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Date: 06.05.2025

CESTAT Allahabad set aside the confiscation of gold, silver, and cash

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Allahabad Bench has allowed appeals filed by Appellants, overturning the Order-in-Original dated April 11, 2022. The case revolved around the alleged smuggling of 3499.750 grams of gold, silver recovery, and Rs. 16.5 lakhs in cash, with charges leveled under multiple sections of the Customs Act, 1962, including Sections 111, 112, 121, and 123.

Case Background

- The Directorate of Revenue Intelligence (DRI), Lucknow Zonal Unit, seized the gold on February 13, 2021 based on intelligence inputs.
- Subsequent search of the Mitruka brothers' premises led to seizure of 7770.410 gm of silver and Rs. 16.5 lakh in cash.
- Show Cause Notices were issued alleging a conspiracy to smuggle gold into India via Myanmar through Guwahati and Bihar.

Tribunal's Key Findings

1. Violation of Natural Justice:

- No opportunity was granted to cross-examine Shri Abhishek Kumar and Shri Ritesh Kumar, whose retracted statements formed the basis of the charges.
- Investigation reports relied upon by the DRI were not supplied to the appellants.

2. No Foreign Markings on Seized Gold:

- The gold lacked foreign inscriptions, and the purity levels (98.52% and 96.73%) did not conclusively establish foreign origin.
- The seizure occurred outside the notified customs area, weakening the Department's claim of a "reasonable belief" required under Section 110.

3. Failure to Establish Reasonable Belief:

- The Tribunal emphasized that under Section 123, the burden shifts to the accused only if the seizure is based on a valid reasonable belief.
- In this case, the belief was based merely on assumptions and unsupported statements.

4. Licit Documentation Provided:

- Appellants furnished GST-compliant invoices and banking records showing legal purchase of gold.
- The Tribunal found merit in the appellants' claim that the gold was of Indian origin and not smuggled.

5. Reliance on Invalidated Evidence:

- The DRI failed to produce concrete evidence beyond the retracted statements.
- The denial of cross-examination and undisclosed investigation reports severely prejudiced the appellants.

6. Inapplicability of Section 123:

- The Tribunal held that in the absence of reasonable belief, Section 123 could not be invoked, thus shifting the burden of proof back to Customs.

7. Quoting Supreme Court & High Court Rulings:

- The order cited key judgments including *Surinder Kumar Khanna (SC)*, *Shantilal Mehta (Del HC)*, and *Imtiaz Iqbal Pothiawala (Bom HC)* to highlight evidentiary and procedural lapses.

Final Order

- The confiscation of gold, silver, and cash was set aside.
- Penalties under Section 112(b) imposed on the Mitruka brothers were quashed.
- Both appeals were allowed in full.

Legal Implications

This verdict reinforces:

- The primacy of natural justice in customs adjudication.
- That retracted statements alone without corroboration cannot justify confiscation.
- The non-applicability of Section 123 without foundational proof under Section 110.
- The need for concrete, not presumptive, evidence to establish smuggling.

Source: CESTAT Allahabad

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Write to us at office@aadrikaalaw.com

Tel: +91-11-4999 2707 | +91-9999005379

www.aadrikaalaw.com

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70305 of 2022

[Arising out of Order-in-Original No.09/Commissioner/LKO/2021-22 dated 11.04.2022 passed by Commissioner, Customs (Prev.), Lucknow]

Girish Mitruka

.....Appellant

Son of Shri Ashok Kumar, Flat No.104,
Vrindavan Apartment, Agra Chowk,
Katihar, Bihar-854105

VERSUS

Commissioner, Customs (Preventive),

Lucknow

....Respondent

5th Floor, Kendriya Bhawan, Sector-H,
Aliganj, Lucknow

AND

Customs Appeal No.70306 of 2022

[Arising out of Order-in-Original No.09/Commissioner/LKO/2021-22 dated 11.04.2022 passed by Commissioner, Customs (Prev.), Lucknow]

Harish Mitruka

.....Appellant

Chuna Gali, Binodpur, Katihar,
Bihar-854105

VERSUS

Commissioner, Customs (Preventive),

Lucknow

....Respondent

5th Floor, Kendriya Bhawan, Sector-H,
Aliganj, Lucknow

APPEARANCE:

Shri Anuj Agarwal, Advocate for the Appellants
Shri Santosh Kumar, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

FINAL ORDER NO.- 70251-70252/2025

DATE OF HEARING : 19.02.2025
DATE OF DECISION : 05.05.2025

P. ANJANI KUMAR:

Brief facts of the case are that the officers of Directorate of Revenue Intelligence, Lucknow Zonal Unit, on the basis of a specific intelligence, seized 3499.750 grams of foreign origin gold, valued at Rs.1,73,93,757/- on 13.02.2021, from the possession of Shri Abhishek Kumar & Shri Ritesh Kumar; Shri Abhishek Kumar and Shri Ritesh Kumar, in their statements dated 13.02.2021 stated that Shri Girish Mitruka & Shri Harish Mitruka were the suppliers of said seized foreign origin gold; Shri Girish Mitruka & Shri Harish Mitruka, though issued summons dated 25.02.2021, 26.03.2021 and 05.04.2021, did not appear before investigation; Show Cause Notice dated 12.04.2021 was issued proposing to confiscate the seized Gold under the provisions of Customs, Act, 1962; subsequently, search of residential premises of Girish Mitruka and Harish Mitruka, conducted on 06.07.2021, resulted in recovery of 7770.410 gm of silver valued at Rs. 3,20,738/- and cash amounting Rs. 16,50,000; in absence of any licit document about recovery of goods as mentioned, the same were seized under relevant provisions of Customs Act, 1962 and a supplementary show cause notice dated 22.11.2021 was issued. It was alleged that smuggling of foreign origin gold into India from Myanmar was planned and executed by way of conspiracy by S/Sh. (i) Girish Mitruka (ii) Harish Mitruka (iii) Abhishek Kumar and (iv) Ritesh Kumar; Girish Mitruka & Harish Mitruka made arrangements for procuring foreign origin gold from Myanmar; as per instruction of Shri Girish Mitruka & Shri Harish Mitruka, Shri Abhishek Kumar and Shri Ritesh Kumar went to Guwahati, Assam, on 29.01.2021 & 02.02.2021 respectively; they took delivery of foreign origin gold and

handed over the same to Shri Girish Mitruka & Shri Harish Mitruka in Katihar; Shri Harish Mitruka & Shri Girish Mitruka got the said gold melted to remove foreign marks on them; Shri Harish Mitruka provided 04 gold pieces each weighing 1532.400 gm and 1967.350 gm, respectively, concealed in specifically built cloth belts to both Shri Abhishek Kumar and Shri Ritesh Kumar, on 09.02.2021, at the shop M/s Govind Synthetics.

