found stitched with her undergarments. The long and short of the story is that later on when the petitioner applied for release/redemption of gold items, same were ordered to be confiscated instead with heavy penalty. It was held that import policy in force at the relevant time made a distinction between ‘prohibited

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<sup>58</sup> CEGAT Mumbai (1999)



goods’ and ‘restricted goods’ and the gold was not a prohibited item, and thus, the Adjudicating Authority was bound to offer an option to the importer to redeem the items on payment of fine, which was not to exceed the market price of the goods less duty payable thereupon.

64. The case of *Suresh Kumar Raisonni v. Commissioner of Customs (supra)*<sup>59</sup>, was one where on personal search of one Jabbar Singh Thakur at the premises of a party at Jhaveri Bazar, Mumbai on 19.08.1997, led to recovery of 42 foreign marked gold biscuits valued at Rs. 22,26,000/-, which were seized under the Customs Act. The proceedings led to the passing of the impugned order for confiscation of gold under Section 111(D) of the Act besides imposition of penalty under Section 112 of the Act. In a nutshell, the Court held that *gold was only a restricted item and not prohibited one and permission was granted for release/redemption of the goods subject to payment of fine*. The cited case of *Union of India v. Dhanak M. Ramji (supra)*<sup>60</sup> was one where jewellery items confiscated from the petitioner were ordered to be released to her by the Tribunal on the premise that these were not prohibited items. The order was assailed by the department and the appeal was dismissed holding that the goods could be released to her as she alone had claimed title to the same. The decision in *Commissioner of Customs v. Ashwini Kumar @ Amanullah (supra)* was given in the factual background where the gold consignment

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<sup>59</sup> CSTA Mumbai 2004

<sup>60</sup> Mumbai High Court 2009



weighing about 12 kg was imported under Airway Bill through FedEx Courier at IGI Airport, which as per Foreign Trade Policy applicable during the relevant time, was not freely importable and could be imported by banks authorized by the RBI or by other authorized by Directorate General of Foreign Trade (DGFT) and to some extent by the passengers. The CESTAT examining a plethora of case law and the relevant provisions of the Customs Act and FTDR Act summarized its conclusion vide paragraph (34) as under:-

34. From Section 125, the Customs Manual, 2018 of the department and various case laws cited by both sides and discussed above, the following position is clear:

(a) Allowing redemption of goods, which are not prohibited is mandatory and the adjudicating authority has to allow it under Section 125.

(b) Allowing redemption of goods whose import is prohibited is discretionary and the adjudicating authority may or may not allow it.

(c) Import of gold is not absolutely prohibited but is restricted.

(d) The owner or the person from who the goods are seized cannot claim as a matter of right that the prohibited goods must be allowed to be redeemed as held by Hon'ble High Court of Madras in the case of *Samyanathan Murugesan* and by Hon'ble High Court of Kerala in case of *Abdul Razak*. Both these judgments were upheld by the Hon'ble Supreme Court.

(e) Although, as per Section 2(33) of the Customs Act, 'prohibited goods' includes restricted goods in respect of which the conditions have not been fulfilled, a distinction was drawn by the Government of India in the case of *Ashok Kumar Verma* (supra) and redemption was allowed of the gold which was smuggled by the appellant passenger ingeniously concealing it in the stroller of the bag. It has also been indicated in this order that Government of India has consistently held the view in many cases that gold is not prohibited but restricted and allowed redemption of confiscated gold.

(f) The Apex Court has also drawn a distinction between goods whose import is absolutely prohibited and those whose import is



restricted under the Foreign Trade (D&R) Act and redemption was allowed in the case of restricted goods.

(g) Thus, while Section 125 allows the adjudicating authority the discretion to allow or not to allow redemption of prohibited goods. As far as gold, which is smuggled, is concerned, there appears to have been a gradual change in the approach of the Government. In the case of *Ashok Kumar, Government of India* allowed redemption of gold that was not only NOT Declared but ingeniously concealed in strolley bags. It has also been declared in this Revision order that GOI had consistently held the view that smuggled gold can be redeemed.

65. We are unpersuaded to countenance the aforesaid conclusions for reasons which follow. The case of *Rajaram Bohra v. Union of India (supra<sup>61</sup>)* was one where huge quantity of gold was seized from the petitioner when he was travelling in train by the RPF and the gold was handed over to the Customs and even in that scenario it was held that since the gold was not a prohibited item, an option should have been given to the petitioner under Section 125 of the Customs Act for release/redemption on payment of fine. The decision in *Commissioner of Customs (Air) v. P. Sinnasamy (supra<sup>62</sup>)* was one where the first respondent arrived from Singapore on 17 September 1999 and contrary to the declaration submitted at the Customs, examination of his baggage resulted in seizure of 111 broken bits of gold biscuits weighing 2548.3 grams valued at Rs. 10,34,355/-. Though it was the consistent view of the Adjudicating Authorities at all levels that respondent No.1 committed offences under Section 111(d) (l) (k) and

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<sup>61</sup> Calcutta 2015

<sup>62</sup> Madras 2017



(m) of the Act read with Section 3(3) of the FTD&R Act, 1992, he was allowed the option of release/redemption of all the subject goods i.e., gold on payment of fine by the Tribunal, which order was assailed by the Government. Examining various provisions of law including the Customs Act and the FTDR Act and plethora of case law on question as to whether Adjudicating Authority has properly exercised its discretion, it was held that since the gold was not a prohibited item, the Adjudicating Authority i.e., Tribunal rightly exercised its power based on the twin tests of ‘relevancy’ and ‘reasonableness’.

66. The cited case of **Becker Gray & Company Ltd. v. Union of India**<sup>63</sup> is a decision by three Hon'ble Judges of the Supreme Court wherein the issues came to be discussed in the context of Section 12 of the FERA as well as the Sea Customs Act, 1949. It was a case whereby the appellants claimed that they had exported Jute Carpet Baking Cloth and the Customs found that declarations given by them were not correct as the full export value of the goods was not shown and the declarations required to be made under the Rules in the prescribed form were also incorrect. It is in the said context that it was held that there was only a breach of restrictions imposed by Section 12(1) of the Sea Customs Act and a mere incorrect declaration was not in contravention of Section 19 of the Sea Customs Act<sup>64</sup>, and

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<sup>63</sup> 1970 (1) SCC 351

<sup>64</sup> The President of the Union may from time to time, by notification in the Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of



therefore, imposition of penalty under Section 167(8) was totally unjustified. We do not see as to how referred provision, namely, Section 19 of the Sea Customs Act is in any way analogous to Section 111 of the Act and in any case, the cited case was not about smuggling of goods but a case of mis-declaration of its value so as to seek levy of lesser customs duty.

67. The cited case of **Commissioner v. Prayag Exporters Ltd.**<sup>65</sup> also has no application since it was a case where the goods in question were not prohibited for export and at the same time there was no provision for levy of export duty on the consignment. The decision in the case of *Commissioner v. Suresh Jhunjunwala (supra)* was also one where the export consignment was held to be a case of over invoicing and the issue regarding redemption of goods was not considered with regard to violation of FERA.

68. The plea by the learned counsel for the appellants that RBI has never issued any circular under Section 58 of RBI Act<sup>66</sup>, 1934

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the Union of Burma or any specified part thereof, either generally or from or to any specified country, region, port or place beyond the limits of the Union of Burma.

<sup>65</sup> 2003 (155) ELT 4 (SC)

<sup>66</sup> 58. Power of the Central Board to make regulations.—

(1) The Central Board may, with the previous sanction of the 1[Central Government], 2[by notification in the Official Gazette,] make regulations consistent with this Act to provide for all matters for which provision is necessary or convenient for the purpose of giving effect to the provisions of this Act.

(2) In particular without prejudice to the generality of the foregoing provision, such regulations may provide for all or any of the following matters, namely:— 3[\*\*\*]

(f) the manner in which the business of the Central Board shall be transacted, and the procedure to be followed at meetings thereof;

(g) the conduct of business of Local Boards and the delegation to such Boards of powers and functions;



regulating import of gold *goes down the drain* as it has been amply demonstrated that import of gold into India has been subject to various restrictions and mandatory requirements. It is no argument that restrictions to bring gold in a certain quantity falls under Section 25 of the Act and there is no notification under Section 11 of the Act. We are of the firm opinion that one has to construe the entire scheme of the Act to ascertain if there are other restrictions regulating

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- (h) the delegation of powers and functions of the Central Board 4[\*\*\*] to Deputy Governors, Directors or officers of the Bank;
- (i) the formation of Committees of the Central Board, the delegation of powers and functions of the Central Board to such Committees, and the conduct of business in such Committees;
- (j) the constitution and management of staff and superannuation funds for the officers and servants of the Bank;
- (k) the manner and form in which contracts binding on the Bank may be executed;
- (l) the provision of an official seal of the Bank and the manner and effect of its use;
- (m) the manner and form in which the balance-sheet of the Bank shall be drawn up and in which the accounts shall be maintained;
- (n) the remuneration of Directors of the Bank;
- (o) the relations of the scheduled banks with the Bank and the returns to be submitted by the scheduled banks to the Bank;
- (p) the regulation of clearing-houses for the 5[the banks (including post office savings banks)];
- 6[(pp) the regulation of fund transfer through electronic means between the banks or between the banks and other financial institutions referred to in clause (c) of section 45-I, including the laying down of the conditions subject to which banks and other financial institutions shall participate in such fund transfers, the manner of such fund transfers and the rights and obligations of the participants in such fund transfers;]
- (q) the circumstances in which, and the conditions and limitations subject to which, the value of any lost, stolen, mutilated or imperfect currency note of the Government of India or bank note may be refunded; and
- (r) generally, for the efficient conduct of the business of the Bank. 7[(3) Any regulation made under this section shall have effect from such earlier or later date as may be specified in the regulation.
- (4) Every regulation shall, as soon as may be after it is made by the Central Board, be, forwarded to the Central Government and that Government shall cause a copy of the same to be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall, thereafter, have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.] 8[(5) Copies of all regulations made under this section shall be available to the public on payment.



importation of gold. We find no merit in the plea that restrictions or prohibition could only be issued by way of notification and cannot be issued by way of circulars.

69. There is no gainsaying that as per Section 123 of the Act, the burden of proving that the goods are not ‘smuggled’ goods is placed upon the person from whom the goods are seized or the person who claims to be owner<sup>67</sup>. Further, the legislative intention could also be deciphered from the fact<sup>68</sup> that “smuggling” in goods *albeit* ‘gold’ in particular, is also made punishable under Chapter in XVI under the titled ‘**offences and prosecutions**’ of the Act and Section 132 *inter alia* makes punishable “any false declaration made knowingly or having reasons to believe that such declaration, statement or document

<sup>67</sup> 123. Burden of proof in certain cases.—1[

(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 2[and manufactures thereof] watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify.

<sup>68</sup> (Unstarred Question No. 1502) asked in the Rajya Sabha regarding ‘Rise in gold smuggling cases’, the following information was provided by the Finance Ministry:

Will the Minister of FINANCE be pleased to state:

(a) whether reports of gold smuggling cases have increased sharply;

(b) if so, the details of such cases reported in the last three years in the country, State-wise; (c) the steps taken to curb the gold smuggling to the country;

(d) whether Government suspects the role of the gangs, who finance the anti-national elements; and

(e) if so, the details thereof?

In response to questions (a) & (b), the following information was provided:

**Total Amount of Gold Seized**

**Year**

2020 – 2154.58 kgs

2021 – 2383.38 kgs

2022 – 3502.16 kgs

2023 (up to February) – 916.37 kgs

In response to question (c), it was stated that Customs as well as the DRI keep constant vigil and take operational measures. Further that Modus Operandi Circulars related to the methods used by smugglers are issued

In response to questions (d) and (e), it was provided that the NIA is undertaking investigations.

(The same has been extracted from <https://sansad.in/rs/questions/questions-and-answers>)



is false<sup>69</sup>.....”. Section 135 of the Act further makes punishable “acquiring of possession of or in any way involved in carrying, removing, concealing or in any other manner dealing with goods, which he knows or has reasons to believe liable to be confiscation under Section 111 or 113 of the Act”<sup>70</sup>. Section 138 of the Act further raises the presumption of “culpable mental state” in the matter of prosecution under this Act and it is upon the accused to prove that he had no such mental state with respect to the act charged as an offence in any prosecution. The explanation to Section 138 of the Act further provides that ‘culpable mental state’ “includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact”. As we noted at the beginning this judgment, smuggling of gold into India causes a cascading effect on the economy of the country, and we cannot overlook the fact that smuggling of gold into India is obviously preceded by payment of consideration either in Indian or foreign currency, which is another aspect of alarming levels of actionable money laundering, venturing into generation of black money and other unlawful activities including financing terrorism.

70. In view of the foregoing discussion, we answer the issues framed to the effect that Section 2(33) of the Act shall also include

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<sup>69</sup> 132. False declaration, false documents, etc.—Whoever makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document in the transaction of any business relating to the customs knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to 1[two years], or with fine, or with both.

<sup>70</sup> - 113 (b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;



importation of such goods within the scope of ‘prohibited category’ with regard to which the mandatory condition under the Act as also in other relevant notifications/circulars issued by the DGFT, the RBI or the any other authority have not been complied with, or in other words the restrictions imposed by the concerned authorities have not been adhered to. We further have no hesitation in holding that the importation of the gold is a prohibited item within the meaning of Section 2(33) of the Act; and that redemption in case of importation of gold which is brought into India illegally in the form of “smuggling” does not entitle the owner or importer for automatic release/redemption of such item, and therefore, as a necessary corollary a decision to allow release/redemption of the goods confiscated with or without imposition of fine in addition to payment of requisite duty is vested in the discretion of the Adjudicating Officer, who needless to state is duty bound to exercise his discretionary powers not only after considering the facts and circumstances of each case before it, but also in a *transparent, fair and judicious manner* under Section 125 of the Act.

71. In view of the aforesaid proposition of law, we proceed to deal with each of the Writ Petitions individually.

**W.P. (C) No. 8902/2021 (Nidhi Kapoor v. Principal Commissioner & Additional Secretary to the Government of India & Ors.)**



72. In the instant Writ Petition, learned Adjudicating Authority after hearing the concerned parties vide order in original dated 16<sup>th</sup> September, 2016, arrived at the following findings:

*“9. I find that the Noticee had an intention to evade payment of the customs duty leviable on the goods, which she tried to clear and import clandestinely. The Noticee was intercepted with dutiable goods at the exit gate of the Arrival Hall after crossing the Green Channel and the value of dutiable goods carried by her was not deliberately filled up in Indian Customs Declaration Slip and knowingly and intentionally did not make true and proper declaration before Customs Officers as required under Section 77 of the Customs Act, 1962. The Noticee attempted to smuggle the goods with the intent to evade customs duty by (a) avoiding the proper channel of customs clearance and (b) walking through the Green Channel with the goods and not declaring anything in respect of the seized items, which were non- bonafide baggage and were concealed by the Noticee.”*

73. Although there is no denying the fact that 80:20 policy stood withdrawn by the RBI, at the same time as discussed in this judgment earlier it was never the policy of the Government to allow unconditional import of gold into India. Further, perusal of the record reflects that the learned Adjudicating Authority placed reliance on decisions in *Sheikh Mohd. Omer v. Collector of Customs (supra)* as also in the case of *Om Prakash Bhatia v. Commissioner of Customs, Delhi (supra)* in reaching the conclusion that the subject goods constituted “prohibited goods” and were therefore liable to confiscation under Section 111 of the Customs Act, 1962. The decision by the learned Adjudicating Authority to absolutely confiscate the gold items and imposing penalty without any option to



the petitioner of its release/redemption was also upheld by the Appellate Authority. On challenge by the petitioner, the Revisional Authority after hearing the parties vide the impugned order dated 08 January 2020 came to the conclusion that the burden to prove ownership of the subject goods was not discharged under Section 123 of the Act by the petitioner. The Revisional Authority also relied on certain judicial pronouncements in the case of **Commissioner of Customs (AIR) Chennai-1 v. Samynathan Murugesan [2009 (247) E.L.T. (Mad.)]** which was upheld by the Apex Court, as well as the decision of the High Court of Bombay in the case of **Union of India v. Aijaj Ahmad – 2009 (244)ELT 49 (Bom.)**. The decision of the Adjudicating Authority to deny the redemption of the goods and order of absolute confiscation were ultimately upheld. Lastly, the plea that another passenger on the same day was apprehended with huge commercial quantity of gold, namely, Ridhima Bajaj but let off by the Custom Authorities in as much as release/redemption was allowed, is hardly of any legal consequence. By all means it is manifest that such decision was contrary to the law but then one bad precedent does not legally entitle the petitioner to claim similar benefit.

74. Therefore, without further ado, we have no hesitation in holding that the discretionary powers were properly exercised by the Adjudicating Authority under Section 125 of the Act in passing the order-in-original dated 16 September 2016. The plea of the petitioner that she had been gifted the gold items of such huge quantity weighing



about 3100 grams was considered and it was held that deed was neither bearing any acceptance nor had any legal sanctity. Therefore, no illegality, perversity or incorrect approach is decipherable from the impugned order dated 2 January 2020 passed by the learned Revisional Authority. Hence, the Writ Petition is liable to be dismissed.