2. Show Cause Notices dated 12.04.2021 and 22.11.2021 were issued proposing to confiscate, 3499.750 grams gold, of foreign origin, valued at Rs.1,73,93,757, recovered from the possession of Shri Abhishek Kumar & Shri Ritesh Kumar on 13.02.2021 and 7770.410 gm of silver, of foreign origin, valued at Rs 3,20,738 1944, recovered from the residence of Shri Girish Mitruka & Shri Harish Mitruka on 06.07.2021 under Section 111(b), (h), (i) of Customs Act, 1962; proposing to confiscate cash of Rs 16,50,000 recovered at the residence of Shri Girish Mitruka & Shri Harish Mitruka on 06.07.2021 under Section 121 of Customs Act, 1962 and proposing to impose penalty, on all the four persons involved, under Section 112 of Customs Act, 1962. Commissioner of Customs (preventive), Lucknow vide order-in original, dated 11.4.2022, confiscated the goods and as proposed imposed penalty of Rs 5,00,000 each on Shri Abhishek Kumar & Shri Ritesh Kumar; penalty of Rs 20,00,000 on Shri Girish Mitruka and a penalty of Rs 10,00,000 on Shri Harish Mitruka under Section 112(b) of the Customs, Act 1962. Shri Girish Mitruka & Shri Harish Mitruka filed the instant appeals against the impugned order.

3. Shri Anuj Agarwal, Learned Counsel for the appellants reiterates the grounds of appeal and submits written submissions on behalf of appellants. Gist of the averments of which are as follows.

- Girish Mitruka and Harish Mitruka are real brothers and Harish Mitruka is the proprietor of his firm M/s Mitruka Traders, which is involved in the trading of Indian origin gold; Girish Mitruka is not concerned with the said business of trading of gold; Abhishek and Ritesh were the employees of the firm Mitruka Traders (Harish Mitruka) and they were not the employees of Girish Mitruka.
- Mitruka Traders purchased gold bars on 2.2.21, 6.2.21 and 9.2.21 weighing 250 gm, 2160 gm and 1099.100 gm (totalling 3509.1 gm) from M/s Narayan Alankar Mandir, Azamgarh, M/s Ashok Kumar Ashish Kumar Gold Pvt Ltd., Azamgarh and M/s Maruti Ornaments, Azamgarh, against tax invoices on which IGST@3% has been duly charged from the firm.
- on 13.2.21 DRI, Zonal Unit, Lucknow, has intercepted and seized 3499.750 gm of gold from both the employees Abhishek and Ritesh on Lucknow-Ayodhya Highway, while they were under transit for delivering the gold to the purchaser; Harish Mitruka has filed his written reply 30.03.21 before the DRI Patna, stating the same.
- the statement of both the employees Ritesh and Abhishek has been recorded by the DRI officials under coercion; both the employees Abhishek Kumar and Ritesh Kumar retraction of their statements dated 13.02.21, on 18.02.21 at the first opportunity, before the special CJM (Customs), Lucknow; they have also submitted in their replies dated 25.05.21, to the Show Cause Notice that they were the employees of Harish Mitruka and have requested for the release of gold; statements recorded under coercion having been retracted immediately, cannot be used or relied upon against the assessee
 - In his statement dated 06.07.21, Shri Girish Mitruka stated that the silver seized from the house is the old family property which has been melted the profit and partitioned amongst the family members. It has

been further stated that the cash seized of Rs. 16,50,000/- belonged to various family members out of which 5 family members regularly file their income tax returns and other 4 members have accumulated the cash from their savings; Girish Mitruka filed applications dated 22.12.21 and 24.01.22 requesting release of silver and cash seized from house; different family members filed affidavits claiming their share of cash seized;

- proof of payment of GST GSTR-2A return have also been filed stating that the gold is of Indian origin and there is no violation of any of the provisions of the Customs Act; all the three sellers who have sold the gold to the firm Mitruka Traders have duly filed their returns under the GST Act; which has not been dealt with/considered by the respondent.

- authority has erred in passing the impugned order by relying upon the call details; without alleging as to what discussion has taken place between Girish Mitruka and the employees of Harish Mitruka i.e. Ritesh Kumar and Abhishek Kumar; no adverse inference cannot be drawn by the fact that tickets were booked from the account of Shri Girish Mithruka;

- Section 2(39) and Section 7(1), 11, 12, 33, 34, 46, 47 and 123 of the Customs Act are not applicable in the present case since the gold seized is of Indian origin and not of foreign origin; there is no violation of Section 11A to F of the Act read with Notification No. 09/96 (Customs) dated 22.01.96 of the Notified goods (Prevention of illegal import) Rules 1961; since the seized gold has not been smuggled, hence it could not be confiscated.

- Adjudication authority relies on a letter from DRI Lucknow dated 04.03.22, the copy of which has not been provided to the appellant; the appellant became aware of such letter only upon receipt of the impugned

order dated 11.04.22; it is said in the impugned order that the statements of shop owners have been recorded in which they have stated that the said invoices were back dated and no physical gold was supplied against the said invoices; no copies of such statements or investigation report were supplied thus, the impugned order has been passed in violation of principles of natural justice as it relied on the documents which have not been provided but used against the appellant;

- purchaser has no role to play in the GSTR-1 return filed by the seller and the entry in the GSTR-2A return of the purchaser is automatic and auto-populated with the GSTR-1 return of the seller; the invoices issued by the sellers, when duly reflected in the GSTR-2A return, cannot be said by any stretch of imagination to be fake and manipulated; it is evident that the seller cannot deny the issuance of the invoices; it appears that the statement of the sellers have been recorded under coercion behind the back of the appellant; no opportunity of cross-examination of the sellers was given to the appellant, which is clear violation of principles of natural justice;

- Learned Commissioner, in the impugned order, has failed to categorically conclude that the present case falls within the exceptions provided under Section 138B and therefore the impugned order is liable to be set aside on this very ground itself; Section 122A of the Customs Act, 1962 makes the principles of natural Justice applicable to an adjudication proceeding undertaken under the Act of 1962

4. The appellants relied on the cases in the grounds of appeal and submit as follows:

(i). K.I. PAVUNNY versus Assistant Collector, reported in 1997 (90) ELT 241 (SC) to submit that if a statement is retracted, it must first be tested

whether confession is voluntary and truthful inculcating the accused in the commission of the crime.

(ii). *New India Assurance Company Ltd Vs Nusli Neville Wadia* 2008 3 SCC 279 to submit that the application of principle of natural justice means that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used.

(iii) *Basudev Garg* 2013(294) ELT (Delhi) to submit that the circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. This case has been followed in *Alliance Alloys Pvt Ltd* 2016 (338) ELT 749 (Tri. - Chan.)

(iv). *Lakshman Das* 2019 (365) ELT 72 (Cal.) to submit that in an adjudication proceeding, which is adversarial in nature, party adducing evidence through a natural person is required to allow cross-examination of such natural person, to the other side.

(v). *Parmarth Iron Pvt Ltd* 2010 (260) E.L.T. 514 (All.) to submit that if the statements of witnesses are relied on, then persons whose statements relied upon have to be made available for cross-examination for evidence to be considered.

(vi). Andaman Timber Industries 2015 (324) ELT 641 (SC) to submit that denial of right of cross- examination of a witness before the adjudicating authority renders the order in original a nullity.

(vii). Sampad Narayan Mukherjee Judgment dated 1.2.2019 by Hon'ble Calcutta High Court to submit that the adjudicating authority, the appellate authority and any other authority under the Act of 1962, is required to adjudicate upon any proceeding, is obliged to adhere to the principles of the Evidence Act, 1872 while deciding on any subject.

(viii). Ciabro Alemão 2018 (362) ELT 465 (Bom.) to submit that in the absence of cross examination, reliance on the statement of witnesses on the ground that all reasonable efforts were made to ensure their presence is not sustainable.

5. Shri Santosh Kumar, Learned authorised representative for the Revenue, reiterates the findings and the impugned order and submits as follows:

- Shri Abhishek Kumar and Shri Ritesh Kumar failed to provide any licit documents in respect of gold recovered from them at the time of interception, on 13.02.2021; burden of proof under section 123 of Customs Act, 1962 has not been discharged; both the persons intercepted by the DRI, in their statements admitted that gold was of smuggled through Myanmar into India via Guwahati to Katihar (Bihar) and then delivered to different places; statements of both the persons, are corroborative to each other and with the other factual circumstances; appellants had never been able to produce any valid documents in support of their claim of the seized gold and silver; the gold is a notified item under Section 123 of the Act; therefore, in absence of any valid documents, the recovered gold will be considered as foreign origin gold and thus the absolute confiscation is legal and proper.; he relies on

Rajendra Kumar Damani @ Raju Damani 2024 (389) E.L.T. 444 (Cal.)
and Anurag Jalan 2022 (382) E.L.T. 532 (Tri. - Kolkata);

- Shri Girish Mitruka and Shri Harish Mitruka gave contradictory versions in their statements, bail applications, letters received in the DRI office and the reply to Show Cause Notice; Shri Girish Mitruka and Shri Harish Mitruka have collectively devised and executed smuggling activity with the help of Shri Abhishek Kumar and Shri Ritesh Kumar and smuggled the gold through Myanmar and diverted to the other places through land route;
- analysis of Call Data Records, done by the DRI, shows that all the alleged persons were in regular touch with each other during the material period of time, before the seizure and after the seizure; that just few days before the interception both the persons Shri Abhishek Kumar and Shri Ritesh Kumar were in the Guwahati, Assam, corroborating that the gold was smuggled through Myanmar into India via Guwahati to Katihar (Bihar) and then delivered to different places ;one person named Shri Ravikant Parihar, worker of Shri Girish Mitruka and Shri Harish Mitruka, was in regular touch with all the accused;
- email dated 26.07.2021 received from Hotel Parikshit Palace, Mahipalpur, New Delhi confirmed the check in of Shri Abhishek Kumar and Shri Ritesh Kumar on 10.02.2021, corroborating their statements dated 13.02.2021;
- enquiry made with the IRCTC, confirmed that ticket for journey dated 09.02.2021 from Katihar to Moradabad and ticket for journey dated 10.02.2021 from Anand Vihar Terminus to Katihar, was booked by Shri Ravikant Parihar; one ticket for journey dated 02.02.2021 from Katihar to Guwahati was booked by the account registered in the name of Smt. Pooja Mitruka who is wife of Shri Girish Mitruka;

- Call Data Record analysis of mobile no of Shri Girish Mitruka, indicated that he received 02-02 messages from BP-SKTBUS on 12.02.2021 & 13.02.2021 and that bus tickets dated 12.02.2021 was booked by Shri Girish Mitruka;
- AC Bus sleeper ticket dated 12.02.2021 bearing PNR No. 22166051-1646520 in the name of Shri Abhishek Kumar and Shri Ritesh Kumar was booked by Shri Girish Mitruka& Shri Harish Mitruka;

6. Learned authorised representative, submits in reply to the arguments of the Learned Counsel for the appellants that the claim of legal purchase of Gold is incorrect; bank statements indicate that all the entries in respect of claimed purchase are of after the date of interception i.e. after 13.02.2021; Statements of the shop owners and follow up investigation conducted by the DRI, proved that the said invoices were fake and manipulated. He submits that the plea that statements of Shri Abhishek Kumar and Shri Ritesh Kumar were recorded by the DRI under coercion and have been retracted is unfounded; mere retraction does not make the statements involuntary or unlawfully obtained and non-reliable; he relies on the following cases:

- Vinod Solanki 2009 (233) ELT 157 (SC)
- Rajendra Kumar Damani @ Raju Damani 2024 (389) ELT 444 (Cal.)
- Zaki Ishrati [2013 \(291\) ELT 161](#) (All.)
- Surjeet Singh Chhabra 1997-89-ELT-646-SC
- KTMS Mohammed AIR 1992 SC 1831
- D. Bhoormull 1983(13) ELT 1546 (SC)

7. Heard both sides and perused the records of the case. Brief issues that require our consideration in the instant case is to see as to whether

(i). Whether the Department could establish the 'Reasonable belief' to seize 3499.750gm of alleged foreign origin gold, valued at Rs.1,73,93,757, on

13.02.2021, from the possession of Shri Abhishek Kumar & Shri Ritesh Kumar.