**W.P. (C) No. 9561/2021 (Supriya v. Additional Secretary to the Government of India & Ors.)**

75. In the instant Writ Petition, the learned Adjudicating Authority vide the order in-original dated 15 November 2017 arrived at the following findings:

*“3.2 The fact of mis-declaration is evident from the events recorded in the panchama dated 15.05.2015 and admission thereof in the voluntarily statement of the Noticee recorded under Section 108 of the Customs Act, 1962 on 15.05.2015. The Noticee had crossed the Green Channel without declaring the gold in his possession either on the Indian Customs Declaration Slip or the Customs Officers...The Noticee attempted to clear the goods clandestinely by concealed the same in various items. I find that she violated provisions of Section 77 of the Customs Act, 1962.*

*3.3 Gold is not allowed to be imported freely in baggage. Gold is permitted to be imported by passenger subject to fulfillment of certain conditions. The Noticee does no fulfill the conditions set out in the proviso to Rule 3(1)(h) of the Foreign Trade (Exemption from Application of Rules in certain cases) Rules, 1993 and hence, she is not entitled to import the gold.*

*3.7 The imported goods in the instant case have been concluded to be non-bonafide baggage and as prohibited goods. The same was being attempted to be removed from the customs area and would have been successful lest the Customs Officers would have not intercepted the Noticee...*



6. *I find that in the instant case, the Noticee failed to satisfy the customs authorities regarding purpose and intention of the importing gold to India. She also failed to provide the documentary evidence regarding licit possession of recovered gold.*”

76. In arriving at such findings, the learned Adjudicating Authority *inter alia* relied on the decision in ***Sheikh Mohd. Omer v. Collector of Customs (supra)*** as also in the case of ***Om Prakash Bhatia v. Commissioner of Customs, Delhi (supra)*** and some other judicial pronouncements and accordingly decided to confiscate the gold items absolutely as also imposing penalty without option of its release/redemption. Although, the said order was set aside in appeal by the Appellate Authority vide order dated 18 July 2018, the Revisional Authority vide the impugned order dated 09 July 2021, upheld the order-in-original and held as under:-

*“7.3 The original authority has correctly brought out that, in this case, the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the ratio of the aforesaid judgments, there is no doubt that the subject goods are ‘prohibited goods’. As such, the Commissioner (Appeals) has erred in holding that the impugned gold is not a prohibited item.*

*9. In view of the findings above, the Government holds that the Commissioner (Appeals) has proceed to allow redemption on the erroneous finding that the impugned gold bars are not a prohibited item. The Commissioner (Appeals) has also incorrectly interfered with the discretion exercised by the original authority by permitting redemption of these gold bars.”*

77. Finally, the Ld. Revisionary Authority, after considering the blameworthy conduct of the petitioner as well as the value of the subject goods held that she deserved no leniency. Thus, we are unable



to find any legal infirmity, illegality or perversity in passing the impugned order-in-original dated 15 November 2017 whereby it was held that the petitioner crossed the 'customs green channel' without declaring the gold items weighing 3000 attempting to evade payment of customs duty when intercepted near the exit gate. The huge quantity of gold being carried out of the customs area took the case of the petitioner beyond the scope and ambit of Section 79 of the Act and could not have been considered as bona fide baggage. The learned Adjudicating Authority has considered the various legal pronouncements as also the policy of the Government to curb import and smuggling of gold, and therefore, rightly decided to absolutely confiscate the gold items redemption and imposed penalty upon the petitioner. The plea advanced on behalf of the petitioner that another passenger, namely Vinay Gupta carrying almost the same quantity of gold was let off by the Customs Authority cuts no ice since it was a precedent not worth its salt. Two wrong precedents cannot create a right. Learned Revisional Authority was therefore correct on facts and law to hold that the claim of the petitioner in gold items weighing about 3000 grams was dubious and the documents with regard to ownership were found to be plainly fabricated. Hence, the impugned order dated 9 July 2021 passed by the learned Revisional Authority does not warrant any interference. Accordingly, the present Writ Petition is devoid of any merit and is liable to be dismissed.



**W.P. (C) No. 13131/2022 (Sudha Murthy v. Jt. Commissioner of Customs, IGI Airport, T-3, Delhi)**

78. In the present Writ Petition, learned Adjudicating Authority vide order-in-original dated 01 January 2021 decided to absolutely confiscate the gold items besides imposing penalty without any option to the petitioner for its release/redemption. The findings recorded are reproduced as under:

*“7.1.... The imported goods in the instant case have been concluded to be non-bonafide baggage as the same were being attempted to be removed from the customs area without declaration and the pax would have been successful in evading applicable customs duty if the Customs Officer had not intercepted the pax. As the free allowance is allowed only on the bonafide baggage as per Rule 3 of the Baggage Rules, 2016, I find that the benefit of free allowance is not available to the pax.”*

79. In arriving at such findings, the learned Adjudicating Authority took note of Section 7 of the FTDR Act as well as Rule 3 (1) (h) of the Foreign Trade (Exemption from application of rules in certain cases) Amendment Order, 2017. It was concluded that the petitioner was not an eligible passenger and her intention was to evade payment of customs duty and it was a clear case of mis-declaration under Section 77 of the Act. It was further held as under:-

*“8.3 I observe that gold once confiscated can be redeemed under Section 125 of the Customs Act, 1962. In the instant case, I am not inclined to give an option to the pax for redemption of the said goods as the passenger not only violated the Green Channel but also attempted an act of theft of goods detained by the Department. The intention of the pax was not to clear the goods on payment of applicable duty, fine and penalty but to clear the goods through Green Channel without payment of duty and then to clear the same*



*by way of theft. Hence, the instant case is fit for absolute confiscation.”*

80. In short, the order-in-original dated 01 January 2021 was upheld in the appeal vide order dated 27 August 2021 and the revision application filed by the petitioner was also rejected vide impugned order dated 07 June 2022. Suffice it to state that learned Revisional Authority concurred with the reasons penned by the learned Adjudicating Authority in holding that the goods were prohibited items and the appeal was devoid of any merits.

81. Therefore, we find that in the instant Writ Petition as well, no infirmity, illegality or incorrect approach can be said to have been adopted by the learned Adjudicating Authority as also by the learned Revisional Authority in passing the impugned orders. Ex facie, the petitioner had mis-declared the goods and attempted to evade payment of duty so much so that she even later attempted to steal away a part of the jewellery items. The petitioner failed to submit any document of ownership to the learned Adjudicating Authority as well as the Appellate Authority. Hence, the present Writ Petition is devoid of any merit and is liable to be dismissed.

**W.P.(C) No.531/2022 (Mr. Jasmeet Singh Chadha v. Commissioner of Customs, IGI Airport, New Delhi)**

82. In the instant Writ Petition, the learned Adjudicating Authority ordered for absolute confiscation of the subject goods and imposed a penalty upon the petitioner, which was affirmed by the appellate



authority and thereafter a revision application was preferred by the petitioner. The grounds taken before the learned Revisionary Authority were mainly that the goods in question were not ‘prohibited items’ and that their redemption should have been allowed; and that the *panchnama* dated 09 September 2014 was invalid as it did not bear his signature; and that the conclusion pertaining to the goods being recovered from the shoes of the petitioner was incorrect. The learned Revisional Authority vide the impugned order dated 22 September 2022 affirmed the order-in-original holding that:

*“6..... Hence, the burden of proving that the subject gold bars, were not smuggled, is on the applicant who had brought the gold into the country. The manner of concealment, in this case clearly shows that the applicant had attempted to smuggle the seized gold to avoid detection by the Customs Authorities. Further, no evidence has been produced to prove licit import of the seized gold bars. The applicant has thus, failed to discharge the burden placed on him in terms of Section 123.*

*7.3 The original authority has correctly brought out that in this case, the conditions subject to which gold could have been legally imported, have not been fulfilled. Thus following the law laid down as above, there is no doubt that the subject goods are prohibited goods.”*

83. While denying the release/redemption of the goods, reliance was placed by the Ld. Adjudicating Authority on the decisions in *Sheikh Mohd. Omer (supra)*, *Om Prakash Bhatia (supra)*, *M/s Raj Grow Impex (supra)*, *Malabar Diamonds (supra)*, *Garg Woollen Mills (supra)*, *P. Sinnaswamy (supra)*, *Raju Sharma (supra)* and *Mangalam Organics (supra)*. Hence, in the instant Writ Petition, we find that the decision of the learned Revisional Authority vide order



dated 22 September 2021 whereby the goods weighing about 2000 grams were absolutely confiscated and penalty of Rs. 11 Lacs was imposed without an option of release or redemption does not suffer from any legal infirmity, perversity or incorrect approach in law. At the cost of repetition, the petitioner had failed to discharge the burden under Section 123 of the Act that he was the owner of the subject goods, and he had admitted his signatures on the *panchnama* as also statement made under Section 108 of the Act thereby acknowledging that he was smuggling gold into India. The learned Adjudicating Authority and ultimately the learned Revisional Authority rightly held that the intention of the applicant was to smuggle the goods into India and evade payment of customs duty, which was evident from the ingenious manner in which the goods were concealed in his shoes. Accordingly, the present Writ Petition is devoid of any merit and is liable to be dismissed as well.

**W.P. (C) No. 8083/2023 (Shahnaz Malik v. Union of India)**

84. In the present Writ Petition too, the learned Adjudicating Authority after hearing the parties rightly concluded vide order-in-original dated 30 December 2016 that the intention of the noticee/petitioner to smuggle the gold items was quite evident from the ingenious *modus operandi* adopted to bring it and get it carried out of the Customs without any declaration. Further, it was rightly held that the subject goods constituted ‘non-bonafide baggage’ per Section



79 of the Act read with Rule 3 of the Baggage Rules of 2003. The following findings were arrived at in the order in original:

*“3.8 The goods imported were found/lying/kept in secret manner at the duty free shop waiting to be cleared by the accomplices of the Noticee, which were finally recovered per the revelation of the Noticee. She, as admitted in her statement, intended to cross the Green Channel without payment of duty, tried to smuggle the goods with connivance of staff of M/S. AISATS. Thus being an organized nature of crime and involving mens rea to smuggle the goods, the plea that she was not given a chance to declare the gold does not come to our rescue especially in view of the fact that second packet had already been cleared by her with the help of her accomplices out of the airport without declaration and payment of Customs Duty. Thus the seized goods are liable to confiscation. Further the mis declaration under Section 77 has been discussed and established earlier. Hence, the confiscation as proposed under Section 111 (l) and (m) is warranted and liable to be upheld in view of facts and sequences of events in para 3.2.*

*6. I fixed that the Noticee had intention to evade payment of Customs Duty leviable on the goods, which she tried to import and clear clandestinely. The Noticee was intercepted with dutiable goods at the exit gate of the arrival hall after crossing the Green Channel and the value of dutiable goods carried by her was not deliberately filled up in Indian Customs Declaration Slip and knowingly and intentionally did not make true and proper declaration before Customs officer as required under Section 77 of the Customs Act, 1962.... Hence find she is liable for penal action under Section 112 and Section 114AA of the Customs Act, 1962.”*

85. The above referred determination was made in keeping with various judicial pronouncements, which were held to have a bearing on the present case, viz., ***Sheikh Mohd. Omer (supra)***, ***Om Prakash Bhatia (supra)***, ***Jasvir Kaur [2009 (241) ELT 0521 (Tri.)]***, ***Alfred Menezes (supra)*** and ***Nine Star Exports (supra)***. The petitioner in the revision application assailed the aforesaid order-in-original as also in



appeal on the ground that import of gold was not prohibited and should have been allowed to be released on payment of redemption fine. We have no hesitation in holding that the decision of the learned Adjudicating Authority ordering absolute confiscation of gold and imposing fine without option to the petitioner of its release/redemption suffers from no illegality. We further have no hesitation in holding that the learned Revisional Authority rightly rejected the revision application vide the impugned order dated 14 July 2021. It was rightly observed that mis-declaration was clearly established as provided under Section 77 of the Customs Act and that the petitioner did not discharge its burden under Section 123 of the Act as she failed to produce any evidence that the gold recovered from her was not smuggled.

86. Accordingly, the instant Writ Petition is also devoid of any merit and is liable to be dismissed.

**YASHWANT VARMA J. (concurring)**

87. I have had the benefit of going through the elaborate opinion penned by my esteemed brother Sharma J. who has noticed the facts as well as the rival submissions addressed in great detail. The opinion not only correctly encapsulates the legal issues which these writ petitions raise, but also answers the fundamental challenge raised by the petitioners correctly. The conclusions arrived at by brother Sharma J. thus commend acceptance and affirmation and which I do formally



in terms of this concurring opinion so record. However, bearing in mind the significance of the questions which stood raised, I deem it apposite to record the following reasons independently in support of the determination and verdict formulated.

88. These writ petitions raise the question whether gold is liable to be viewed as falling in the category of “prohibited goods” and consequentially its redemption and release being subject to a discretionary exercise of power conferred upon the Adjudging Officer under Section 125 of the **Customs Act, 1962**<sup>71</sup>. The petitioners would contend that since the article is not specifically prohibited for import, it becomes mandatorily liable to be released in the hands of the person from whose possession or custody the gold had been seized. The said issue itself arises in the context of the discretion which stands vested in the Adjudicating Authority in terms of Section 125 of the Act which postulates that such an officer “*may*” in the case of prohibited goods release the same by providing an option to pay redemption fine in lieu of confiscation as opposed to the statutory obligation placed by that provision and which mandates that the Adjudicating Authority “*shall*” release all other categories of goods. The answer to the question which stands posited would have to be examined in the context of the definition of prohibited goods and the various other

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<sup>71</sup> Act



provisions contained in the Act as well as the **Foreign Trade (Development and Regulation) Act, 1992**<sup>72</sup>.

89. Learned counsels appearing for the petitioners as well as Mr. Tarun Gulati, learned senior counsel and amicus, would urge that in the absence of gold having been placed in the negative list, either in terms of a notification issued under Section 11 of the Act or Section 3(2) of the FTDR, it cannot be treated as falling in the category of prohibited goods. Mr. Gulati, the learned amicus, has laid stress upon the language employed in Section 11 which speaks of a prohibition, absolute or otherwise, being recognized to exist only if a notification indicative of the said intent had been duly published in the Official Gazette as contemplated under the statute. According to the learned amicus, the aforesaid position also stands fortified upon a reading of Section 3(2) of the FTDR which too contemplates an order being passed by the Union Government prohibiting, restricting or otherwise regulating the import of goods and such an order being published in the Official Gazette.

90. The learned amicus further submitted that Section 3(3) of the FTDR clearly stipulates that an order once made under sub-section (2) thereof would result in such goods being held to be prohibited under Section 11 of the Act by virtue of the deeming fiction incorporated therein. According to the learned amicus, the decisions of the Supreme

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<sup>72</sup> FTDR



Court in **Sheikh Mohd. Omar v. Customs**<sup>73</sup> and **Om Prakash Bhatia v. Commissioner of Customs**<sup>74</sup> proceed in ignorance of the requirement of a notification being in place before an imported article could be said to fall in the category of prohibited goods. It was pointed out that while *Sheikh Mohd. Omar* was a decision which came to be rendered prior to the promulgation of the FTDR, the decision in *Om Prakash Bhatia* came to be rendered after the FTDR had come into force, and in any case, in the backdrop of Section 18 of **Foreign Exchange Regulation Act, 1973**<sup>75</sup> which too had spoken of restrictions and prohibitions which would apply to the import and export of goods.

91. It would be pertinent to note at this juncture that insofar as Section 18 of FERA is concerned, the prohibition which was put in place related to the obligation of the exporter to comply with the export conditions applicable. This is evident from the language of Section 18 which read as follows: -

**“18. Payment for exported goods.**—(1)(a) The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of all goods or of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed or so specified

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<sup>73</sup> 1970(2) SCC 728

<sup>74</sup> (2003) 6 SCC 161

<sup>75</sup> FERA



and true in all material particulars which, among others, shall include the amount representing—

(i) the full export value of the goods; or

(ii) if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the overseas market, and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been, or will within the prescribed period be, paid in the prescribed manner.....”

92. As would be evident from a perusal of Section 18, the Union Government stood empowered to prohibit the export of all or any goods including a class of goods specified in a notification issued in that respect, unless the exporter had furnished to the prescribed authority a declaration in terms as contemplated in that provision. Section 18 is thus structurally clearly distinct and distinguishable from the regime of prohibited goods which stands embodied in Section 2(33) of the Act. In fact, FERA did not even incorporate a defining provision for prohibited goods.

93. Reverting then to the submissions addressed by the learned amicus, we note that *Sheikh Mohd. Omar* was principally dealing with the provisions of Section 3 of the **Imports and Exports Control Act 1947**<sup>76</sup> which employed the expressions “*prohibiting, restricting or otherwise controlling*”. *Sheikh Mohd. Omar* was a decision in which an order referable to Section 3 had been duly promulgated. This is

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<sup>76</sup> The 1947 Act



evident from paragraph 6 of the report where the Supreme Court had noticed the promulgation of the **Imports (Control) Order, 1955**<sup>77</sup> in exercise of powers conferred by Section 3 of the 1947 Act. In terms of the order dated 07 December 1955, the import of animals was made subject to a license and a customs clearance permit being granted by the Union Government to the importer. It was in the aforesaid backdrop that the Supreme Court held that Section 111(d) of the Act must be interpreted to include every type of prohibition, be it complete or partial.

94. According to Mr. Gulati, *Om Prakash Bhatia* proceeded to follow *Sheikh Mohd. Omar* without bearing in mind the change in the statutory regime which had come to be ushered in by FERA and the FTDR. More importantly, Mr. Gulati contended that both the decisions in *Sheikh Mohd. Omar* and *Om Prakash Bhatia* had failed to notice the earlier decision of the Supreme Court in **Becker Gray & Co Ltd & Ors v. Union of India & Anr**<sup>78</sup>. In *Becker Gray*, the Supreme Court had observed as follows: -

“4. Mr. Bindra, however, urged that, in these cases, there was the distinctive features that the Board also found that the declarations were further incorrect inasmuch as the goods were declared to have been sold, while they were being exported on consignment basis as unsold goods, and it was further stated in the declarations that the full export value of the goods is the value shown instead of stating that it was the fair valuation of unsold goods. The finding recorded by the Board, no doubt, shows that the declarations required to be

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<sup>77</sup> The 1955 Order

<sup>78</sup> (1970) 1 SCC 352



made under the Rules in Form GRI contained incorrect information; but that incorrect information related to points on which Section 12(1) does not require a declaration. A declaration, which is in contravention of the Rules or the Forms prescribed under the Rules, may be penalised under Section 23 of the Act, but such contravention will not attract the provisions of the Sea Customs Act. Under Section 23-A of the Act, only a breach of restrictions imposed by Section 12(1) of the Act is to be deemed a contravention of restrictions imposed by Section 19 of the Sea Customs Act. An incorrect declaration in contravention of the Rules made under Section 27 of the Act is not to be deemed a contravention of any restriction imposed by Section 19 of the Sea Customs Act. It is therefore, quite clear that, in these cases, the imposition of the penalties under Section 167(8) of the Sea Customs Act was totally unjustified. Consequently, these appeals are allowed with costs, and the orders of the Adjudicating Officer, and the Board imposing the penalties under Section 167(8) of the Sea Customs Act are set aside. Penalties, if recovered, shall be refunded.”