(ii). Whether evidences available on record prove that the seized gold bars were smuggled into India from Myanmar without any legal documents?

(iii) Under the facts and circumstances of this case, whether the appellants discharged the burden of presumption under section 123 of Customs Act, 1962?

(iv) Whether not-following the procedure prescribed under section 138B and non-granting of opportunity to cross-examine vitiated the proceedings in the impugned case.

(v). Whether the statements of Shri Abhishek Kumar and Shri Ritesh Kumar, retracted, can be relied upon to establish that the goods seized are liable for confiscation under Section 111 and the persons are liable to pay penalty Section 112(b) of the Customs Act, 1962.

8. We find that in the instant case DRI, Zonal Unit, Lucknow, has intercepted Shri Abhishek Kumar and Shri Ritesh Kumar on Lucknow-Ayodhya Highway, and seized 3499.750 gm of gold from them; On being asked they could not produce any document to prove licit import/purchase of gold recovered from them; in their statements admitted that gold was smuggled from Myanmar into India and was brought via Guwahati to Katihar (Bihar) and then delivered to different places; the impugned gold belongs to Shri Harish Mitruka and Shri Girish Miturka and both are involved in the smuggling of gold from Myanmar through land route; they have retracted their statements dated 13.02.21, on 18.02.21, before the special CJM (Customs), Lucknow. Appellants submit that they have submitted, during adjudication, that the gold was purchased legally and they submitted invoices of the sellers; however, impugned order finds that all the entries in respect of

claimed purchase are of after the date of interception; not a single transaction before the interception date from the relevant firms is appearing in the bank statements; all the documents were fabricated after the interception to cover up the illegal smuggling of gold.; investigation in respect of invoices was conducted by the DRI, wherein, it was found that the said invoices were fake and manipulated; shop owners stated that invoices are back dated and no physical gold was supplied against the said invoices.

9. The appellants submit that the entire payment was made to all the parties by banking channels; bank statement was annexed with reply to Show Cause Notice; Payment of 12,78,487.00 has been made to Narayan Alankar Mandir on 10.03.2021; payment to Ashok Kumar Ashish Kumar has been made on several dates i.e. 25,00,000 + 24,59,450 on 01.03.2021+ 18,50,000 on 03.03.2021+ 20,00,000 plus 19,00,000 on 06.03.2021; payments of 38,40,000 on 22.02.2021 and 17,12,818 on 10.03.2021 were made to Maruti Ornaments. They submit that these sellers have duly filed their returns under the GST; on the filing of GSTR-1 return by the sellers, on the portal of GST, invoices are auto populated and its duly reflected in the GSTR-2A return of the firms; these facts evidence that the gold seized is of Indian origin and is a legal purchase by M/s Mitruka Traders and that it is incorrect to allege that the invoices are fabricated. They submit that they were not allowed to cross-examine Shri Abhishek Kumar and Shri Ritesh Kumar and the said investigation report was not supplied to the appellants enabling them to defend themselves, in violation of the principles of Natural justice.

10. We find it would be beneficial to have a look at the provisions of the Act.

10.1. Section 111 of the Customs Act, 1962 empowers the officers to confiscate goods. It reads as under.

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

(a) ...

(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) ...

(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;

10.2. "123. Burden of proof in certain cases –

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be –

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, diamonds, manufactures of gold or diamonds, watches and any other class of goods which the Central Government may by notification in the Official Gazette specify."

11. We find that though seizure is effected, vide the power bestowed in Section 110 of the Customs Act, 1962, it is with the pre-condition that the proper officer should have reasons to believe that that such goods are liable for confiscation under the Act; once such seizure is done, Section 123 of the Customs Act, 1962, shifts the burden of proof to prove that goods are not smuggled on the person from whom the goods are seized. The

jurisprudence, distilled on the such seizures, particularly made outside the Customs Area or specified area, envisages that:

- It is a pre-requisite that the proper officer should have reasons to believe that the goods are smuggled goods before seizing them under Section 110; the reasonable belief cannot be based on presumption; a case of suspicion or speculation is not one of reasonable belief.
- If there was no reasonable belief, then the onus cannot be shifted on the person from whom the goods were seized; Section 123 kicks in only when Section 110 is satisfied and that "reasonable belief" exists and can be explained before the adjudicating authority or tribunal or court, as the case may be.
- If Revenue fails to prove reasonable belief, then the goods would not be liable to be seized in the first place. Wrong invocation of Section 110, leaves no scope to invoke section 123. It would then be incumbent on the Customs authorities to prove that the seized goods are liable for confiscation. In the event of failure to prove so, there is no question of confiscation and penalty.
- If Revenue is able to prove reasonable belief, then the seizure under 110 is proper and Section 123 sets in. If the person from whom goods were seized is able to prove that the goods in question were not smuggled, then the onus under Section 123 stands discharged.

12. In view of the above, it is clear that it would be incumbent on the Customs authorities to prove that the seized goods are subject to confiscation. In the event of failure to prove so, there would be no question of confiscation and penalty. It gives an understanding that the Sections 111(b) and 111(d) are applicable only when it is established that the goods are of foreign origin and smuggled into the country without payment of

applicable customs duties. We find that in the instant case, 3499.750 gm of gold was seized after intercepting the persons on Lucknow-Ayodhya Highway. Impugned gold does not bear any foreign marking. The purity also on being tested by the CRCL, was reported to be 98.52% and 96.73% by weight. Evidently, the seizure is outside the designated customs area or port area or "specified area" defined under section 11H of Customs Act, 1962. Therefore, the existence of Reasonable belief becomes suspect. Other than the statements of Shri Abhishek Kumar and Shri Ritesh Kumar statements dated 13.02.2021, which were retracted on 18.02.21, no other evidence has been put forth by the revenue to establish that the impugned gold is smuggled.

13. Hon'ble Delhi High Court in the case of Shanti Lal Mehta v. UOI and Others 1983 (14) ELT 1715 (Del.). The Hon'ble High Court reviewed the jurisprudence on the matter till then and set aside the confiscation and penalty on the ground that there was lack of reasonable belief on part of the proper officer before the seizure was affected and section 123 was not to be invoked. Hon'ble High Court observed that

54. The other question which was argued before me was that the customs officer did not act on any reasonable belief when he searched the petitioner's premises on 15-12-1967 and seized the goods. Section 110 opens with the words "if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods". What is the meaning of "reasonable belief"? Did the officer entertain reasonable belief in the facts and the circumstances of this case? This is the other question to be decided. The Supreme Court has said that reasonable belief is a pre-requisite condition of the power of seizure that the statute confers on the officer. (See Collector of Customs v. Sampathu Chetty, AIR 1962 S.C. 316). The preliminary requirement of Section 110 is that the officer seizing should entertain a reasonable belief that the goods seized were smuggled.

55. Reasonable belief as required by Section 110 refers to the point of time when the goods in question are seized and not to a stage subsequent to the act of seizure. (M.G.

Abrol v. Amichand, AIR 1961 Bom. 227). The condition precedent that there was such a reasonable belief anterior to the seizure must exist before the presumption under Section 123 can be invoked. Section 123 says.

.....
 56. In Babulal Amthalal Mehta v. Collector of Customs, AIR 1957 S.C. 877, while considering the provisions of Section 178A of the Sea Customs Act, 1878, it was observed;
"Though the word 'smuggling' is not defined in the Act, it must be understood as having the ordinary dictionary meaning, namely, carrying of goods clandestinely into a country."

Where Section 123 cannot be invoked it would be for the customs authorities to prove that the goods were imported after the restrictions against import were imposed. (Amba Lal v. Union of India, AIR 1961 S.C. 264. In Pukhraj v. D.R. Kohli, AIR 1962 S.C. 1559 the Supreme Court said that when the court was dealing with the question as to whether the belief in the mind of the officer who effected a seizure, was reasonable or not, the court was not sitting in appeal over the decision of the said officer. All that it could consider was whether there was any ground which prima facie justified a reasonable belief. That the officer had reasonable belief must be stated in the notice to show cause. It must be adjudicated upon by the authorities under the Act. At the stage of appeal or revision from the orders of the officer adjudging confiscation each successive appellate or revisional authority has also to address itself to this requirement of reasonable belief. The seizing officer either by his own evidence or other materials placed before the adjudicating authority, has to prove to its satisfaction that there was ground for him to reasonably believe that the goods were smuggled goods, that is to say that the goods were imported into the country and imported at a time and place when they were restricted or prohibited from being imported. If the adjudicating authority is not satisfied that the goods were seized on a reasonable belief Section 123 cannot be invoked and in that event it would be for the customs authorities to prove that the goods were smuggled and Section 123 in that event would have no application. If, therefore, Section 123 is wrongly applied and the presumption thereunder is raised, without the condition precedent thereunder having been satisfied, the entire inquiry and the order passed therein would be vitiated. In Collector of Customs v. Sampathu Chetty (supra) the Supreme Court under the old Sea Customs Act of 1878 said:

"The entire evidence in the possession of the seizing officer would be and has to be before the officer adjudicating the confiscation under Section 182 of the Sea

Customs Act. No doubt, on the language of Section 178A the presumption of the goods being smuggled arises only when the seizure is made by an officer entertaining a reasonable belief that the goods are smuggled, and in that sense the reasonable belief of the seizing officer is a pre-requisite for the statutory onus to arise. It is also true that at the stage of adjudication the reasonableness of the belief of the officer effecting the seizure that the goods are smuggled would be the subject-matter of investigation by the adjudicating officer. Nevertheless, it is manifest that at the stage of the adjudication (when only the rule of evidence laid down by the section comes into operation) the very facts which led the seizing officer to effect the seizure, as distinguished from their significance as affording a reasonable belief for the seizing officer to hold that the goods are smuggled, are before the adjudicating officer. These facts which justified the seizing officer to reasonably believe that the goods were smuggled would certainly import a rational connection between the facts on which the presumption is raised and the fact to be proved, so that whatever other constitutional infirmity might attach to the impugned provision, the lack of rational connection is not one of them."

It would be necessary, therefore, before any person could be called upon to prove that the goods seized from him were not smuggled goods, that the customs officer making the seizure must proceed upon the foundation of a reasonable belief inspired in him by some definite material by way of some definite information or otherwise so that he could be said to have seized the goods in a reasonable belief that they were smuggled goods. (Bapalal v. Collector of Central Excise, AIR 1965 Gujarat 135). The question is whether the record before me shows that there was a reasonable belief in the mind of the seizing officer that the goods were smuggled goods. It does not appear to me that he had entertained any reasonable belief at the time of seizure. Neither the board on appeal, nor the Central Government applied their mind to this question.

Two reasons:

57. Applying the principles of these cases to the facts of the present case what do we find? Two reasons were given in support of the reasonable belief. One is that the customs authorities received some information. What is that information? It was never disclosed to the petitioner. Nor was it disclosed to the adjudicating authorities. Very vague words such as 'on information received' are used in the show cause notice. The information on which the customs authorities act must be definite information. No one suggests that they must disclose the name of the informant. That would be detrimental to investigation and against public interest. The least they can do is to give the gist of the information so that the person from whom the

goods are seized knows the nature of the information received by the customs. To hold otherwise would mean that the customs officer can act on any information, wishy-washy though it may be, received from the underworld the nature of which the man in the over-world will not be entitled to know. The words "reasonable belief" used in Section 110(1) are intended to check the exercise of the powers given to the customs officers arbitrarily and without any foundation at all, to the harassment of the general public. The customs officer must have some definite materials by way of some definite information to form the foundation of his reasonable belief (M.G. Abrol supra).