95. It must, however, be observed that *Becker Gray* was rendered in the context of Section 19 of the Sea Customs Act, 1878, and which was framed in the following words: -

**“19. Power to prohibit or restrict importation or exportation of goods.**—The Central Government may from time to time, by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of [India] [across any customs frontier as defined by the Central Government].”

96. Significantly, Section 19 of the **Sea Customs Act, 1878** was couched in terms distinct from Section 2(33) since it specifically alluded to the power to either “*prohibit or restrict*”. Mr. Gulati had also drawn our attention to the decision of the Tribunal in **Prayag**



**Exporters Pvt. Ltd. vs. Commissioner**<sup>79</sup> where while dealing with the validity of a confiscation order passed by the Adjudicating Authority on the basis of over-inflating the value of a footwear consignment had held as follows: -

“2. It has been the consistent view of this Tribunal that clause (d) of section 113 of the Act did not apply in such cases for the reason that export of the goods was not prohibited. This is the view taken in the Tribunal’s decision in *Badriprasad Pvt. Ltd v. CCE, 1995 (80) E.L.T. 624, Shilpi Export v. CCE, 1996 (83) E.L.T. 302*, to cite only two. We note that an appeal against the last decision has been dismissed by the Supreme Court reported in 2000 (115) E.L.T. A219”

97. It was pointed out that the aforesaid view of the Tribunal was upheld and affirmed by the Supreme Court in **Commissioner vs. Prayag Exporters Pvt. Ltd.**<sup>80</sup> as would be evident from the following extracts of that decision: -

“2. This appeal is filed against the judgment and order dated 18-8-2000 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No. C/195-V/2000-Bom. whereby the Tribunal has arrived at the conclusion that it has taken consistent view that Clause (d) of Section 113 of the Customs Act would apply in cases of prohibited goods and would not apply to the facts of the present case. Admittedly, goods in question are not prohibited for export and no export duty is leviable on the said goods. In this view of the matter, no interference is called for with the impugned judgment and order. Hence, this appeal is dismissed.”

98. It was in the aforesaid backdrop that Mr. Gulati submitted that the decisions rendered earlier in point of time had taken the consistent

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<sup>79</sup> Order dt. 18.08.2000, Appeal No. C/195-V/2000-Bom (CEGAT, West Zonal Bench, Mumbai)

<sup>80</sup> (2007) 12 SCC 401



view that in the absence of any specific proscription, no prohibition could be assumed. It was however pointed out that *Om Prakash Bhatia* which was rendered in the context of Section 18 of the FERA, had observed as follows: -

“7. Next — as the order for confiscation of goods is passed by referring to Section 113(d) of the Act, we would refer to the same. It reads as under:

“113. *Confiscation of goods attempted to be improperly exported etc.*—The following export goods shall be liable to confiscation—

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(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, *contrary to any prohibition imposed by or under this Act or any other law for the time being in force;*”

8. The aforesaid section empowers the authority to confiscate any goods attempted to be exported contrary to any “prohibition” imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force.

9. Further, Section 2(33) of the Act defines “prohibited goods” as under:

“2. (33) ‘prohibited goods’ means any goods the import or export of which is *subject to any prohibition under this 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;”

10. From the aforesaid definition, it can be stated that: (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods



in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either “absolutely” or “subject to such conditions” to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Sk. Mohd. Omer v. Collector of Customs* [(1970) 2 SCC 728], wherein it was contended that the expression “prohibition” used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955.”

99. The learned amicus pointed out that unlike the facts which obtain in the present batch, *Om Prakash Bhatia* was concerned with a case where a specific notification under Section 18 of the FERA had been issued. Our attention was then invited to the judgment in **Commissioner vs. Suresh Jhunjhunwala**<sup>81</sup> where again, according to Mr. Gulati, the distinction between a prohibition and a restriction was duly highlighted as would be evident from the following passages of that decision: -

“14. The definition of prohibited goods is a broad one. The said provision not only brings within its sweep an import or export of goods which is subject to any prohibition under the said Act, but also any other law for the time being in force.

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<sup>81</sup> (2007) 12 SCC 391



15. The Tribunal does not appear to have considered the matter from this angle. Power to confiscate, thus, would arise under both the situations.

16. In *Prayag Exporters (P) Ltd. v. Commr. of Customs* [(2000) 121 ELT 819 (cegat)] the Tribunal proceeded on the basis that Clause (d) of Section 113 of the Customs Act would not apply to cases where the export of goods is (*sic not*) prohibited. The Tribunal in arriving at the said conclusion referred to two of its earlier decisions in *Badri Prasad & Sons (P) Ltd. v. Collector of Customs* [(1995) 80 ELT 624 (CEGAT)] and *Shilpi Exports v. Collector of Customs* [(1996) 83 ELT 302 (CEGAT)] .

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18. However, it appears, the same Bench considered the matter at some length in *Om Prakash Bhatia* [(2003) 6 SCC 161 : (2003) 155 ELT 423] and opined that the exporters were obliged to declare the value of the goods. In a detailed judgment, this Court not only took into consideration the provisions of the Customs Act, but also the provisions of Section 15 of the Foreign Exchange Regulation Act and the rules framed thereunder, as also the notifications issued by the Central Government from time to time. The Court opined that for determining the export value of the goods, it is necessary to refer to the meaning of the word “value” as defined in Section 2(41) of the Act, and the same must be determined in accordance with the provision of sub-section (1) of Section 14, stating: (SCC p. 169, para 16)

“16. ... Section 14 specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to be resorted to and applied for determining the export value of the goods as provided under sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out



whether the export value is truly stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods sought to be exported.”

**19.** The ingredients of the aforementioned provision read with Section 18 of the Foreign Exchange Regulation Act were analysed and the law was laid down stating: (SCC p. 169, para 18)

“18. (a) The exporter has to declare the full export value of the goods (sale consideration for the goods exported).

(b) The exporter has to affirm that the full export value of the goods will be received in the prescribed manner.

(c) If the full export value of the goods is not ascertainable, the value which the exporter expects to receive on the sale of the goods in the overseas market.

(d) The exporter has to declare the true or correct export value of the goods, that is to say, the correct sale consideration of the goods. Criterion under Section 14 of the Act is the price at which such or other goods are ordinarily sold or offered for sale in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale or offer for sale.”

**20.** This Court did not stop there, but also took into consideration the provision of Rule 11 of the Foreign Trade (Development and Regulation) Rules, 1993, holding: (SCC p. 170, para 20)

“20. Hence, in cases where the export value is not correctly stated, but there is an intentional overinvoicing for some other purpose, that is to say, not mentioning the true sale consideration of the goods, then it would amount to violation of the conditions for import/export of the goods. The purpose may be money-laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. In any case, overinvoicing of the export goods would result in illegal/irregular transactions in foreign currency.”

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21. It may be true that the said decision related to a matter concerning a drawback scheme, but a decision of this Court interpreting a different section by itself cannot, in our opinion, be brushed aside, only on the ground that the decision of the same Bench in *Prayag Exporters* [(2007) 12 SCC 401 : (2003) 155 ELT 4 (SC)] is applicable being related to the DEPB Scheme. The question, in our opinion, has to be considered having regard to the provisions of the definition of the “prohibited goods”, “entry of goods” together with the provisions of the Foreign Exchange Regulation Act.

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25. In view of the order proposed to be passed by us, we do not intend to enter into the factual controversy of this matter any further. The Tribunal, in our opinion, should have considered the matter from another angle, namely, as to whether the respondents have violated the provisions of the Foreign Exchange Regulation or not. As regards the finding arrived at by the Tribunal that the respondents had not overvalued the goods, inter alia, on the ground that no expert opinion regarding the value of the export goods had been adduced, the Tribunal did not advert to the materials which had been brought on records during investigation, whereupon the Commissioner relied upon.

26. We are, therefore, of the opinion that the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. The matter is remitted to the Tribunal for consideration thereof afresh. No costs.”

100. According to the learned amicus, the decisions of the Supreme Court in **Commissioner of Customs, New Customs House, Mumbai vs. Vishal Exports Overseas Ltd.**<sup>82</sup>, as well as **Gurcharan Singh vs. DRI**<sup>83</sup> must be appreciated in the peculiar facts of those cases coupled with the aspect that they had come to be rendered prior to Section 3(4) of the FTDR being inserted by virtue of **Act 25 of 2010**. Section 3(4)

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<sup>82</sup> (2007) 9 SCC 168

<sup>83</sup> (2008) 17 SCC 28



stipulates that no permit or license shall be necessary for the import or export of any goods nor shall any goods be prohibited for import except as may be required by a rule or order made under the aforesaid statute. According to the learned amicus, the aforesaid provision which is of seminal import has clearly been lost sight of in the various decisions rendered on the subject and the issue must, therefore, be authoritatively ruled upon by this Court.

101. The learned amicus further commended for our consideration, the decision of the Supreme Court in **Commissioner of Customs vs. Atul Automations (P) Ltd.**<sup>84</sup>, where the legal position was explained as under: -

“6. We have considered the submissions on behalf of the parties. MFDs were imported in October-November 2016. They were detained by the Customs Authorities opining that the imports had been made in violation of the Foreign Trade Policy, 2015-2020 framed under Sections 3 and 5 of the Foreign Trade Act and the Waste Management Rules.

7. Clause 2.01 of the Foreign Trade Policy provides for prohibition and restriction of imports and exports. The export or import of restricted goods can be made under Clause 2.08 only in accordance with an authorisation/permission to be obtained under Clause 2.11. Photocopier machines/Digital multi-function print and copying machines are restricted items importable against authorisation under Clause 2.31. Indisputably, the respondents did not possess the necessary authorisation for their import. The Customs Authorities therefore prima facie cannot be said to be unjustified in detaining the consignment. Merely because earlier on more than one occasion, similar consignments of the respondent or others may have been cleared by the Customs Authorities at the Calcutta,

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<sup>84</sup> (2019) 3 SCC 539



Chennai or Cochin Ports on payment of redemption fine cannot be a justification simpliciter to demand parity of treatment for the present consignment also. The defence that DGFT had declined to issue such authorisation does not appeal to the Court.

8. Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Sections 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provide for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply mutatis mutandis as deemed to have been made under Section 11 of the Customs Act also. Section 18-A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what is restricted. We therefore find no error with the conclusion of the Tribunal affirmed by the High Court that the respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the Customs Authorities with fine under Section 112(a) of the Customs Act, 1962.

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11. Rule 15 of the Waste Management Rules dealing with illegal traffic, provides that import of “other wastes” shall be deemed illegal if it is without permission from the Central Government under the Rules and is required to be re-exported. Significantly the Customs Act does not provide for re-export. The Central Government under the Foreign Trade Policy has not prohibited but restricted the import subject to authorisation. The High Court therefore rightly held that MFDs having a utility period, the extended producer responsibility would arise only after the utility



period was over. In any event, the E-waste Rules, 2016 certificate had since been issued to the respondents by the Central Pollution Control Board before the goods have been cleared.”

102. Mr. Gulati submitted that *Atul Automations* constitutes the first judgment rendered by the Supreme Court which had noticed the interplay between the Act and FTDR. Learned amicus submitted that *Atul Automations* correctly enunciates the legal position on a cumulative consideration of the provisions contained in the aforementioned two statutes and thus correctly recognizes and propounds the distinction between a restriction and a prohibition.

103. Learned amicus then referred to the decision of the Madras High Court in **City Office Equipments v. Commissioner of Customs (Seaport-Import), Chennai**<sup>85</sup> where the following pertinent observations were made: -

“13. Unfortunately, the Act does not define the expression "Restricted Goods". But the definition of the expression "Prohibited Goods" itself contains an indication as to how the expression "Restricted Goods" has to be understood.

14. A careful look at Section 2(33) would show that even prohibited goods could be permitted to be imported or exported subject to some terms and conditions. The moment those conditions are complied with, those goods would cease to be prohibited goods. This is why the exclusion clause contained in the second part of Section 2(33) uses the expression “any such goods”. Therefore, it appears that the Customs Act recognizes only two types of goods namely: (1) those that are prohibited; and (2) those that are not prohibited. The Act also recognizes the fact that even

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<sup>85</sup> 2014 SCC Online Mad 13005



prohibited goods could be imported or exported subject to certain conditions. If those conditions are fulfilled, prohibited goods would automatically become non-prohibited goods.

15. Section 11 of the Act empowers the Central Government, by Notification in the official gazette, to prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance of the import or export of goods of any specified description. The expression “illegal import” is defined in Section 11A(a) of the Customs Act, 1962 to mean the import of any goods in contravention of the provisions of the Customs Act or any other law for the time being in force.

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23. Therefore, despite the fact that the goods, whose import is restricted in terms of the Foreign Trade Policy, should be construed to be prohibited goods, there is no bar for the release of the goods: (1) either under Section 125(1) of the Customs Act, 1962 upon payment of fine in lieu of confiscation; or (2) in terms of Section 11(9) of the Foreign Trade (Development and Regulation) Act, 1992 upon payment of redemption charges.”

104. Emphasis was laid on the conclusions which that High Court ultimately came to record when it held that even prohibited goods could be imported subject to the applicable conditions being fulfilled. The said High Court had then proceeded to observe that if those conditions were fulfilled, the prohibited goods would automatically become “non-prohibited goods”.

105. Turning then to the decision of the Supreme Court in **Union of India vs. Raj Grow Impex**<sup>86</sup>, the learned amicus laid stress upon the following passages from that decision: -

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<sup>86</sup> 2021 SCC Online SC 429



“146. As noticed, only the particular restricted quantity of the commodities covered by the said notifications could have been imported and that too, under a licence. Therefore, any import within the cap (like that of 1.5 lakh MTs) under a licence is the import of restricted goods but, every import of goods in excess of the cap so provided by the notifications, is not that of restricted goods but is clearly an import of prohibited goods.

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148. In the case of *Sheikh Mohd. Omer* (supra), a particular mare was found to be not a ‘pet animal’ and, therefore, its import was found to be violative of the Imports Control Order. It was, however, an admitted position that the import of horses or mares was not prohibited as such. The question was as to whether by making such import, the appellant contravened Section 111(d) read with Section 125 of the Customs Act. While answering the question, this Court held that any restriction on import or export is to an extent a prohibition; and the expression “any prohibition” in Section 111(d) of the Customs Act includes restrictions. This Court further underscored that “any prohibition” means every prohibition; and restriction is also a type of prohibition.

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155. Thus, we have no hesitation in holding that the goods in question, having been imported in contravention of the notifications dated 29.03.2019 and trade notice dated 16.04.2019; and being of import beyond the permissible quantity and without licence, are ‘prohibited goods’ for the purpose of the Customs Act.

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158. A bare reading of the provision aforesaid makes it evident that a clear distinction is made between ‘prohibited goods’ and ‘other goods’. As has rightly been pointed out, the latter part of Section 125 obligates the release of confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of this provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this provision that if the Adjudicating Authority does not choose to give such an option, the result would



be of absolute confiscation. The Adjudicating Authority in the present matters had given such an option of payment of fine in lieu of confiscation with imposition of penalty whereas the Appellate Authority has found faults in such exercise of discretion and has ordered absolute confiscation with enhancement of the amount of penalty. This takes us to the principles to be applied for exercise of the discretion so available in the first part of Section 125(1) of the Customs Act.

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**176.** As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally and cautiously and has to be guided by law; has to be according to the rules of reason and justice; and has to be based on relevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act, when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall be weighed before taking a final decision for release or absolute confiscation of goods.

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**178.** It needs hardly any elaboration to find that the prohibition involved in the present matters, of not allowing the imports of the commodities in question beyond a particular quantity, was not a prohibition *simpliciter*. It was provided with reference to the requirements of balancing the interests of the farmers on the one hand and the importers on the other. Any inflow of these prohibited goods in the domestic market is going to have a serious impact on the market economy of the country. The cascading effect of such improper imports in the previous year under the cover of interim orders was amply noticed by this Court in *Agricas* (supra). This Court also held that the imports were not *bona fide* and were made by the importers only for their personal gains.

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**184.** In regard to the submissions invoking equity, noticeable it is that various such features of equity were taken into consideration by the Adjudicating Authority, in the orders-in-original dated 28.08.2020 and by the High Court, in the impugned order dated 15.10.2020 while directing release of goods. We have already disapproved the orders so passed by the Adjudicating Authority and the High Court. Therefore, no leniency in the name of equity can be claimed by these importers. In fact, any invocation of equity in these matters is even otherwise ruled out in view of specific rejection of the claim of *bona fide* imports by this Court in *Agricas* (supra). Once this Court has reached to the conclusion that a particular action is wanting in *bona fide*, the perpetrator cannot claim any relief in equity in relation to the same action. Absence of *bona fide* in a claimant and his claim of equity remain incompatible and cannot stand together.

**185.** The overt suggestions on behalf of the interveners that demand and supply of pulses is dynamic and not static in nature have only been noted to be rejected. In our view, meeting with the requirements of demand and supply is essentially a matter for policy decision of the Government. No equity could be claimed with such submissions by the importers. Similarly, if, for whatever reason, any consignment of the subject goods has been released, such release had not been in accord with law and no equity could be claimed on that basis.”