58. The second reason for entertaining a reasonable belief is that the seized goods were not accounted for by the petitioner on 15-2-1967 when the officer seized the goods from his possession. The seized goods consisted of 20 items of ornaments and diamonds. Out of these six items were released before the show cause notice was issued. One item was released at the adjudication stage. Six items were released by the Board on appeal. Only 7 items have been confiscated. These consist of 2 packets of diamonds and 5 ornaments. The petitioner claimed that they belonged to the queen mother of Nepal. A letter was written to queen mother. On her behalf a reply was received that she had given certain ornaments to the petitioner for polishing, remaking etc., though not for sale. But this was done later on. The letter was written on 3-7-1967. The reply was received on 24-7-1967. But at the time of seizure all that the officer had before him were 2 packets of diamonds and 5 ornaments. Neither the diamonds nor the ornaments had any foreign markings or label to suggest to the customs that these were smuggled goods. In the search list these two packets of diamonds are described as "appearing to be diamonds". This shows that the customs officer did not believe them to be diamonds on any reasonable ground. The ornaments had no foreign label or making. They were ordinary ornaments as are worn in this country. There was nothing peculiar about them. Nothing extraordinary. On this material could any reasonable man entertain a belief that these were smuggled goods?

59. The belief must be such as any reasonable man in the circumstances of the case would entertain about the existence or non-existence of a thing. Simply because the goods were not accounted for at that time does not necessarily mean that the goods were smuggled goods. Unaccounted goods may be stolen goods. Reasonable belief could be entertained either on the basis of some external indicia or on the basis of some internal information that the goods had been illegally imported into India from Nepal or some other foreign country either

without payment of duty or in contravention of any restriction or prohibition imposed by statute. There was nothing to suggest the foreign origin of the goods. There was nothing to suggest the illegal importation of the goods into the country.

60. The goods must be smuggled goods. The word 'smuggled' means that the goods were of foreign origin and they had been imported from abroad. Only then does the presumption under Section 123 arise. The goods themselves did not suggest that the petitioner was an old smuggler or a dealer in smuggled goods. If there was such information with the customs, they ought to have disclosed it. The goods themselves did not suggest any illicit importation. Nor was there any inscription on the goods which could be the basis of the reasonable belief that the goods were of foreign origin. There was nothing in the appearance of the goods to suggest that they had been newly manufactured and brought into this country very recently from another country. In a word there was nothing absolutely from which inferences about their origin or recent import could arise. It was not a case where large quantity of gold with foreign markings was found hidden in the trousers of the accused as happened in *Hukma v. State of Rajasthan*, AIR 1965 S.C. 476. 61. In fact there is a finding by the Board in favour of the petitioner supporting his contention that there could be no reasonable belief in the mind of the officer when he seized the goods. On the penalty of Rs. 25,000/- imposed on the petitioner the Board observed: "there is no definite evidence to show that the appellant knew or had reason to believe that those items were smuggled. In the absence of this evidence the penalty imposed is not justified. The Board accordingly remits the personal penalty in full". If the petitioner did not know that the goods were smuggled, how could the customs officer reasonably believe that the goods were smuggled. The petitioner knew better. 62. The customs officer merely thought that as the goods had not been accounted for these are smuggled goods. At the time of seizure what happened was this. The petitioner was present at the shop. He told the customs officer that they were duly entered in his account books but his accountant had gone to the income tax officer. The officer did not wait for the man to arrive to explain the entries to him. He seized the goods and took them away. This was not a case of reasonable belief. It was a case of suspicion. A case of speculation. A case of guess work. 63. As a result, Section 123 did not apply to the case. There was no reasonable belief. No presumption could be raised under Section 123. There was no obligation on the petitioner to prove that the goods were not smuggled. The burden of proof was wrongly cast on him. The entire inquiry was vitiated. 64. For these reasons the writ petition is allowed. The order of

confiscation of the goods is set aside. The order of the Addl. Collector of Customs dated 14-08-1968 the order of the Central Board of Excise and Customs dated 18-9-1971 and the order of the Central Government dated 30-5-1972 are quashed. The respondents are directed to return to the petitioner items 6 to 11 and 16 of the search lists forthwith. The parties are left to bear their own costs. ...

14. We further find that The Hon'ble High Court of Bombay in the case of Union of India Vs. ImtiazIqbalPothiawala reported in 2019 (365) ELT 167 (Bom.), held as under:

"7. Secondly, the questions which arise for our consideration in this case is in the context of the application of Section 123 of the Act in respect of the goods notified therein. Gold is an item which is notified under Section 123 of the Act and it provides that burden of proof in case of notified goods, would be upon the person from whose possession and/or the person who claims ownership of the goods to prove that the seized goods are not smuggled goods. However, before the aforesaid burden could be cast upon the person who claims to be the owner of the seized goods, the Revenue should be able to establish that the goods seized under Section 110 of the Act, was on a reasonable belief that the imported goods were smuggled goods. Therefore, where seizure is a subject of challenge on the ground of absence of reasonable belief then, the question of burden of proof on the person, claiming to be the owner of the goods, would arise only when the challenge to seizure is, negated. In the facts of the present case, neither before us nor before the authorities under the Act, has the respondent No. 1 challenged the seizure for absence of reasonable belief that the seized gold was smuggled goods. Thus, the burden of proof in this case is upon the respondent to establish that the seized gold bars are not smuggled."

The Hon'ble High Court further observes that:

(B) Reg. Question (b) :-

(i)

(ii).

(iii). We are of the view that in the absence of evidence in the form of regular books of account, registration under the income-tax and Sales Tax, etc., cannot ispo facto lead to the conclusion that the seized gold bars, are smuggled

gold bars. These may lead to proceedings for breaches of other Acts but it does not follow from it that the gold bars are smuggled goods. In fact, if a person in possession of the stolen gold is able to establish that it had come into India after a proper declaration and compliance of the Act, no confiscation under the Act, can arise. Proceedings under the Indian Penal Code may be initiated by the police for theft, but it would not by reason of theft become smuggled goods. Moreover, smuggling as defined under Section 2(39) of the Act, is an act or omission which will render goods liable to confiscation under Section 111 of the Act for import and 113 of the Act for exports. On reading of Sections 111 and 113 of the Act, not keeping proper books of account or not being registered with the income-tax and/or Sales Tax Authorities, is not an omission which renders the goods liable for confiscation i.e. smuggled goods.