106. It was pointed out by Mr. Gulati, that the decision in *Raj Grow Impex* too must be appreciated bearing in mind that it was rendered in the context of a specific order issued by the Union Government and referable to Section 3(2) of the FTDR. According to the learned amicus, the aforementioned decisions in *Atul Automation* as well as *Raj Grow Impex* lay down the correct position in law and consequently in the absence of a product being covered under a notification issued either under Section 11 of the Act or one referable to Section 3(2) of



the FTDR, it must be recognised to fall outside the ambit of prohibited goods.

107. Mr. Gulati further submitted that, undisputedly, gold and gold articles are classified under Chapter 71 of the **Indian Trade Classification based on Harmonized System**<sup>87</sup>. It was submitted that during the relevant period all that the ITC (HS) prescribed was that the import of gold would be subject to **Reserve Bank of India**<sup>88</sup> regulation. The learned amicus submitted that significantly the ITC(HS) itself has classified gold as falling in the category of “Free”. According to the learned amicus, once the ITC(HS) had placed gold in the category of articles which could be freely imported, there would be no justification to treat the said article as falling in the category of prohibited goods.

108. The learned amicus also invited our attention to the following parts of the **Foreign Trade Policy**<sup>89</sup>, 2015-20 and which clearly evidences the intent of the Union Government to declare all imports to be free unless a contrary prescription be found to apply. According to the learned amicus, since the FTP, 2015-20 itself envisages imports, by default, being free, there exists no legal justification to construe Section 2(33) of the Act as encompassing a restriction or regulation. The relevant parts of the FTP, 2015-20 are extracted hereinbelow: -

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<sup>87</sup> ITC(HS)

<sup>88</sup> RBI

<sup>89</sup> FTP



**“2.01 Exports and Imports – ‘Free’, unless regulated**

(a) Exports and Imports shall be ‘Free’ except when regulated by way of ‘prohibition’, ‘restriction’ or ‘exclusive trading through State Trading Enterprises (STEs)’ as laid down in Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports.....”

109. It was the submission of Mr. Gulati that the various circulars and notifications which have been alluded to by the respondents cannot be equated with the requirements placed by Section 11 of the Act or Section 3(2) of the FTDR, since those circulars cannot be recognized to be notifications issued in accordance with the procedure as contemplated in those provisions. Mr. Gulati submitted that for a restriction to legally apply, it would have been imperative for the RBI to introduce the same by way of a statutory regulation made in exercise of powers conferred by Section 58 of the **Reserve Bank of India Act, 1934**<sup>90</sup>. According to the learned amicus, a circular cannot be countenanced to be a valid substitute for a notification or a regulation.

110. It was then submitted that more fundamentally, it must be borne in mind that RBI is essentially concerned with the discharge of central banking functions pertaining to payments made to and from India and regulation of monetary policy. The learned amicus submitted that the RBI does not have the jurisdiction or authority to either allow, regulate or restrict imports. For the purposes of highlighting the

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<sup>90</sup> The 1934 Act



functions discharged by the RBI and it not being concerned with the import or export of goods, our attention was drawn to the decision rendered by the Karnataka High Court in **Commissioner of Customs v. Sri Exports**<sup>91</sup>. The relevant passages of that decision are extracted hereinbelow: -

“6. We have considered the submissions made by Learned Counsel for the parties and have perused the record. The Foreign Trade (Development and Regulation) Act, 1992 is an Act to provide for development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto. Section 3 of the Act deals with Powers of the Central Government to make provisions relating to imports and exports. Section 3(2) empowers the Central Government to make a provision for prohibiting, restricting or otherwise regulating, in all cases or in a specific class of clauses and subject to such exceptions, if any, as may be made by or under the order the import or export of goods or services of technology, by an order published in the Official Gazette. Section 3(4) of the Act provides that without prejudice to contained in any other law, rules, regulation, notification or order, no permit or licence shall be necessary for import or export of goods nor any goods shall be prohibited for import or export except, as may be required under this Act, or Rules, or orders made thereunder. Section 5 of the Act provides that Central Government may from time to time formulate and announce by notification in the Official Gazette, the Foreign Trade Policy and may also amend the same. Thus, the Foreign Trade Policy which has been issued by the Central Government in exercise of powers under Section 5 of the Act has the statutory force.

7. Para 2.01 of the Policy provides that exports and imports shall be free except when regulated by way of prohibition, restriction, or exclusive trading through State Trading Enterprises has laid down in Indian Trade Classification (harmonized system) of exports and imports. Para 2.01 empowers the DGFT to impose restrictions on

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<sup>91</sup> Judgment dt. 16.10.2020, CSTA No. 13/2019



export and import through a notification for the purposes mentioned in the said para. Para 4.41 of the scheme deals with nominated agencies. Thus, from perusal of the provisions of Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade Policy, it is evident that amendments to the Foreign Trade Policy can be made by the Central Government under Section 5 of the Act or by DGFT by issuing a Notification under Para 2.07 of the Foreign Trade Policy. The change in categorization from free to restricted can be made in respect of import of goods, only by an amendment and the same cannot be done by DGFT by issuing a Circular.

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**9.** Thus on the date, the gold medallions were imported *i.e.* 3-7-2017 there was no restriction and the restriction was imposed by the Central Government *vide* Notification dated 25-8-2017 subsequently, which has been quoted supra. In other words, there was no restriction with regard to import of gold medallion on the date the same was imported by the respondent.

**10.** Similarly, the gold granules were imported on 21-9-2017 and thereafter DGFT issued a Notification dated 18-12-2019 by which import policy was amended and gold in any form was allowed only to be imported through nominated agencies as notified by the Reserve Bank of India in case of Banks and for other agencies by the DGFT. Thus, it is evident that on the date when the gold granules were imported *i.e.*, on 21-9-2017, there was no restriction on its import and the restriction was imposed subsequently on 18-12-2019 by the DGFT by way of Notification. Thus, when gold medallions and gold granules were imported, they were freely importable and the same was brought under the restricted category subsequently.

**11.** It is not the case of the respondent that it is a nominated agency. It is pertinent to mention here that the Circulars issued by the Reserve Bank of India apply where the gold is imported by nominated banks as notified by Reserve Bank of India and nominated agencies as notified by DGFT. The gold medallions as well as the gold granules fall under CTH 7114 19 10 and 7108 13 00 respectively. It is pertinent to mention here that the Circulars issued by the Reserve Bank of India apply in case the Banks nominated by it import the gold. At this stage, it is pertinent to



refer to the relevant extract of communication dated 18-6-2019 sent by State Bank of India to the office of Principal Commissioner of Customs, regarding regulations of Reserve Bank of India for import of gold policy, which reads as under:

Custom's query	Central Office's reply
(a) Whether RBI can regulate import/export of goods in general and more particularly, the import of gold granules. If yes, inform the modalities of regulations.	Regulation of imports/exports of any item (including import of gold granules) is in the domain of Ministry of Commerce/DGFT and is governed by the Export-Import Policy/Foreign Trade Policy as prevalent during relevant points in time. Attention is drawn to relevant paras of Foreign Trade Policy 2015-20 (notably Para 2.07, Para 2.08 and Para 4.37)

12. Thus, the Reserve Bank of India itself has clarified that regulation of import I export of any item including importing of gold granules is in the domain of Ministry of Commerce/DGFT and is governed by Export-Import Policy/Foreign Trade Policy as prevalent at the relevant point of time.”

111. The learned amicus had also placed for our consideration a detailed note indicating the divergent views which have been expressed by different High Court on the question which stands posited. In **Bhargavraj Rameshkumar Mehta v. Union of India**<sup>92</sup>, the Gujarat High Court while dealing with the question of smuggled goods and whether the same would fall within the definition of prohibited goods answered the same in the following terms:-

“15. We may recall, the contention of the Counsel for the

<sup>92</sup> Neutral Citation No. 2018:GUJHC:2473-DB



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 therefor, 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.....”

112. In **Mohd. Haroon v. Additional Director General, DRI**<sup>93</sup>, the Madras High Court (Madurai Bench) significantly observed that while gold would not be a prohibited item of import it would fall in the category of a regulated or restricted article. *Md. Haroon* while following an identical view which was expressed by the Madras High Court in **Malabar Diamond Gallery v. Additional Director General, DRI**<sup>94</sup> observed as under:-

“7. Initially, a submission was made that since the petitioners had brought prohibited goods into India, they cannot be permitted to be re-exported. They can only be confiscated. As already pointed out, the petitioners were carrying gold as well as electronic goods. Electronic goods are obviously not prohibited items. They can be cleared after making declaration and paying the applicable

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<sup>93</sup> Judgment dt. 26.04.2021 in WP(MD) Nos. 3917 & 3918 of 2020 & WMP(MD) No. 5459 of 2021 (Mad. HC)

<sup>94</sup> 2016 SCC OnLine Mad 19597



customs duty. Gold is also not a prohibited item for import. It would only come under the regulated/restricted category. Of course, the Division Bench of the Madras High Court in the decision reported in 2016 (341) E.L.T. 65 (Mad.) (*Malabar Diamond Gallery P. Ltd. v. Addl. Dir. General, Directorate of Revenue Intelligence, Chennai*), went on to hold that though gold is not notified as one of the prohibited goods, when there is failure to comply with the conditions subject to which goods are to be imported, they are liable for confiscation. “Prohibited goods” has been defined in Section 2(33) of the Customs Act, 1962. The Division Bench held that the provision cannot be narrowly interpreted so as to hold that gold is not an enumerated prohibited goods to be imported into the country. Section 11A(a) defined “illegal import” as meaning the import of any goods in contravention of the provision of the Customs Act or any other law for the time being in force. The Division Bench held that Section 11A cannot be thrown to winds while interpreting Section 2(33) of the Act. If the restrictive conditions set out in the notifications are found to have been breached, the authorities are bound to proceed on the premise that prohibited goods have been imported.”

113. The Calcutta High Court in **Commissioner vs. Uma Shankar Verma**<sup>95</sup> has however held that gold is a prohibited item. The relevant extracts from that decision are reproduced hereinbelow:-

“11. The principal question which, thus, arises for consideration is as to whether gold is a prohibited item? A Public Notice No. 51, dated 27th October, 1997 was issued which reads thus –

“Attention is invited to Public Notice No. 214/(PN)/92-97, dated 1st June, 1994 vide which import of gold and silver was allowed without licence by Reserve Bank of India or any other agency to be designated by the Ministry of Finance (Deptt. of Economic Affairs). In exercise of the powers conferred under paragraph 4.11 of the Export and Import Policy 1997-2002 read with Col. 4 of the ITC (HS) Classification in Chapter 71, the Director

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<sup>95</sup> Judgment dt. 10.05.1999 in A.P.O.T No. 105 of 1999 (Cal H.C)



General of Foreign Trade hereby notifies that these designated agencies as mentioned in the Notification 80/97 referred above may import gold and silver for sale in the domestic market also without a licence or without surrender of SIL in respect of following entries of ITC (HS):

Classifications of Export and Import Items 1997-2002:-

Gold :

710812 00 Other unwrought forms.”

**12.** The same was further amended by a Public Notice No. 54 dated 4th November, 1997 which is to the following effect :-

“Attention is invited to Public Notice No. 51/(PN)/97-02 dated 27th October, 1997 on the above subject. In partial modification of the above Public Notice, it is hereby notified that the import of gold and silver shall be permitted to the nominated and authorised agencies by the Reserve Bank of India (RBI)/Ministry of Finance. It is further notified that payment of Customs duty for import of gold and silver by such agencies without surrender of Special Import Licence (SIL) and by other importers against surrender of SIL shall also be made in Indian Rupees on payment of such Customs duties as may be notified by the Deptt. Of Revenue from time to time.

This issues in public interest.”

**13.** It is, therefore, evident that the gold could be imported only against a Special Import Licence or by the agencies authorised by the Reserve Bank of India.

**14.** The entire case of the writ petitioner/respondent is that they have purchased gold from Standard Chartered Bank which was meant for sale. The said question is essentially a question of fact and as such we need not consider the same in this proceeding as such a question will have to be determined by the statutory authority.

**15.** Having regard to the provisions of the Customs Act as also the 1992 Act, we are of the opinion that keeping in view the fact that a legal fiction has been created in terms of Section 3(3) of the said 1992 Act, there cannot be any doubt whatsoever, that gold



would come within the purview of a prohibited item. A legal fiction as is well known must be giving its full effect. In *Gajraj Singh & Ors. v. State Transport Appellate Tribunal & Ors.* reported in 1997 (1) SCC 650 it has been held as under —

“Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances.”

**16.** In *Commissioner of Income Tax, Madras v. Urmila Ramesh* reported in 1998 (3) SCC 6 the Apex Court observed :-

“Even though the word ”deemed” is not used in Section 41(2) of the Act, as has been used in Section 10(2) (vii) second proviso of the 1922 Act, nevertheless this provision creates a legal fiction whereby an amount received in excess of the written-down value is firstly treated as income and secondly regarded as income from business or profession and thirdly it is considered to be the income of the previous year in which the money payable became due. That this section creates a legal fiction has been held by this Court in *Cambay Electric* case where (at ITR p. 93) it was observed as under: (SCC p. 654, para 7)

“It is true that by a legal fiction created under Section 41(2) a balancing charge arising from sale of old machinery or building is treated as deemed income and the same is brought to tax; in other words, the legal fiction enables the Revenue to take back what it had given by way of depreciation allowance in the preceding years since what was given in the preceding years was in excess of that which ought to have been given. This shows that the fiction has been created for the purpose of computation of the assessable income of the assessee under the head ‘Business Income’. It was rightly pointed out by the learned Solicitor General that legal fictions are created



only for a definite purpose and they should be limited to the purpose for which they are created and should not be extended beyond their legitimate field. But, as indicated earlier, the fiction under Section 41(2) is created for the purpose of computation of assessable income of the assessee under the head 'Business Income' and under Section 80-E(1), in order to compute and allow the permissible special deduction, computation of total income in accordance with the other provisions of the Act is required to be done and after allowing such deduction the net assessable income chargeable to tax is to be determined; in other words, the legal fiction under Section 41(2) and the grant of special deduction in case of specified industries are so closely connected with each other that taking into account the balancing charge (i.e. deemed profits) before computing the 8% deduction under Section 80-E(1) would amount to extending the legal fiction within the limits of the purpose for which the said fiction has been created.”

We are unable to agree with the submissions of Shri Ranbir Chandra that reference to the language of Section 41 (2) in *Cambay Electric* case was only incidental. It is evident from the meaning and effect of Section 41(2) of the Act in that case, which it did. The two provisions namely Section 10(2) (vii) second proviso of the 1922 Act and Section 41(2) of the Act both create a legal fiction, difference in language notwithstanding.”

**17.** In *Aluminium Industries Ltd. v. Collector of Central Excise* reported in 1998 (99) E.L.T. 486 (S.C.) = (1998) 9 SCC 404, it has been held as under: -

“4. By virtue of this proviso a legal fiction has been created. The price fixed under any law for time being in force has to be taken as the normal price of the goods. In that view of the matter, in the instant case, the price fixed by the notification dated 18-10-1978 will have to be taken as the normal price of the aluminium rods manufactured by the appellant.”



18. In this view of the matter the definition of prohibited goods contained in sub-section 2(33) of the said Act pales into insignificance.

19. For the reasons aforementioned there cannot be any doubt whatsoever that gold is a prohibited item which comes within the first part of Section 125 of the Customs Act.

20. Reliance placed by Mr. Kapur upon a decision of the Full Bench of the CEGAT, West Regional Bench, Bombay in *Hasmukh Dalpatrai Ganatra & Anr. v. Collector of Customs, Bombay* reported in 1987 (30) E.L.T. 782 has no application in the facts of the present case inasmuch as it was held therein that the goods were covered by valid import licence and as such they were held not to be prohibited goods. It was in that situation the decision of the Apex Court in *Seikh Mohd. Omer (supra)* the Supreme Court was distinguished wherein while considering the clause (d) of Section 111 of the Customs Act it was clearly held that prohibition may be complete or partial and any restriction on import or export is to an extent lead to prohibition.”

114. The Madras High Court in **Commissioner of Customs, Chennai vs. Samynathan Murugesan**<sup>96</sup> following the line propounded in *Om Prakash Bhatia* held that once the conditions for import had not been complied with and gold was being carried by a person who was not an eligible passenger, it would clearly fall in the category of prohibited goods. The said High Court has held as follows:-

“7. Section 11 empowers the Central Government to prohibit either absolutely or subject to such conditions to be fulfilled before or after clearance the import or export of the goods of any specified direction by issuing a notification in this behalf.

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8. Relevant portion of The Exemption Notification 31/2003 under Section 25 of the Customs Act reads thus :

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<sup>96</sup> 2009 SCC Online Mad 819



“G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the erstwhile Ministry of Finance (Department of Revenue) No. 171/94-Customs, dated the 30th September, 1994, published in the Gazette of India, vide number G.S.R. 733(E), dated the 30th September, 1994, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description specified in column (2) of the Table below and falling under Chapter 71 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India by an eligible passenger, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, as is in excess of the amount calculated at the rate as specified in the corresponding entry in column (3) of the said Table and from the whole of the additional duty leviable thereon under Section 3 of the said Customs Tariff Act. ...

(2) The exemption is subject to the following conditions, namely:-

the duty shall be paid in convertible foreign currency;

the quantity of gold imported in any form shall not exceed ten kilograms per eligible passenger, and

the gold is either carried by the eligible passenger at the time of his arrival in India or is imported by him within fifteen days of his arrival in India....

“Explanation : For the purpose 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.”



Therefore, the gold brought in could be cleared on payment of a concessional rate of duty if the respondent is an eligible passenger. The respondent is not a eligible passenger. The learned Senior Counsel appearing for the respondents submitted that the respondent had been in Singapore from 1993. We are not concerned with the date on which he first went to Singapore. For the purpose of this exemption or this concession, he should have come to India after a period of not less than six months' stay in Singapore and short visits 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. He had gone to Singapore on 19-4-2005 was coming to India on 12-7-2005 i.e., after a period of less than six months. So he was not an 'eligible passenger'. The previous periods where he had stayed for longer duration are not relevant now. The liberalisation policy and the repeal of the Gold control order had weighed with the Tribunal. The Tribunal ought to have considered whether he could have carried the gold as part of his baggage as an eligible passenger.

9. In view of meaning of the word "prohibition" as construed laid down by the Supreme Court in *Om Prakash Bhatia* case we have to hold that the imported gold was '**prohibited goods**' since the respondent is not an eligible passenger who did not satisfy the conditions. The impugned order deserves to be set aside."

115. In *Malabar Diamond Gallery*, the Division Bench of the Madras High Court dealt with the issue which arises in some detail. The High Court was dealing with an appeal directed against the judgment of a learned Single Judge of that Court who had declined a prayer for release of gold. While answering the issue which arose, the Madras High Court observed as follows:-

"41. Positively, prohibited goods are defined, as goods, import or export of which, should be subject to any prohibition under this Act or any other law for the time being in force. Negatively, Section 2(33) of the Act, also states that goods are not prohibited goods, when import or export of which, 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. The expression “subject to any prohibition under this Act or any other law for the time being in force and compliance of the conditions, subject to which, the goods are permitted to be imported or exported, are the determining factors, to understand and to give effect to the meaning of the words, “prohibited goods”.

**42.** Literal interpretation of the words, “prohibited goods” and the contention that gold is not notified and therefore, to be released, would cut down the wide ambit of the inbuilt prohibitions and restrictions in the Customs Act, 1962 and any other law for the time being in force.

(i) In *Poppatlal Shah v. State of Madras* reported in AIR 1953 SC 274, the Supreme Court held that, “It is settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word, phrase and sentence is to be considered in the light of the general purpose and object of the Act itself.”

(ii) It is well settled that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act, so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within the statute or between a Section or other parts of the statute. [Ref. *Raj Krishna v. Bonod Kanungo* reported in AIR 1954 SC 202].

(iii) In *The State of Bihar v. Hira Lal Kejriwal* reported in AIR 1960 SC 47, the Supreme Court, at Paragraph 6, held that,-

“To ascertain the meaning of a section it is not permissible to omit any part of it: the whole section should be read together and an attempt should be made to reconcile both the parts. ....The first part gives life to that Order, and, therefore, the acts authorised under that Order can be done subsequent to the coming into force of the Ordinance. ....The second part appears to have been enacted for the purpose of avoiding this difficulty or, at any rate, to dispel the ambiguity.”



(iv) In *State of W.B. v. Union of India* reported in AIR 1963 SC 1241, the Apex Court held that in considering the expression used by the Legislature, the Court should have regard to the aim, object and scope of the statute to be read in its entirety.

(v) In *State of Uttar Pradesh v. Dr. Vijay Anand Maharaj* reported in AIR 1963 SC 946, the Hon'ble Supreme Court held as follows:

“The fundamental and elementary rule of construction is that the words and phrases used by the Legislature shall be given their ordinary meaning and shall be constructed according to the rules of grammar. When the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. It is a well recognized rule of construction that the meaning must be collected from the expressed intention of the Legislature.”

(vi) In *Namamal v. Radhey Shyam* reported in AIR 1970 Rajasthan 26, the Court held as follows:

“11. Maxwell in his book on Interpretation of Statutes (11<sup>th</sup> Edition) at page 226 observed thus:—

“The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They



are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Cole's words, to suppress the mischief and advance the remedy.”

(vii) In *Commissioner of Sales Tax v. Mangal Sen Shyamlal* reported in (1975) 4 SCC 35 = (1975) 4 SCC 35 : AIR 1975 SC 1106, the Apex Court held that, “A statute is supposed to be an authentic repository of the legislative will and the function of a court is to interpret it “according to the intent of them that made it”. From that function the court is. not to resile. It has to abide by the maxim, “ut res magis valiat quam pereat”, lest the intention of the legislature may go in vain or be left to evaporate into thin air.”

(viii) If the words are precise and unambiguous, then it should be accepted, as declaring the express intention of the legislature. In *Ku. Sonia Bhatia v. State of U.P.*, reported in (1981) 2 SCC 585 = (1981) 2 SCC 585 : AIR 1981 SC 1274, the Supreme Court held that a legislature does not waste words, without any intention and every word that is used by the legislature must be given its due import and significance.

(ix) In *Balasinor Nagrik Co-operative Bank Ltd. v. Babubhai Shankerlal Pandya* reported in (1987) 1 SCC 606, the Supreme Court, at Paragraph 4, held as follows:

“It is an elementary rule that construction of a section is to be made of all parts together. It is not permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section. ....It also provides for the manner of the exercise of such power. .... Sub-section (1) of Section 36 is made subject to the fulfilment of the conditions prerequisite”

(x) In the case of *Reserve Bank of India v. Peerless G.F., & Co., Ltd.*, (1987) 1 SCC 424 : AIR 1987 SC



1023, the Hon'ble Apex Court held:

“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

- (xi) In *Balram Kumawat v. Union of India* reported in (2003) 7 SCC 628, the Supreme Court held that, “Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. The rule of “ex visceribus actus” should be resorted to in a situation of this nature.”
- (xii) In *State of Gujarat v. Salimbhai Abdulgaffar Shaikh* reported in (2003) 8 SCC 50, the Supreme Court



held that,-

“Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court.....

.....It is well settled principle that the intention of the legislature must be found by reading the Statute as a whole. Every clause of Statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole Statute. It is also the duty of the Court to find out the true intention of the legislature and to ascertain the purpose of Statute and give full meaning to the same. The different provisions in the Statute should not be interpreted in abstract but should be construed keeping in mind the whole enactment and the dominant purpose that it may express.”

(xiii) In *A.N. Roy Commissioner of Police v. Suresh Sham Singh* reported in (2006) 5 SCC 745 : AIR 2006 SC 2677, the Apex Court held that,-

“It is now well settled principle of law that, the Court cannot change the scope of legislation or intention, when the language of the statute is plain and unambiguous. Narrow and pedantic construction may not always be given effect to. Courts should avoid a construction, which would reduce the legislation to futility. It is also well settled that every statute is to be interpreted without any violence to its language. It is also trite that when an expression is capable of more than one meaning, the Court would attempt to resolve the ambiguity in a manner consistent with the purpose of the provision, having regard to the great consequences of the alternative constructions.”

(xiv) In *Visitor Amu v. K.S. Misra* reported in (2007) 8 SCC 593, the Supreme Court held that, “It is well



settled principle of interpretation of the statute that it is incumbent upon the Court to avoid a construction, if reasonably permissible on the language, which will render a part of the statute devoid of any meaning or application. The Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intent is that every of the statute should have effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. It is not a sound principle of construction to brush aside words in a statute as being in apposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute.”

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**70.** From the decisions in *Samyanathan Murugesan's case* (cited supra), *Abdul Razak's case* (cited supra) and *Brinda Enterprises' case* (cited supra), it is manifestly clear that the adjudicating authorities/Courts have to consider two aspects, viz., (1) eligibility of the passengers to import the goods; and (2) whether such passengers had fulfilled the conditions of import or export, any restriction on import or export, which is also to be treated as prohibition.

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**78.** No sooner goods are brought from outside, into the territorial waters of the country, they become imported goods. At this juncture, it has to be seen, as to whether, such goods are legally or illegally imported, whether they fall within Section 11 of the Customs Act, 1962, which defines, an illegal import as, import of any goods in contravention of the provisions of the Customs Act, 1962 or any other law for the time being in force. Goods imported, contrary to the enumerated subject matters in chapters IV and IV-A of the Customs Act, 1962, which deal with prohibition on importation and exportation goods and detection of illegally imported goods prevention and disposal thereof, more fully described in Sections 11 and 11A of the Act, are also to be treated as prohibited. Goods imported from outside of the territory waters of the country, against any prohibition or restriction under the Customs Act, 1962 or any other law, time being in force, are to be treated as prohibited goods.



**79.** There is one thing to state that gold is not one of the enumerated prohibited goods and another, to state that goods are not permitted to be brought into the country, by smuggling, which, means any act or omission which would render such goods liable to confiscation under section 111 or section 113. There may not be total prohibition for import of goods, but if import is not done lawfully, in other words against any prohibition or restriction, which are inbuilt in the Customs Act, 1962 or any other law for the time being in force, then such goods should fall within the definition of Section 2(33) of the Act.

**80.** A conjoint reading Sections 2(33), 11 or 11A of the Act and other provisions in the Customs Act, 1962, and any other law, for the time being in force, would also make it clear that importation of goods, defined as illegal or prohibited or without complying with the conditions, or in violation of statutory provisions in the Customs Act, 1962 or any other law for the time being in force and in all cases, whether there is either total prohibition or restriction, in the light of the judgment of the Apex Court in *Om Prakash Bhatia's case*, such goods should fall within the definition of Prohibited goods. When import is in contravention of statutory provisions, in terms of Sections 11 or 11A of the Customs Act, 1962 or any other law, for the time being in force and when such goods squarely fall within the definition “illegal import”, or the other provisions in the statute, dealing with prohibition/restriction, the same are to held as, “prohibited goods” and liable for confiscation.

**81.** As rightly contended by Mr. A.P. Srinivas, learned counsel for the respondents that under Section 123 of the Customs Act, 1962, if the importer fails to discharge the burden that the goods seized from him, were not smuggled, then there is a strong reason for the proper officer to seize such goods. Smuggling is nothing but importing goods clandestinely, without payment of duty and such goods would squarely fall within the definition of “Prohibited goods”, under Section 2(33) of the Act.

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**92.** Provisions in the Customs Act, 1962, dealing with prohibition/restriction or any other law for the time in force, have to be read into Section 2(33) of the Act. Section 11A of the Act, as to what is “illegal import”, cannot be thrown to winds, while interpreting, “what is prohibited goods”, in terms of Section 2(33)



of the Customs Act, 1962. To add, while interpreting Section 2(33) of the Customs Act, 1962, as to what is prohibition, imposed in other laws, for the time being in force, one cannot ignore, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, rules framed by way of delegated legislation, like the Baggage Rules, 1998, framed in exercise of the powers conferred under Section 79 of the Customs Act, 1962 or for the matter, Section 77 of the Customs Act, 1962, which mandates, the owner of the baggage for the purpose of clearing the goods, to make a declaration of the contents of the baggage to the proper office and also the customs Notification No. 3/2012, dated 16.01.2012, that only passengers of Indian origin or a passenger in possession of a valid passport, issued under the Passport Act, 1967, who have stayed abroad for six months and above alone are eligible to import gold of foreign origin and clear the same on payment of customs duty, at the rate prescribed.”

116. Proceeding then to deal with the prayer for provisional release, the Madras High Court pertinently observed as under:-

“93. While considering a prayer for provisional release, pending adjudication, whether all the above can wholly be ignored by the authorities, enjoined with a duty, to enforce the statutory provisions, rules and notifications, in letter and spirit, in consonance with the objects and intention of the Legislature, imposing prohibitions/restrictions under the Customs Act, 1962 or under any other law, for the time being in force, we are of the view that all the authorities are bound to follow the same, wherever, prohibition or restriction is imposed, and when the word, “restriction”, also means prohibition, as held by the Hon'ble Apex Court in *Om Prakash Bhatia's case* (cited supra).

94. When a claim for provisional release under Section 110A of the Customs Act, is made, in the light of the decision in *Lexus Exports Pvt. Ltd's case* (cited supra), exercise of such right under Section 110A is only provisional and not absolute. On the culmination of adjudication proceedings, the authority may grant an option to pay fine in lieu of confiscation under Section 125 of the Customs Act, 1962 and such expected or anticipated right, cannot give rise to a cause for issuance of any mandamus sought for, under Section



110A of the Act and on the facts and circumstances of the case, when provisional release, sought for, is denied by the authorities, by filling a counter affidavit, contending that there is a prima facie case of smuggling.

**95.** If Courts have to consider the prayer sought for, under Section 110A of the Act, on the presumption that such rights are likely to be granted in future, under Section 125 of the Act, by the competent authority, then we would be exceeding in our jurisdiction. At the stage, when provisional release is either ordered or denied, discretion exercised by the authority, is administrative in nature.

**96.** Objective satisfaction, at the stage of provisional release, casts a duty on the authority, to consider, as to whether, there are prohibitions/restrictions in the Customs Act, 1962, or any other law for the time being in force and whether he is bound to exercise his discretion, satisfying principles of fairness, reasonableness and whether, it is in accordance with the objects sought to be achieved. At the time of provisional release, it is also to be seen as to whether subjective satisfaction is based on valid materials, and not on whims and fancies of the authority.

**97.** Keeping in mind, the objects and purpose for which, Customs Act, 1962, is enacted, dealing with prohibition/restriction, this Court is of the considered view that the competent authority, has to arrive at a satisfaction, as to whether, goods seized and liable for confiscation, can be released provisionally, pending adjudication, and in that context, the role of the Courts, in exercise of the powers, under Article 226 of the Constitution of India, should be confined only to test such satisfaction, arrived at, by the competent authority, with regard to the objects of the Customs Act, 1962 and any other law for the time being in force. When the competent authority, under the Customs Act, 1962, makes a plea that there is a prima facie case of smuggling and that the appellant has failed to discharge the burden, in terms of Section 123 of the Customs Act and when the adjudication proceedings are pending, we are of the considered view that it would be appropriate to direct provisional release?

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**100.** Going through the material on record, and in the light of the decisions considered, in particular, *Om Prakash Bhatia's*



*case* (cited *supra*), we are of the considered view that the discretion exercised by the competent authority, considering the objects of the Customs Act, 1962, or any other law for the time being in force, cannot be held as not in conformity with the Customs Act, 1962, or any other law, for the time being in force.”

117. The respondents had also cited for our consideration the decision of the Supreme Court in **Commissioner of Customs, Mumbai vs. M. Amba Lal & Company**<sup>97</sup> where the following observations were made:-

“11. We may now briefly notice the scheme of the Act. The expression “dutiable goods”, “duty”, “import”, “imported goods”, “importer” and “smuggling” are defined in the following manner:

“2. (14) ‘dutiable goods’ means any goods which are chargeable to duty and on which duty has not been paid;  
(15) ‘duty’ means a duty of customs and leviable under this Act;

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(23) ‘import’, with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

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(25) ‘imported goods’ means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

(26) ‘importer’, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer;

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(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;

12. Dutiable goods are goods whose import is permitted by the Act or any other law in force. Duty is the tax leviable on the

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<sup>97</sup> (2011) 2 SCC 74



goods occasioned by their import into India or their export out of India. The dutiability of the goods is covered by Section 12 of the Act which is the charging section. Under this section, all goods imported into or exported from India are liable to customs duty unless the Customs Act itself or any other law for the time being in force provides otherwise. The rate of duty is fixed by the Customs Tariff Act, 1975. “Import” and “imported goods” mean that if goods are brought into India, meaning thereby into the territory of India from outside, there is import of goods and the goods become imported goods and become chargeable to duty up to the moment they are cleared for home consumption. The word “importer” has been defined in the Act as importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption includes any owner or any person who holds himself out to be an importer. The word “smuggling”, in relation to goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113 of the Act.

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**17.** The notification issued by the Central Government in exercise of the powers conferred by Section 25(1) of the Act exempts the articles enumerated in the Table annexed when imported into India from payment of duty under the Act. The language used in the notification is plain and unambiguous. Therefore, we are required to consider the same in their ordinary sense. A construction which permits one to take advantage of one’s own wrong or to impair one’s own objections under a statute should be disregarded. The interpretation should as far as possible be beneficial in the sense that it should suppress the mischief and advance the remedy without doing violence to the language. From the wording of the above exemption notification, it is clear that the benefit of the exemption envisaged is for those goods that are imported.

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**21.** In short, question before us is: whether goods that are smuggled into the country can be read within the meaning of the expression “imported goods” for the purpose of benefit of the exemption notification? We are of the view that “smuggled goods” will not come within the definition of “imported goods” for the purpose of the exemption notification, for the reason, the Act defines both the expressions looking at the different



definitions given to the two classes of goods: imported and smuggled, and we are of the view that if the two were to be treated as the same, then there would be no need to have two different definitions.

**22.** In order to understand the true meaning of the term “imported goods” in the exemption notification, the entire scheme of the Act requires to be taken note of. As noted above, “imported goods” for the purpose of this Act is explained by a conjoint reading of Sections 2(25), 11, 111 and 112. Reading these sections together, it can be found that one of the primary purposes for prohibition of import referred to the latter is the prevention of smuggling [See Section 11(2)(c)]. Further, in the light of the objects of the Act and the basic skeletal framework that has been enumerated above, it is clear that one of the principal functions of the Act is to curb the ills of smuggling on the economy. In the light of these findings, it would be antithetical to consider that “smuggled goods” could be read within the definition of “imported goods” for the purpose of the Act. In the same light, it would be contrary to the purpose of exemption notifications to accord the benefit meant for imported goods on smuggled goods.”

118. In *Amba Lal*, the Supreme Court significantly observed that goods which have been smuggled would not fall within the definition of “imported goods” at all. Their Lordships underlined the distinction which must be recognised to exist between imported and smuggled goods. It was in this context that learned counsels representing Customs had submitted that since all the petitioners in the present batch had attempted to smuggle in gold, the article was liable to be confiscated absolutely and no prayer for redemption was liable to be entertained.

119. It may be appropriate to observe at this juncture that a facile reading of *Amba Lal* would seem to suggest that smuggled goods were held to be outside the meaning of the expression imported goods as



employed in the Act. This was the line which was also advocated for our consideration by learned counsels representing the Customs. However, the said contention as broadly addressed may not be a correct reading of *Amba Lal* for reasons which are recorded hereinafter. It becomes pertinent to note that the Act defines imported goods to mean any goods which are brought into India from a place outside. Undisputedly, the rough diamonds which formed the subject matter of consideration in *Amba Lal* had been imported. The principal question which however arose for the consideration of the Supreme Court was whether the importer could avail the benefits of the exemption notification once it had been found that the goods had been smuggled. It was in the aforesaid context that the Supreme Court observed that the since the goods had been smuggled into India, it would be antithetical and “*contrary to the purpose of the exemption notifications to accord the benefit meant for imported goods on smuggled goods.*” What *Amba Lal* seeks to espouse as a principle is the imperative of import conditions being strictly adhered to and in case of a violation of the conditions which may apply, an importer being rendered ineligible to benefits under an exemption notification.