15. We further find that Hon'ble Supreme Court in the case of Tata Chemicals Ltd Vs Commissioner of Customs (Preventive), Jamnagar reported in (2015) 11 SCC 628, which has explained the meaning of the word 'reason to believe' as under: -

"reason to believe" by opining it to be not the subjective satisfaction of the officer concerned, for "such power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with their strains imposed by law" and that such belief must be that of an honest and reasonable person based upon reasonable grounds. Further, if the authority would be acting without jurisdiction or there is no existence of any material or conditions leading to the belief, it would be open for the Court to examine the same, though sufficiency of the reasons for the belief cannot be investigated.

16. We find that Tribunal in the case of Balanagu Naga Venkata Raghavendra Vs CC Vijayawada 2021 (378) ELT 493 (Tri-Hyd) held that the burden under section 123 will not shift on the Appellants when the seizure of gold without foreign markings are seized from city. Tribunal held as follows.

"14. The confiscation of the gold by the adjudicating authority was set aside by the Tribunal and on appeal by

the Revenue the Hon'ble High Court of Kerala, in the above factual matrix, has overturned the decision of the Tribunal. Therefore, it was not merely the purity of the gold in question but also the statements made during the investigation which formed the basis of the reasonable belief of the officers. In the present case, none of the statements recorded by the Department admit to or even suggest that the gold was smuggled gold. It has also not been brought out in the show cause notice that the purity of the seized gold is such that it could only have been of foreign origin. It is true that the conduct of the appellants was suspicious inasmuch as the gold pieces were being carried in newspapers and a letter was found written to one Shri Vijay in Trissur for requesting the gold to be handed over to the bearer of the letter. It is also confirmed by the DCM, Railways that the appellants had travelled from Trissur to Vijayawada by train. However, we note that Trissur is not even a port in itself. The gold was apparently collected from one Shri Vijay in Trissur. There were also several contradictions between different statements as recorded in para 16 of the show cause notice. All these would show that Shri Kanaka Ratnam (Appellant in Appeal No. 30496 of 2017) wrote a letter to Shri Vijay of Trissur to hand over gold to the bearer of the letter and both the letter and the gold were recovered from his son Shri Naga Venkata Raghavendra (Appellant in Appeal No. 30495 of 2017). Both the appellants had travelled by train from Trissur to Vijayawada. Naga Venkata Raghavendra was acting suspiciously when the Officers approached him. Subsequent statements were contradictory to each other. These factors by themselves cannot, in our considered opinion, constitute the basis for forming a reasonable belief that the seized gold was smuggled. Therefore, the Officers did not have a reasonable belief in the first place to assert that the seized primary gold was smuggled gold which is essential to shift the burden on to the accused under Section 123. The case of Om Prakash Khatri (supra) was different inasmuch as in that case while the foreign markings were missing on the gold in that case the carriers had admitted that they were carrying smuggled gold for Shri Khatri and that it was smuggled through Kerala and they were carrying it to Bombay and marks and numbers have been deleted to avoid being caught. They also admitted that they avoid air travel as there is a high risk of being caught. Coupled with these statements was the fact the gold of very high purity. The ratio of this judgment does not apply to the present case and the facts are quite different.

15. In view of the above, we find that the officers of the Department had no reasonable belief that the gold was smuggled and therefore they have not discharged their

responsibility of forming reasonable belief under Section 123 without which the burden of proof will not shift to the person from whom the gold is seized.”

17. We further find that the Tribunal in the case of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) *dismissed the appeal of Revenue on the grounds that jewelry was not bearing any foreign marking and in the absence of any evidence other than statement of passenger.* From the above discussion, we observe that in the absence of any evidence other than the statements of Shri Abhishek Kumar & Shri Ritesh Kumar, which were later retracted, the officers of DRI could not establish that there are sufficient grounds to establish that the ‘reasonable belief’ as contemplated in Section 110 of the Customs, Act, existed in the case. It is further fortified by the other factors that the seizure was at a place not specified under a Section 111(H) as notified under Section 6 of the Customs, Act, 1962; there were no foreign markings on the gold pieces seized and that the purity was only 98.52% and 96.73% by weight. Therefore, the claim of reasonable belief is nothing but a presumption that the gold bars/pieces were of smuggled nature. It is not supported by any corroborative evidence. There is no document available on record to establish that gold bars/pieces were smuggled into India from a place outside India. The impugned order has concluded that the said gold bars/pieces were smuggled into India only on the basis of retracted statements without any concrete evidence to substantiate this claim. The surmise on the basis of Call Data Records is not conclusive. It establishes at best that the persons involved were in touch with each other for some time around the seizure. Understandably, Shri Abhishek Kumar & Shri Ritesh Kumar are employees of Bajarang Traders of Shri Mitrika and hence, it is not surprising that they are in touch with each other from various locations in

the country. It is not the case of the department they were in contact with any person abroad or at least in the borders. Therefore, we hold that material evidence available on record does not establish that the gold bars/pieces were smuggled into India.

18. we find that there was no meaningful Enquiry/ investigation was undertaken to prove the smuggled nature of the gold; it is also not mentioned as to how the gold was smuggled from Myanmar, except making a bland statement that shri Girish Mitruka and shri Harish Mitruka have smuggled it from Myanmar. Going by various judicial pronouncements, we find that Revenue needs to prove the smuggled nature of goods with cogent evidence. It is another matter that the persons involved may have committed any offence, in respect of the gold carried, punishable under any other law for time being in force. It itself does not make goods liable for confiscation under Customs Act and persons involved liable for penalty. The Revenue requires to prove that the gold is of smuggled nature even when it is notified under Section 123. We further find that Revenue did not establish that silver valued at Rs. 3,20,738/- and cash amounting Rs. 16,50,000 are sale proceeds of the smuggled goods. Therefore, we find that neither the seized goods are liable for confiscation under Section 111 nor the persons involved are liable for penalty under Section 112. The provisions of Section 123 are not attracted.