120. Our attention was also invited to a recent decision rendered by the Gujarat High Court in **Abdul Hussain Saifuddin Hamid v. State of Gujarat**<sup>98</sup>, where while dealing with an identical question the Court had observed thus:

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<sup>98</sup> Neutral Citation No. 2020: GUJHC:39311-DB



“38. The argument of the learned counsel appearing for the writ-applicant is that his client should have been given an option to pay fine in lieu of confiscation, more particularly, when the appellate authority in the appeal filed by the writ-applicant against the Order in Original has recorded a finding that the contraband gold seized from the possession of the writ-applicant as such is not a prohibited item and can be imported but such import is subject to the restrictions including the RBI regulations. However, at the same time, the view taken by the appellate authority is that the writ-applicant returned to India within 37 days from the date of his departure to Sharjah and he could not be said to be qualified as an eligible person to import gold and, therefore, the gold is liable for absolute confiscation. In other words, the view taken is that when an attempt is made to conceal the contraband clandestinely, the same is liable for absolute confiscation and there is no question of giving an option to pay the fine in lieu of the confiscation. In this regard, the appellate authority seems to have relied on a decision of the Madras High Court in the case of Commissioner of Customs (Air) v/s. Samynathan Murugesan. In the said case, it was the Commissioner of Customs (Air), Customs House, Chennai, who was the petitioner before the High Court. The question before the High Court was, “whether in the facts and circumstances of the case, the Tribunal was right in remanding the matter with a direction to the Commissioner to invoke the power under Section 125 of the Customs Act for redemption of the goods on payment of fine ? The facts of the said case are almost identical to the facts of the case in hand.

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51. No sooner goods are brought from outside, into the territorial waters of the country, they become imported goods. At this juncture, it has to be seen, as to whether, such goods are legally or illegally imported, whether they fall within Section 11 of the Customs Act, 1962, which defines, an illegal import as, import of any goods in contravention of the provisions of the Customs Act, 1962 or any other law for the time being in force. Goods imported, contrary to the enumerated subject matters in chapters IV and IV-A of the Customs Act, 1962, which deal with prohibition on importation and exportation goods and detection of illegally imported goods prevention and disposal thereof, more fully described in Sections 11 and 11A of the Act, are also to be treated as prohibited. Goods imported from outside of the territory



waters of the country, against any prohibition or restriction under the Customs Act, 1962 or any other law, time being in force, are to be treated as prohibited goods.

**52.** There is one thing to state that gold is not one of the enumerated prohibited goods and another, to state that goods are not permitted to be brought into the country, by smuggling, which, means any act or omission which would render such goods liable to confiscation under section 111 or section 113. There may not be total prohibition for import of goods, but if import is not done lawfully, in other words against any prohibition or restriction, which are inbuilt in the Customs Act, 1962 or any other law for the time being in force, then such goods should fall within the definition of Section 2(33) of the Act.

**53.** A conjoint reading Sections 2(33), 11 or 11A of the Act and other provisions in the Customs Act, 1962, and any other law, for the time being in force, would also make it clear that importation of goods, defined as illegal or prohibited or without complying with the conditions, or in violation of statutory provisions in the Customs Act, 1962 or any other law for the time being in force and in all cases, whether there is either total prohibition or restriction, in the light of the judgment of the Supreme Court in Om Prakash Bhatia's case, such goods should fall within the definition of Prohibited goods. When import is in contravention of statutory provisions, in terms of Sections 11 or 11A of the Customs Act, 1962 or any other law, for the time being in force and when such goods squarely fall within the definition 'illegal import', or the other provisions in the statute, dealing with prohibition/restriction, the same are to held as, "prohibited goods" and liable for confiscation.

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**55.** The expression 'subject to the prohibition under the Customs Act, 1962 or any other law for the time being in force, in Section 2(33) of the Customs Act, has to be read and understood, in the light of what is stated in the entirety of the Act and other laws. Production of legal and valid documents for import, along with payment of duty, determined on the goods imported, are certainly conditions to be satisfied by an importer. If the conditions for import are not complied with, then such goods, cannot be permitted to be imported and thus, to be treated as prohibited from being imported.

**56.** In Om Prakash Bhatia v. Commissioner of Customs, Delhi



reported in 2003 (155) ELT 423 (SC), the Supreme Court held that if there is intentional over-invoicing of the goods imported, then such goods imported, fall under the category, 'prohibited goods', as per Section 2(33) of the Customs Act, 1962. Smuggling under the Customs Act, 1962, in relation to any goods, means any act or omission which will render such goods liable to confiscation, under section 111 or section 113 of the Act and therefore, those goods, would also fall under the definition of prohibited goods, in terms of Section 2(33) of the Customs Act, 1962.

**57.** If there is a fraudulent evasion of the restrictions imposed, under the Customs Act, 1962 or any other law for the time being in force, then import of gold, in contravention of the above, is prohibited. For prohibitions and restrictions, Customs Act, 1962, provides for machinery, by means of search, seizure, confiscation and penalties. Act also provides for detection, prevention and punishment for evasion of duty.

**58.** The expression, 'subject to prohibition in the Act and any other the law for the time being in force.' In Section 2(33) of the Customs Act, has wide connotation and meaning, and it should be interpreted, in the context of the scheme of the Act, and not to be confined to a narrow meaning that gold is not an enumerated prohibited good to be imported into the country. If such narrow construction and meaning have to be given, then the object of the Customs Act, 1962, would be defeated.

**59.** The Provisions in the Customs Act, 1962, dealing with prohibition/restriction or any other law for the time in force, have to be read into Section 2(33) of the Act. Section 11A of the Act, as to what is 'illegal import', cannot be thrown to winds while interpreting, 'what is prohibited goods', in terms of Section 2(33) of the Customs Act, 1962. To add, while interpreting Section 2(33) of the Customs Act, 1962, as to what is prohibition, imposed in other laws, for the time being in force, one cannot ignore, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, rules framed by way of delegated legislation, like the Baggage Rules, 1998, framed in exercise of the powers conferred under Section 79 of the Customs Act, 1962 or for the matter, Section 77 of the Customs Act, 1962, which mandates, the owner of the baggage for the purpose of clearing the goods, to make a declaration of the contents of the baggage to the proper office and also the customs Notification No.3/2012, dated 16.01.2012, that only passengers of Indian



origin or a passenger in possession of a valid passport, issued under the Passport Act, 1967, who have stayed abroad for six months and above alone are eligible to import gold of foreign origin and clear the same on payment of customs duty, at the rate prescribed.”

121. Having noticed the different views which have been expressed by various High Courts, this may be an appropriate juncture to briefly take note of some of the incidental rules, circulars and notifications which are asserted to govern the subject. However, the said discussion must necessarily be prefaced with the observation that undisputedly there is no specific notification issued either under Section 11 of the Act or Section 3(2) of the FTDR relating to the import of gold.

122. To enable us to have a broad overview of the statutory scheme which prevails, our attention was invited firstly to the Baggage Rules 2016. It may however be noted that Rules 3, 4 and 5 essentially deal with the permissible limit of gold and jewellery which may be carried or brought in by passengers arriving from different countries including foreigners. Those Rules essentially deal with the limits up to which such articles may be carried by passengers. We were further informed that subsequently the **Central Board of Excise and Customs**<sup>99</sup> has promulgated the Customs Baggage Declarations Regulations 2013 and which embodies the Customs Declaration Form specifically requiring passengers to make an appropriate declaration with respect to gold jewellery being carried above the free allowance as well as gold

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<sup>99</sup> CBEC



bullion. The duty free allowance is also specified in those Regulations. 123. From the various Notifications and Circulars issued by the CBEC as well as the RBI, the following position emerges. The Circular of CBEC dated 10 May 1993 takes note of the fact that while gold may not be included in the list of prohibited items in the import policy, its import clearly fell in the restricted category of goods. It also took note of the restriction of its import being allowed only against a license and in accordance with any public notice that may have been issued.

124. Our attention was then invited to the Notification of 28 January 2004 issued by the Ministry of Commerce and Industry which had taken note of the Export and Import Policy 2002-07 while dealing with the subject of import of gold and the amendments which were sought to be introduced in the import policy. Gold which fell under **Exim Code** 7108 while declared to be free was provided to be subject to RBI regulations. Para 3 is extracted hereinbelow:-

**“3. After amendment the following entries would read as under:**

<b>S. No.</b>	<b>Exim Code</b>	<b>Item Description</b>	<b>Policy</b>	<b>Conditions relating to the Policy</b>
1	27160000	<b>Electrical Energy</b>	<b>Free</b>	
2	71061000	Powder	<b>Free</b>	Subject to RBI Regulations.
3	71069100	Unwrought	<b>Free</b>	Subject to RBI Regulations
4	71069210	Sheets, plates, strips, tubes and pipes	<b>Free</b>	Subject to RBI Regulations.
5	71069290	Other	<b>Free</b>	Subject to RBI Regulations.
6	71081100	Non-monetary:	<b>Free</b>	Subject to RBI



7	71081200	Powder Other unwrought forms	<b>Free</b>	Regulations. Subject to RBI Regulations.
8	71081300	Other semi-manufactured forms Monetary	<b>Free</b>	Subject to RBI Regulations.
9	71189000	<b>Other</b>	<b>Free</b>	Subject to RBI Regulations.
10	85269300	Global Positioning System (GPS) Receiver; Differential Global Positioning System (DGPS) Receiver	<b>Free</b>	
11	93040000	Other Arms(for example, Spring, Air or Gas Guns and Pistols, Truncheons), excluding those of heading 9307	<b>Restricted</b>	Import of Air Gun & Air Pistol will be free subject to the condition that the requirements specified in the MHA Notification No. S.O. 667 (E) dated 12.9.1985 and Notification No. S.O. 831 (E) dated 2.8.2002 are fulfilled and also that the purchaser / user of these items shall obtain requisite user license from the competent authority under the provisions of the existing Arms Act, 1959.”



125. The aforesaid Notification was followed by a Policy Circular dated 16 April 2004 and which specifically dealt with the subject of duty-free import of gold. The said Policy Circular provided as follows:-

“2. It is hereby reiterated that the Policy of duty-free imports through the nominated agencies and 15 nominated banks detailed in Chapter 4 of the EXIM Policy and Handbook of Procedures will continue to be operational. Exporters will continue to have the option to import duty free gold and silver for exports through the nominated agencies or directly under the Advance Licensing Scheme.

3. RBI reserves the right to regulate the import of gold as laid down in Notification No. 29 dated 28.1.2004 as gold and silver are also used as currency and are surrogate for foreign exchange. All such change in the RBI regulations are deemed to be covered by the EXIM Policy in terms of the Notification No. 29 dated 28.1.2004.

This issues with the approval of the DGFT.”

126. From the material placed on the record it is evident that the import of gold was duly controlled at least from 1996 and envisaged to be channelised only through certain categories of nominated agencies. Those agencies were identified in a Circular dated 14 October 2009 and which reads thus:-

“2. In order to address the difficulties in supply of gold, silver and platinum to small jewellery exporters, DGFT has included 5 more new agencies/entities as "nominated agencies" for import of gold/silver/platinum (hereinafter referred as the "precious metal"). Now the nominated agencies are as under:

- (1)Metals and Minerals Trading Corporation limited (MMTC);
- (2) Handicraft and Handloom Export Corporation (HHEC);
- (3) State Trading Corporation (STC);
- (4) Project and Equipment Corporation of India Ltd (PEC);



- (5) STCL Ltd;
- (6) MSTC Ltd;
- (7) Diamond India Limited (DIL);
- (8) Gems & Jewellery Export Promotion Council (G&J EPC);
- (9) A Star Trading House (only for Gems & Jewellery sector) or a Premier Trading House under paragraph 3.10.2 of Foreign Trade Policy; and
- (10) Any other agency authorised by Reserve Bank of India (RBI)";

3. DGFT has specified minimum supply criteria of 15% by nominated agencies (other than the designated banks nominated by RBI and Gems & jewellery units operating under EOU and SEZ scheme) and laid down procedure and condition to be followed by these nominated agencies (other than the designated banks nominated by RBI and Gems & jewelry units operating under EOU and SEZ scheme) vide Policy circular No. 77 (RE-2008)/2004-09 dated 31.03.2009 as amended from time to time. Relevant notifications No57/2000-Cus dated 08.05.2000 and 52/2003-Cus dated 31.03.2003 have been suitably amended vide notification No. 106/2009-Customs dated 14.09.2009 allowing aforesaid nominated agencies duty free import of precious metals for supply to exporters for manufacture of jewellery and export thereof subject to the procedure and conditions specified by DGFT.

4. In order to avoid divergent practices and to streamline supply of precious metal for exports, the following procedure, supplementing the procedure specified by DGFT, is being prescribed:

- (i) the Nominated Agencies shall be allowed import of precious metal for warehousing in their own bonded vaults. The vaults shall be licensed by the jurisdictional Dy/ Asstt. Commissioners of Customs or Central Excise (hereinafter referred as the "said officer") under Section 58 of the Customs Act, 1962;
- (ii) the Nominated Agencies shall furnish a bond to the satisfaction of the said officer undertaking to properly account for the warehoused precious metal and also to discharge the duty liability at the prescribed effective rate of duty in the event of the exporter not fulfilling his export obligation within the prescribed period;



(iii) the Nominated Agencies may be permitted to give a general bond for an estimated amount of duty worked out at the effective rate involved in their monthly import or may give a revolving bond starting with a bond equal to the duty estimated at the effective rate on quantity of precious metal likely to be imported in a month;

(iv) the Nominated Agencies (other than designated banks nominated by RBI and public sector undertakings) shall also furnish a bank guarantee equal to 25% of the estimated amount of duty involved on import of precious metals in a month or the bonds executed by them. The exemption from bank guarantee to the designated banks nominated by RBI and public sector undertakings shall be admissible subject to the following conditions:

(a) the nominated agency has not defaulted in following the procedure and condition specified by DGFT,

(b) in case of default in export of jewellery manufactured out of precious metal supplied by nominated agency within the prescribed period, the nominated agency have not defaulted in payment of duty within the specified period;

(c) the nominated agency has not been served with a show cause notice or no demand confirmed against it, during the preceding 3 years, for violations invoking fraud or collusion or any wilful mis-statement or suppression of facts under relevant provisions of the Customs Act, 1962, the Central Excise Act, 1944, the Finance Act, 1994 covering Service Tax, the Foreign Trade (Development & Regulation) Act, 1992, the Foreign Exchange Management Act, 1999 and the rules made thereunder,

(v) the Commissioner of Customs may allow more than one Nominated Agencies to keep their imported goods in the same vault provided the quantities are kept segregated and separate accounts are maintained;

(vi) the Nominated Agencies will be required to keep the imported duty free goods for supply to the exporters segregated from the quantities imported for domestic consumption on payment of duty;

(vii) the Nominated Agencies shall be exempt from following the double lock system. Physical presence of the Bond Officer will not be required for bonding or ex-bonding the goods. No



cost recovery charges would be payable by the Nominated Agencies;

(viii) the Nominated Agencies can be visited by Custom officers for surprise audit or checks. The Commissioner should devise a system of random audit at least once in 6 months initially and once in a year subsequently;

(ix) the exporters intending to receive precious metal from the Nominated Agencies will register themselves with their jurisdictional Asstt. Commissioners who will issue them a one-time Certificate specifying therein the details of their units such as name and address of the unit and the head/owner of the organization. This certificate has to be produced to the Nominated Agencies while taking gold. The units shall submit an undertaking to the Asstt. Commissioner without bank guarantee to follow the conditions of notification under which they are receiving duty free precious metal and export the jewellery made therefrom within the period stipulated in the Foreign Trade Policy. The EOU units may submit a self-declaration to the Nominated Agencies stating therein the details of their unit;

(x) the Nominated Agencies would allow clearance of the goods for export production under the relevant exemption notification under their own internal documents and would submit a consolidated monthly account in format enclosed of the goods released exporter-wise and the duty involved which will be worked on the basis of effective rate of duty;

(xi) the Nominated Agencies shall maintain an account of the goods released to the exporters (exporter-wise) on day-to-day basis. This account shall be liable for inspection by any Customs Authorities as the account of a bonded warehouse;

(xii) the exporter shall furnish the EP copy of the shipping bill and Bank certificate of realization in Appendix 22A to the nominated agencies as a proof of having exported the jewellery made from the duty free goods released to them within the period prescribed in the Foreign Trade Policy;

(xiii) wherever such proof of export is not produced within the period prescribed in the Foreign Trade Policy, the Nominated Agencies shall (without waiting for its recovery from the exporter) deposit the amount of duty calculated at the effective rate leviable on the quantity of precious metal not exported, within 7 days of expiry of the period within which the



jewellery manufactured out of the said precious metal was supposed to be exported. The duty so paid by the Nominated Agency shall be reflected in the monthly statement prescribed in para (x) above. The Nominated Agencies will settle their claim with the exporter at their own level;

(xiv) the Nominated Agencies shall report the cases of failure, to export the jewellery made out of precious metal released to the exporter, to the Commissioner of Customs in whose jurisdiction the licensed vault of the Nominated Agencies is installed; and

(xv) the exporters operating under replenishment scheme may be permitted to receive precious metal from the Nominated Agencies on submission of EP copy of the shipping bill. Nominated agencies shall also monitor the export proceeds realization of such shipments against which they have replenished precious metal, on the basis of Bank certificate of realization in Appendix 22A to be submitted by exporters to the nominated agencies, as a proof of having exported the jewellery.”

127. We also take note of the Customs Notification dated 17 March 2012 and which amended the relevant provisions of the Customs Tariff Act, 1975. The said Notification while dealing with gold dore bars, gold bars and coins provided as under:-

S.No.	Chapter or Heading or sub-heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
“318.	71	Gold dore bar, having gold content not exceeding 95%	Nil	400[8.75%]	5 and 34



<p><sup>4</sup>[321]</p>	<p>71 or 98</p>	<p>(i) Gold bars, other than tola bars, bearing manufacturer's or refiner's engraved serial number and weight expressed in metric units, and gold coins having gold content not below 99.5%, imported by the eligible passenger.</p>	<p><sup>141</sup>[10%]</p>	<p>Nil</p>	<p>35</p>
<p><sup>487</sup>[323.</p>	<p>71</p>	<p>(i) Gold bars, other than tola bars, bearing manufacturer's or refiner's engraved serial number and weight expressed in metric units;  (ii) Gold coins having gold content not below 99.5% and gold findings, other than imports of such goods through post, courier or baggage.  Explanation. -</p>	<p>10%  10%</p>	<p>Nil  -</p>	<p>-  -]</p>



		For the purposes of this entry, "gold findings" means a small component such as hook, clasp, clamp, pin, catch, screw back used to hold the whole or a part of a piece of jewellery in place.			
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Conditions 5 & 34:

Condition 5: If the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.

Condition 34: If,-

- (a) the goods are directly shipped from the country in which they were produced and each bar has a weight of 5 kg or above;
- (b) the goods are imported in accordance with the packing list issued by the mining company by whom they were produced;
- (c) the importer produces before the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, an assay certificate issued by the mining company or the laboratory attached to it, giving detailed precious metal content in the dore bar;
- (d) the gold dore bars are imported by the actual user for the purpose of refining and manufacture of standard gold bars of purity 99.5% and above; and
- (e) the silver dore bars are imported by the actual user for the purpose of refining and manufacture of silver bars of purity 99.9% and above.

Condition 35



If, -

1. (a) the duty is paid in convertible foreign currency;
- (b) the quantity of import does not exceed ten kilograms of gold and one hundred 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) imported by him within fifteen days of his arrival in India, or
  - (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 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.”

128. Our attention was then drawn to the Master Circular on Import of Goods and Services as issued by RBI on 02 July 2012 and which while dealing with the subject of gold import explained the extant position as under:-



### “C.13. Direct Import of Gold

AD Category - I bank can open Letters of Credit and allow remittances on behalf of EOUS, units in SEZs in the Gem & Jewellery sector and the nominated agencies / banks, for direct import of gold, subject to the following

- i. The import of gold should be strictly in accordance with the Foreign Trade Policy.
- ii. Suppliers' and Buyers' Credit, including the usance period of LCs opened for direct import of gold, should not exceed 90 days.
- iii. Banker's prudence should be strictly exercised for all transactions pertaining to import of gold. AD Category - I bank should ensure that due diligence is undertaken and all Know Your Customer (KYC) norms and the Anti-Money-Laundering guidelines, issued by Reserve Bank from time to time are adhered to while undertaking such transactions AD Category I bank should closely monitor such transactions. Any large or abnormal increase in the volume of business of the importer should be closely examined to ensure that the transactions are bonafide trade transactions.
- iv. In addition to carrying out the normal due diligence exercise, the credentials of the supplier should also be ascertained before opening the LCs. The financial standing, line of business and the net worth of the importer customer should be commensurate with the volume of business turnover. Apart from the above, in case of such transactions banks should also make discreet enquiries from other banks to assess the actual position. Further, in order to establish audit trail of import/export transactions, all documents pertaining to such transactions must be preserved for at least five years.
- v. AD Category- I bank should follow up submission of the Bill of Entry by the importers as stipulated.
- vi. Head Offices/International Banking Divisions of AD Category -I banks shall henceforth submit the following statements to the Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Central Office, Trade Division, Amar Building, Fort, Mumbai-400001:



a) Statement on **half yearly** basis (end March / end September) showing the quantity and value of gold imported by the nominated banks/ agencies/ EOUS/ SEZs in Gem & Jewellery sector, mode of payment-wise, as per **Annex'3'**;

b) Statement on **monthly basis** showing the quantity and value of gold imports by the nominated agencies (other than the nominated banks)/ EOUS/ SEZS in Gem & Jewellery sector during the month under report as well as the cumulative position as at the end of the said month beginning from the 1st month of the Financial Year, as per **Annex '4'**.

Both the statements shall be submitted, even if there is 'Nil' position and they should reach the aforesaid office of RBI by the 10th of the following month / half year to which it relates.

The statements may also be submitted by e-mail.”

129. RBI thereafter issued another Circular on 04 June 2013 regulating the import of gold by nominated banks and agencies. The relevant extracts of that Circular are extracted hereunder:-

“Attention of Authorised Persons is drawn to our AP. (DIR Series) Circular No. 103 dated May 13, 2013 on the captioned subject in terms of which, it was decided to restrict the import of gold on consignment basis by banks, only to meet the genuine needs of the exporters of gold jewellery. It has now been decided to extend the provisions of this circular to all nominated agencies/ premier / star trading houses who have been permitted by Government of India to import gold. Accordingly, any import of gold on consignment basis by both nominated agencies and banks shall now be permissible only to meet the needs of exporters of gold jewellery.

2. It has further been decided that all Letters of Credit (LC) to be opened by Nominated Banks / Agencies for import of gold under all categories will be only on 100 per cent cash margin basis. Further, all imports of gold will necessarily have to be on



Documents against Payment (DP) basis. Accordingly, gold imports on Documents against Acceptance (DA) basis will not be permitted. These restrictions will however not apply to import of gold to meet the needs of exporters of gold jewellery.

3. The above instructions will come into force with immediate effect. ADs may bring the contents of this circular to the notice of their constituents and customers concerned. They are also advised to strictly ensure that foreign exchange transactions effected by / for their constituents are compliant with these instructions in letter and spirit.

4. All other instructions relating to import of gold issued from time to time shall remain unchanged.

5. The directions contained in this circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions/approvals, if any, required under any other law.”

130. On 04 September 2013, CBEC issued another Circular setting out the various regulatory measures with respect to import of gold and gold dore bars. The relevant parts of that Circular are extracted hereinbelow:-

“Subject: Import of Gold and Gold Dore Bars - *Procedure and Guidelines*.

Reference is invited to Board's Circular No. 28/2009 dated 14-10-2009 regarding procedure to be followed by the Nominated Agencies for supplying duty free gold to exporters. RBI has now issued fresh guidelines for import of gold and gold dore bars vide circular RBI/2013-14/187, AP (DIR Series) Circular No. 25 dated 14-8-2013, as revised (copy enclosed). In order to operationalize the same, the following procedure shall be followed for import of gold. This circular shall supersede the customs circular no. 28/2009-Cus., dated 14-10-2009 insofar as the import of gold is



concerned. The import of silver and platinum shall continue to be governed by the customs circular dated 14-10-2009.

2. Henceforth, gold shall be permitted to be imported only by the agencies notified by DGFT, which as of now are as follows:

- i. Metals and Minerals Trading Corporation limited (MMTC);
- ii. Handicraft and Handloom Export Corporation (HHEC);
- iii. State Trading Corporation (STC);
- iv. Project and Equipment Corporation of India Ltd. (PEC);
- v. STCL Ltd;
- vi. MSTC Ltd;
- vii. Diamond India Limited (DIL);
- viii. Gems & Jewellery Export Promotion Council (G&J EPC);
- ix. A Star Trading House (only for Gems & Jewellery sector) or a Premier Trading House under paragraph 3.10.2 of Foreign Trade Policy; and
- x. Any other agency authorized by Reserve Bank of India (RBI).

3. Import of gold by the banks/agencies/entities specified in para 2 above, henceforth referred to as Nominated Agencies for the purpose of this Circular, shall be subject to the following:

- a. Import of gold in the form of coins and medallions is prohibited.
- b. It shall be incumbent on the nominated banks/agencies/entities to ensure that at least one fifth, i.e., 20%, of every lot of import of gold imported to the country is exclusively made available for the purpose of exports and the balance for domestic use. A working example of the operations of the 20/80 scheme is given in the Annexure to the RBI Circular dated 14-8-2013, as revised.
- c. Entities/units in the SEZ and EOUS, Premier and Star Trading Houses shall be permitted to import gold exclusively for the purpose of exports only and these entities shall not be permitted to clear imported gold for any purpose other than for exports (irrespective of whether they are nominated agencies or not).



- d. Gold made available by a nominated agency to units in the SEZ and EoUs, Premier and Star Trading Houses shall not qualify as supply of gold to the exporters, for the purpose of the 20/80 Scheme;
- e. Gold imported against any authorization such as Advance Authorization/Duty Free Import Authorization (DFIA) shall be utilized for export purposes only and no diversion for domestic use shall be permitted.
4. For import of gold, following procedure is prescribed:
- i. all imports shall be routed through customs bonded warehouses only;
  - ii. jurisdictional Commissioner may permit the vaults of the nominated agencies as customs bonded warehouse subject to the procedure prescribed under Section 58 of the Custom Act;
  - iii. for every consignment of gold imported, at least 20% quantity shall be for supply to the exporters only and remaining can be cleared on payment of duty in accordance with RBI circular dated 14-8-2013, as revised;
  - iv. the Nominated Agencies shall furnish a bond to the satisfaction of the said officer undertaking to properly account for the warehoused gold and also to discharge the duty liability at the prescribed effective rate of duty;
  - v. the Nominated Agencies may be permitted by the jurisdictional Commissioner of Customs to give a general bond for an estimated amount of duty worked out at the effective rate involved in their monthly import or a revolving bond starting with a bond equal to the duty estimated at the effective rate on quantity of gold likely to be imported in a month;
  - vi. the Nominated Agencies (other than designated banks nominated by RBI and public sector undertakings) shall also furnish a bank guarantee equal to 25% of the estimated amount of duty involved on import of gold in a month or the bonds executed by them. The exemption from bank guarantee to the designated banks nominated by RBI and public sector undertakings shall be permissible subject to the following conditions:



- a. the said entity has not defaulted in following the procedure and condition specified by Customs and/or DGFT;
  - b. in case of default in export of jewellery manufactured out of precious metal supplied by nominated agency within the prescribed period, the said entity has not defaulted in payment of duty within the specified period;
  - c. the said entity has not been served with a show cause notice or no demand confirmed against it, during the preceding 3 years, for violations involving fraud or collusion or any willful misstatement or suppression of facts under relevant provisions of the Customs Act, 1962, the Central Excise Act 1944, the Finance Act, 1994 covering Service Tax, the Prevention of Money Laundering Act, 2002, the Foreign Trade (Development & Regulation) Act, 1992, the Foreign Exchange Management Act, 1999 and the Rules made thereunder,
- vii. the Commissioner of Customs may allow more than one Nominated Agencies to keep their imported goods in the same bonded warehouse provided the quantities are kept segregated and separate accounts are maintained;
- viii. the Nominated Agencies shall be exempt from following the double lock system. Physical presence of the Bond Officer will not be required for bonding or ex-bonding the goods. No cost recovery charges would be payable by the Nominated Agencies;
- ix. the Nominated Agencies can be visited by Custom officers for surprise audit or checks. The jurisdictional Commissioner should devise a system of random audit at least once in 3 months during the first year and twice in a year subsequently;
- x. the Nominated Agencies, intending to clear gold to an exporter, shall file an ex-bond Bill of entry, clearly stating the name, address and details of owners/promoters/Managing Director/Partners etc of the exporter to whom the gold is being sold, with the jurisdictional customs officer where the gold has been bonded. The Nominated Agencies shall clear gold for



- domestic use on payment of duty by filing appropriate ex-bond Bill of Entry.
- xi. the exporters intending to receive precious metal from the Nominated Agencies will register themselves with their jurisdictional Deputy/Assistant Commissioners who will issue them a one-time Certificate specifying therein the details of their units such as name and address of the unit and the owners/promoters/Managing Director/Partners etc. of the organization. Exporters already registered with the customs authorities under the provisions of circular 28/2009- Cus., dated 14-10-2009 need not take a fresh registration under this circular. This certificate has to be produced to the Nominated Agencies while taking gold. The units shall submit an undertaking to the Deputy/Assistant Commissioner without bank guarantee to follow the conditions of notification under which they are receiving duty free gold and export the jewellery made therefrom within the period stipulated in the Foreign Trade Policy. The same procedure will be followed by the EOU/SEZ units intending to receive gold from nominated agencies;
  - xii. the customs officer shall permit clearance of the gold for export production under the relevant exemption notification after submission of the documents stated above and shall make necessary entries in the Register in the form prescribed in Annexure-I. This register shall be maintained by the customs officer separately for each of the nominated agency importing gold under his/her jurisdiction;
  - xiii. the Nominated Agencies shall also maintain an account of the goods released to the exporters (exporter-wise) on day-to-day basis. This account shall be liable for inspection by any Customs authority as the account of a bonded warehouse;
  - xiv. proof of export by the exporter shall be furnished in accordance with para 4A.8(a) of HBP V.1, to the nominated agencies as a proof of having exported the jewellery made from the duty free gold released to them within the period prescribed in the Foreign Trade Policy. The Nominated Agency shall furnish a self-certified



- copy of the same to the customs officer where the gold was bonded;
- xv. wherever such proof of export is not produced within the period prescribed in the Foreign Trade Policy, the Nominated Agency shall (without waiting for its recovery from the exporter) deposit the amount of duty calculated at the effective rate leviable on the quantity of precious metal not exported within 7 days of expiry of the period within which the jewellery manufactured out of the said quantity of gold was supposed to be exported. The Nominated Agencies will settle their claim with the exporter at their own level. The Nominated Agencies shall also report the cases of failure to export the jewellery made out of gold released to the exporter, to the Commissioner of Customs in whose jurisdiction the gold was originally warehoused;
- xvi. the customs officer shall ensure that all clearances of gold from the customs bonded warehouse are in accordance with the RBI circular, especially that the quantity of gold imported by the Nominated Agency, in the third consignment onwards from the date of notification of the RBI Circular dated 14-8-2013, as revised, does not exceed five times the quantity of gold contained in the exported products for which proof of export and realization of payments related thereto, has been submitted to the customs officer;
- xvii. the reconciliation of exports and calculation of quantities for subsequent imports shall be done nominated agency-wise and port-wise by the jurisdictional customs officer.

5. For the import of gold dore bars, the following procedure is prescribed:

- i. import of gold dore bars shall be permitted only against a license issued by the DGFT;
- ii. the entity to whom the license has been issued by DGFT, hereinafter referred to as the license-holder, shall be permitted to import gold dore bars subject to the conditions laid down in notification 12/2012-Cus., dated 17-3-2012 as amended;



- iii. the customs officer at the port from where gold dore bars are imported shall ensure that the quantity of gold imported by the license-holder, in the third consignment onwards from the date of notification of the RBI Circular dated 14-8-2013 as revised, does not exceed five times the quantity of gold contained in the exported products for which proof of export in accordance with Para 4A.8 (a) of HBP Volume 1 has been submitted to the customs officer;
- iv. the customs officer at the port from where gold dore bars are imported shall maintain a license-holder-wise record of the gold imported as per Register prescribed in Annexure-II. He/she shall also maintain a record of proof of export of the goods manufactured out of gold supplied by the license-holder to exporters from the refined gold. The proof of export, duly certified by the central excise officer in whose jurisdiction the refinery is registered, shall be submitted to the customs officer by the license holder.
- v. the license holder shall ensure that at least 20% of the gold manufactured out of each consignment of gold dore bars is supplied to the exporters and the remaining is supplied for domestic use in accordance with the RBI circular dated 14-8-2013, as revised;
- vi. entities/units in the SEZ and EOUS, Premier and Star Trading Houses shall be permitted to procure gold from the refinery of the license holder exclusively for the purpose of exports only and these entities shall not be permitted to clear such gold for any purpose other than for exports (irrespective of whether they are nominated agencies or not). Further, gold made available by such refineries to units in the SEZ and EoUs, Premier and Star trading houses shall not qualify as supply of gold to the exporters, for the purpose of the 20/80 Scheme;
- vii. the central excise officer, in whose jurisdiction the refinery is registered, shall monitor that at least 20% quantity of refined gold shall be for the supply to the exporters only and remaining can be cleared in accordance with the RBI circular dated 14-8-2013, as revised;
- viii. for each consignment of gold dore bars imported, the license holder shall submit a report on utilization of gold dore bars, gold produced after refining, gold issued to



exporters and the proof of export for the goods manufactured and exported by these exporters to the central excise officer under whose jurisdiction the refinery of the license holder is registered. A copy of the same, duly authenticated by the central excise officer, shall be submitted to the customs officer under whose jurisdiction the consignment was initially imported.

6. This Circular shall be deemed to be modified as and when, and in the manner RBI issues any circular to amend the policy related to import of gold as contained in their circular dated 14-8-2013 as revised.”

131. In order to lay in place a comprehensive review of the circulars and notifications issued on the subject, we may, before parting on this subject, profitably refer to the notification of the Ministry of Commerce dated 30 November 2018 which reads thus:-

**“Subject: Amendment of import policy of items under HS code 7108 12 00 under ITC (HS), 2017, Schedule - I (Import Policy).**

**S.O. (E):** In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends import policy of items under HS code 7108 12 00 under ITC (HS), 2017 Schedule - I (Import Policy).

Exim Code	Item Description	Policy	Policy Conditions	Revised Policy Conditions
7108 12 00	Other unwrought forms	Free	Subject to RBI Regulations.	Subject to RBI Regulations. <b>However, import</b>



				<b>policy of Gold Dore is “Restricted”</b>
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132. The aforesaid notification was followed by a notification issued by that Ministry dated 18 December 2019. The relevant parts of that notification are reproduced below:-

**“Subject: Amendment in import policy conditions of gold and silver under Chapter 71 of ITC (HS), 2017, Schedule -I (Import Policy).**

**S.O. (E):** In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends the import policy with conditions of gold in any form, other than monetary gold and silver in any form under Chapter 71 of ITC(HS), 2017, Schedule -I (Import Policy).

Exim Code	Item Description	Present Policy	Revised Policy	Existing Policy Condition	Revised Policy Condition
71081100	Powder	Free	Restricted	Subject to RBI Regulations	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).
71081200	Other unwrought	Free	Restricted	Subject to RBI Regulations.	Import is allowed only



	forms			However, import policy of Gold Dore is "Restricted".	through nominated agencies as notified by RBI (in case of banks) and DGFT (for other import agencies).  Gold Dore can be imported by refineries against a licence with AU condition
71081300	Other semi-manufactured forms	Free	Restricted	Subject to RBI Regulations	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).

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**Effect of the Notification:** Import policy of gold in any form, other than monetary gold and silver in any form, is amended from 'Free' to 'Restricted'; import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies). **However, Import under Advance Authorisation and supply of gold directly by the foreign buyers to exporters under para 4.45 of FTP against export orders are exempted.**



This issues with the approval of Minister of Commerce & Industry.”

133. The last notification which merits consideration is one dated 05 January 2022 which too regulates the import of gold in purported exercise of powers conferred by Sections 3 and 5 of the FTDR. The relevant parts of that notification are extracted hereunder:-

**“Subject: Amendment in import policy conditions of gold under Chapter 71 of Schedule - I (Import Policy) of ITC (HS), 2017**

**S.O. (E):** In exercise of powers conferred by Section 3 read with Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby amends the import policy conditions for gold in any form, other than monetary gold and silver in any form under Chapter 71 of ITC (HS), 2017, Schedule- I (Import Policy) as under:

ITC (HS) Code	Item Description	Policy	Existing Policy Condition	Revised Policy Condition
71081100	Powder	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies)	No change in existing Policy Condition
71081200	Other unwrought forms	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).  Gold dore can be imported by refineries	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies) and IFSCA (for qualified jewelers through



			against a license with AU conditions.	India International Bullion Exchange).  Gold dore can be imported by refineries against a license with AU conditions.
71081300	Other semi-manufactured forms	Restricted	Import is allowed only through nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies).	No change in existing Policy Condition.”

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**Effect of the Notification:** In addition to nominated agencies as notified by RBI (in case of banks) and nominated agencies notified by DGFT, qualified jewellers as notified by International Financial Services Centres Authority (IFSCA) will be permitted to import gold under specific ITC(HS) Codes through India International Bullion Exchange IFSC Ltd. (IIBX). However, Import of gold/silver under Advance Authorisation and supply of gold/silver directly by foreign buyers to exporters under para 4.45 of FTP against export orders would continue to be governed by the relevant FTP provisions.

This issues with the approval of Minister of Commerce & Industry.”

134. Having noticed the contentions broadly advanced as well as the Notifications and Circulars issued by the CBEC, Customs and RBI, it would be appropriate to now advert to the relevant statutory provisions. Section 2(33) of the Act defines “*prohibited goods*” to mean 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. It however significantly proceeds to exclude goods which have come to be imported or exported in compliance with the conditions which apply. The exclusion of imported or exported articles and transactions which have been completed subject to due compliance with the conditions prescribed are clearly excluded from the ambit of prohibited goods by virtue of the usage of the phrase “*but does not include....*”. The expression “*prohibited goods*” as used in Section 2(33) and the concept of “*prohibition*” must therefore and necessarily draw colour and meaning from the specific exclusion of goods which have come to be imported or exported upon due compliance with the conditions prescribed. If compliance with conditions for import or export were irrelevant and the expression ‘*prohibition*’ were to be understood in absolute terms, there clearly does not appear to be any justification for the definition clause to also deal with those goods which enter the territory of India after complying with the various conditions for import that may have been prescribed. In our considered opinion, this is the first aspect which appears to indicate that the word “*prohibition*” is intended to also extend to a restriction or regulation under the Act.

135. When one travels further to Section 11 of the Act, the aforesaid intent becomes further evident. Section 11 comprises the power to prohibit importation or exportation of goods. The provision empowers the Union Government to prohibit the import or export of



goods of any specified description “*either absolutely or subject to such conditions (to be fulfilled before or after clearance).....*”. The language of the provision thus clearly indicates that a prohibition in respect of import may be either absolute or be subject to the fulfilment of such conditions as may be prescribed.

136. We also take note of the significance of Section 111 of the Act which deals with the confiscation of improperly imported goods. While dealing with the circumstances in which the imported goods may become liable for confiscation, the provision firstly speaks of dutiable or prohibited goods. Section 111, apart from speaking of dutiable or prohibited goods also brings within its net goods which have come to be imported either in violation of conditions prescribed or goods which have been concealed as well as imported articles which may have otherwise not complied with the conditions prescribed under the Act.

137. What thus clearly appears to flow from Section 111 is of the power of confiscation being extendable not just in the case of dutiable or prohibited goods but also to goods whose import may have been effected in violation of the conditions prescribed by the Act. This is clearly evident from a reading of Clauses (e), (f), (g), (h), (i), (j), (m), (n), (o) and (p) of Section 111.

138. Section 3 of the FTDR empowers the Union Government to publish an order encapsulating provisions for the development and regulation of foreign trade. In terms of Section 3(2), the Union



Government is further conferred with the authority to prohibit, restrict or otherwise regulate the import or export of goods or services by way of an order duly published in the Official Gazette. Here too the statute uses the expression “*restricting or otherwise regulating*” alongside the power to prohibit. Section 3(3) then proceeds to stipulate that any order made under sub-section (2) would by way of a deeming fiction operate as a prohibition under Section 11 of the Act. This is evident from the plain and unambiguous language of sub-section (3) which prescribes that goods which are covered under an order promulgated under Section 3(2) “*shall be deemed*” to be goods, the import or export of which, has been prohibited under Section 11.

139. It would be pertinent to recall at this stage that Section 3(2) empowers the Union Government to either prohibit, restrict or otherwise regulate the import or export of goods. An order promulgated under Section 3(2) may thus either absolutely prohibit the import or export of goods or regulate or restrict their entry into the territory of India. However what Section 3(3) does is place even those goods, the import or export of which may be restricted or regulated under an order issued under sub-section (2) thereof, to be placed in the category of prohibited goods as contemplated under Section 11 of the Act. This too would appear to lend credence to the word “prohibition” as used in Section 2(33) of the Act extending even to goods, the import or export of which, is restricted or regulated. In any case the concept of prohibited goods must necessarily be understood and



interpreted on a conjoint reading of Sections 2(33) and 11 of the Act along with Section 3 of the FTDR.

140. The learned amicus had commended for our consideration sub-section (4) of section 3 of FTDR and which according to him has significantly altered the landscape against which the expression “prohibited goods” is liable to be understood. According to Mr. Gulati, Section 3(4) which came to be introduced in terms of Act 25 of 2010 clearly confers an overriding effect upon the provisions of the FTDR and any orders that may be issued thereunder. It was his submission that Section 3(4) encapsulates the clear intent of the Legislature to mandate that no import or export of goods shall be prohibited except in terms of the provisions of the FTDR or the rules and orders made thereunder. It was emphasised that the overarching effect of sub-section (4) which is clearly evident from the Legislature having employed the phrase “*without prejudice to anything contained in any other law*” must be given its full effect. It was the submission of the learned amicus that the principles enunciated in *Sheikh Md. Omar* and *Om Prakash Bhatia* must be understood and appreciated bearing in mind the indubitable fact that they came to be rendered prior to the introduction of sub-section (4) in Section 3 of the FTDR. According to the learned amicus, the various decisions and precedents which have proceeded to adopt the line of reasoning which weighed upon the Supreme Court while deciding *Sheikh Md. Omar* and *Om Prakash Bhatia* have clearly failed to notice or appreciate the impact



of Section 3(4).

141. We however find ourselves unable to countenance the said submission since it fails to take into consideration the prescriptions in relation to gold as embodied in the FTP as well as the ITC(HS). Undisputedly, both the FTP as well as the ITC(HS) while declaring that the import of gold would be free parallelly also stipulate that it would be subject to RBI regulation. Undoubtedly, both the FTP as well as the ITC(HS) owe their genesis to the provisions of the FTDR and the Act. The FTP is formulated and announced in terms of the specific power conferred upon the Union Government by Section 5 of the FTDR. It thus ceases to remain a mere announcement of an executive policy and in fact transcends to become a statutory statement traceable to Section 5.

142. The FTP thus stands imbued with a statutory flavour and would clearly fall within the meaning of a measure formulated under the FTDR and all stipulations contained therein being liable to be recognised as requirements placed under the said enactment and thus referable to Section 3(4). The concept of prohibition spoken of in Section 3(4) of the FTDR would thus have to be understood and interpreted on a conjunctive reading of Section 2(33) read with Section 11 of the Act together with Section 3(2) of the FTDR as explained hereinabove. We thus find ourselves unable to either interpret or countenance the impact of Section 3(4) of the FTDR as travelling beyond or overriding the concept of prohibition as



explained and interpreted by us in the preceding parts of this decision.

143. We further find that sub-section (4) of Section 3 also uses the expression “*prohibited*”. Forming part of the larger umbrella of the policy making power as well as the authority to regulate foreign trade and which is the subject of Section 3 itself, the word as appearing therein cannot possibly be read or interpreted in a manner distinct or different from what we have noted hereinabove.

144. For the purposes of reiteration, we step back to Section 3(2) and the power of the Union Government to prohibit, restrict, or regulate the import or export of goods and the said order resulting in the goods covered therein being placed by way of a statutory fiction in the category of prohibited goods under Section 11 of the Act. In our considered opinion, *Sheikh Md. Omar* has clearly enunciated the meaning to be assigned to “prohibited goods” and as defined by Section 2(33). The enunciation of the legal position as appearing in *Sheikh Md. Omar* cannot be said to have been diluted in any manner by the introduction of sub-section (4) of Section 3 of the FTDR. In any view of the matter, the dictum laid down in *Sheikh Md. Omar* or *Om Prakash Bhatia* cannot be said to have fallen under a cloud of doubt by the mere introduction of sub-section (4) in Section 3 of the FTDR.

145. In summation, we note that Section 2(33) of the Act while defining prohibited goods firstly brings within its dragnet all goods in respect of which a prohibitory notification or order may have been



issued. That order could be one promulgated either under Section 11 of the Act, Section 3(2) of the FTDR or any other law for the time being in force. However, a reading of the latter part of Section 2(33) clearly leads us to conclude that goods which have been imported in violation of a condition for import would also fall within its ambit. If Section 2(33) were envisaged to extend only to goods the import of which were explicitly proscribed alone, there would have been no occasion for the authors of the statute to have spoken of goods imported in compliance with import conditions falling outside the scope of “prohibited goods”.

146. Our conclusion is further fortified when we move on to Section 11 and which while principally dealing with the power to prohibit again speaks of an absolute prohibition or import being subject to conditions that may be prescribed. It is thus manifest that a prohibition could be either in absolutist terms or subject to a regime of restriction or regulation. It is this theme which stands reiterated in Section 3(2) of the FTDR which again speaks of a power to prohibit, restrict or regulate. It becomes pertinent to bear in mind that in terms of the said provision, all orders whether prohibiting, restricting or regulating are deemed, by way of a legal fiction, to fall within the ambit of Section 11 of the Act. This in fact reaffirms our conclusion that Section 2(33) would not only cover situations where an import may be prohibited but also those where the import of goods is either restricted or regulated. A fortiori and in terms of the plain language and intent of



Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of “prohibited goods”.

147. We are further of the considered opinion that the absence of a notification issued under Section 11 of the Act or Section 3(2) of the FTDR would have no material bearing since a restriction on import of gold stands constructed in terms of the FTP and the specific prescriptions forming part of the ITC (HS). Those restrictions which are clearly referable to Section 5 of the FTDR and the relevant provisions of that enactment would clearly be a restriction imposed under a law for the time being in force. Once the concept of prohibited goods is understood to extend to a restrictive or regulatory measure of control, there would exist no justification to discern or discover an embargo erected either in terms of Section 11 of the Act or Section 3(2) of the FTDR. This more so since, for reasons aforementioned, we have already found that the power to prohibit as embodied in those two provisions itself envisages a notification or order which may stop short of a complete proscription and merely introduce a restriction or condition for import.

148. A concluding note then on the various precedents which were cited for our consideration. We note that in *Becker Gray*, the Supreme Court had found that Section 12 of the Sea Customs Act did not extend to an undervaluation of goods. It must however be borne in mind that Section 111 of the Act clearly contemplates undervaluation



of goods resulting in that transaction falling in the category of improper import and thus liable for confiscation. In *Sheikh Mohd. Umer*, the Supreme Court has clearly expounded upon the correct meaning to be assigned to the expression “prohibited goods”. We find ourselves unconvinced to doubt the correctness of the view so expressed even when tested against the statutory regime which currently prevails. The decision of the Tribunal in *Prayag Exporters* as well as *Atul Automations* of the Supreme Court fail to either notice or consider the judgment in *Sheikh Mohd. Umer*. Though *Atul Automations* is a judgment rendered by a Bench of a larger coram, the same has been duly noticed in *Raj Grow Impex* which had reaffirmed the view expressed in *Sheikh Mohd. Umer*. The discordant line which came to be drawn in the decision of the Supreme Court in *Prayag Exporters* was ultimately explained away in *Suresh Jhunjunwala*.

149. Turning then to the decisions rendered by some of the other High Courts, we find ourselves unable to countenance the line of reasoning as adopted by the Madras High Court in *City Office Equipment* when it held that if prohibited goods are imported in compliance with applicable conditions, they become “non-prohibited” goods. The view expressed in that decision to the effect that the Act contemplates a regime where either an absolute embargo operates and in the absence of such a stipulation, the goods are to be viewed as “non-prohibited”, in our considered opinion, fails to bear in mind the nuanced meaning which Section 2(33) and the other statutory



provisions noticed by us merits being accorded to the expression “prohibited goods”. The decision of the Madras High Court must, in any case, be viewed in light of the previous decision of the same High Court in *Samynathan Murugesan* and *Malabar Diamond Gallery*. We find that the decisions of the Gujarat High Court in *Bhargavraj Rameshkumar Mehta* and *Abdul Hussain Saifuddin Hamid* as well as the decision of the Madras High Court in *Mohd. Haroon* have correctly enunciated the legal position in respect of the question that was raised in these batch of petitions.

150. That takes us to consider the submission of learned amicus who had doubted the power of the RBI to restrict or regulate the import of gold. As was noticed by us hereinabove, the learned amicus had contended that RBI is really not concerned with the subject of import or export of goods. It was his submission that RBI is principally concerned with the framing of monetary policy and it cannot be recognised to have been conferred with any statutory authority or jurisdiction to regulate the import or export of goods. It was in the aforesaid backdrop that the learned amicus had sought to draw support from the decision of the Karnataka High Court in *Sri Exports*.

151. We deem it apposite to note that *Sri Exports* essentially turned upon the fact that gold medallions had been imported prior to a restriction coming to be imposed by the Union Government. Admittedly, the gold granules too had been imported prior to a notification being issued by the DGFT apprising all that in terms of



the amended import policy, gold could be imported only through nominated agencies as notified by the RBI. *Sri Exports* essentially rested upon the aforesaid circumstance. In any case that decision cannot be read as a precedent ruling against the authority or the power of the RBI to formulate a regulatory measure with respect to import of gold for reasons which follow.

152. *Sri Exports* had also noticed the response submitted by the Central Office of **State Bank of India**<sup>100</sup> while responding to a query raised by the Principal Commissioner of Customs. The question which was raised and placed for the consideration of SBI's, Central Office was whether RBI could regulate the import/export of goods "in general". While responding to that query, the Central Office of SBI is stated to have observed that the regulation of import or export of any item would fall within the domain of the Ministry of Commerce/DGFT and additionally, governed by the Export Import Policy/Foreign Trade Policy.

153. In our considered opinion, the response of the SBI can by no stretch of imagination be construed as diluting the rigour of a regulatory measure operated by RBI in relation to the import of gold. Quite apart from the fact that the response was not of the RBI itself, we find that SBI correctly responded to the query which stood posed by asserting that the regulation of imports or exports is principally a

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<sup>100</sup> SBI



subject which falls within the remit of the Ministry of Commerce/DGFT. It had further while replying to the query stated that the regulation of imports/exports would be governed by the EXIM Policy and the FTP as prevalent at the relevant time.

154. The submission addressed by the learned amicus does not commend acceptance when one bears in mind the admitted position that the stipulation with respect to the import of gold being subject to RBI regulatory control is a prescription which stands incorporated in and introduced by the FTP itself. It is the FTP formulated in terms of Section 5 of the FTDR which makes the import of gold subject to RBI regulation. This stipulation thus clearly evidences the intent of the Union Government to confer RBI with the authority to formulate regulatory provisions in relation to the import of gold. Since this power stands bestowed upon the RBI by the Union Government and forms an integral part of the FTP itself, one need not look for or undertake an expedition to discern a power independently vested in the RBI to issue appropriate directives and circulars regulating the import of gold.

155. While closing, we deem it appropriate to place our note of appreciation for Mr. Tarun Gulati, learned senior counsel and the amicus curiae who was ably assisted by Mr. Kishore Kunal and Mr. Kumar Sambhav, learned counsels of this Court. They have rendered stellar assistance enabling us to deal with the complex questions of law which stood posited and aided us in navigating through the



divergent views which had been expressed on the subject. We express our gratitude to learned counsels for having taken out their valuable time to assist the Court.

**OPERATIVE DIRECTIONS**

156. The Court holds that an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the discretionary power of the Adjudging Officer. For reasons aforesaid, the Court finds no illegality in the individual orders passed by the Adjudging Officer and which were impugned in these writ petitions.

157. Accordingly, and for all the aforesaid reasons, the Court finds no merit in the challenge raised to the impugned orders in the present batch of writ petitions. They shall, consequently, stand dismissed.

**YASHWANT VARMA, J.**

**DHARMESH SHARMA, J.**

**AUGUST 21, 2023**

*Su/bh*