19. The next issue to be seen is as to whether in the facts and circumstances of the case, the appellants have discharged the Burden of Proof as envisaged under Section 123 of Customs Act, 1962. Though, in view of our discussion as above, we are of the considered opinion that the reasonable belief under Section 110 not being established, Section 123 is not attracted, it would be in the interest of Justice to analyse the same assuming that the provisions of

Section 123 are attracted. Revenue alleges that the appellants have failed to discharge their burden under section 123 of the Customs, Act 1962. We find that though Shri Abhishek Kumar & Shri Ritesh Kumar, in their initial statements on 13.02.2021 admitted that the gold was smuggled, have retracted the statements before magistrate on 18.02.2021. We find that the appellants have claimed licit procurement of the goods in question; they claim that payment was made to all the parties by banking channels; bank statement was annexed with reply to Show Cause Notice; Payment of 12,78,487.00 has been made to Narayan Alankar Mandir on 10.03.2021; payment to Ashok Kumar Ashish Kumar has been made on several dates i.e. 25,00,000 + 24,59,450 on 01.03.2021+ 18,50,000 on 03.03.2021+ 20,00,000 plus 19,00,000 on 06.03.2021; payments of 38,40,000 on 22.02.2021 and 17,12,818 on 10.03.2021 were made to Maruti Ornaments; these sellers have duly filed their returns under the GST; on the filing of GSTR-1 return by the sellers, on the portal of GST, invoices are auto populated and its duly reflected in the GSTR-2A return of the firms; these evidence that the gold seized is of Indian origin and is a legal purchase by M/s Mitruka Traders, it is incorrect to allege that the invoices are fabricated.

20. We find that Learned Authorised representative submits that all the entries in respect of claimed purchase are of after the date of interception; not a single transaction before the interception date from the relevant firms is appearing in the bank statements; all the documents were fabricated after the interception to cover up the illegal smuggling of gold. Learned Commissioner finds that investigation in respect of invoices was conducted by the DRI, wherein, it was found that the said invoices were fake and manipulated; shop owners stated that invoices are back dated and no physical gold was supplied against the said invoices. However, the details of

such investigation are not made available to the appellants. The same is not part of the proceedings and is not part of Documents relied upon. They were not given an opportunity to counter the findings. We find that this is a clear case of violation of principles of Natural Justice. The appellants were also not given opportunity to cross-examine Shri Abhishek Kumar and Shri Ritesh Kumar. We find that there is merit in the submissions of the appellant on the transactions made by them through banks in respect of the purchase of gold and the issuance of invoices under GST populating the details in GSTN-1. We find that the claim cannot be brushed aside on the basis of an investigation stated to have been conducted by the DRI at the back of the appellants and particularly, when copy of the same was not provided to the appellants. We find that the presumption or burden under Section 123 is not absolute. Initially, yes, the burden is on the accused from whom the notified goods are seized. But once that burden is discharged by that person, it is to be rebutted or proved wrong by the Revenue. Account details, financial transactions and GSTN returns cited by the appellants could have been easily corroborated and verified. Revenue has not done the same. Instead, they rely on an investigation said to have conducted by DRI, at the back of the appellants and copy of which is neither given to the appellant nor part of the proceedings. Therefore, we are of the considered opinion that not only the claim of the appellant is not negated but also the principles of natural justice have been violated.

21. We find that Learned Counsel for the appellants submits that the Commissioner did not follow the provisions of Section 138B of the Customs Act, 1962 in as much as he did not examine Shri Abhishek Kumar & Shri Ritesh Kumar and did not accord permission to cross examine them. We find that this is more relevant in the case as the entire case is built on the

statements of the above two persons. We find that Tribunal, in the case of Flamingo DFS Pvt Ltd., Vs. Commissioner of Customs, Visakhapatnam reported in 2018 (363) ELT 450 (Tri-Hyderabad), held that *if Revenue chooses not to examine any person in the adjudication proceedings, it amounts to giving up that witness and such statement cannot be considered relevant*. We find that since the statements of Shri Abhishek Kumar & Shri Ritesh Kumar have been relied upon in this case, Learned Commissioner should have examined them in adjudication proceedings; only then their statements could not have been considered relevant and relied upon. against the Appellant. We find that Hon'ble Punjab and Haryana High Court held, in the case of G-Tech Industries Vs. Union of India- 2016 (339) ELT 209 (P&H), that the statement of any person cannot be relied upon directly, in the context of Section 9D of the Central Excise Act, 1944 which is *Pari Materia* with Section 138B of the Customs Act, 1962 by the Adjudicating Authority. Hon'ble High Court held that

15. The rationale behind the above precaution contained in clause (b) of Section 9D (1) is obvious. The statement recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D (1) mandates that the evidence of the witness has to be recorded before the Adjudicating Authority, as in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned."

22. We find that in the instant case the Adjudicating Authority did not follow the procedure, laid down under Section 138B, in order that he could rely on the statements of Shri Abhishek Kumar & Shri Ritesh Kumar, who are co-accused, to conclude that the impugned gold was liable for confiscation. We

find that the mandate not having been followed statements of the Shri Abhishek Kumar & Shri Ritesh Kumar cannot be held to be voluntary in nature and hence reliable, more so, looking in to the fact that the cross examination of the same was also not allowed. We find that Hon'ble Apex Court held in the case of Surinder Kumar Khanna- Vs. Intelligence Officer, DRI- 2018 (362) ELT 935 (SC)

14 – "In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence, it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The Appellant is therefore entitled to be acquitted of the charges levelled against him."

23. The reliability of the statements of the co-accused becomes weak for the reason that the persons making those statements were not examined following the provisions of Section 138 B of the Customs Act, 1962. It is further weakened as Cross-examination is not allowed. Hon'ble Madras High Court observed, in the case of Vijayaraj Surana Vs. Commissioner of Customs, Chennai-III reported in 2016 (340) ELT 308 (Mad.), that

it has to be noted that each case has to be decided on its peculiar facts. Admittedly, statements have been recorded by the respondent from those three persons under Section 108 of the Customs Act, 1962 and the matter is at the threshold. Therefore, while adjudicating the show cause notices, if the respondent proposes to rely on any of those statements, the petitioners should be given fair opportunity, because the show cause notices appear to be solely based upon the statements recorded from those three persons. Therefore, in my view, the facts of the present case would require opportunities to the petitioners to cross-examine those three persons, in the event the respondent proposes to rely upon their statements. If the

respondent does not propose to rely upon those statements while adjudicating the show cause notices, then the question of affording an opportunity of cross-examination would not arise. However, for that reason, the petitioners should submit their reply to the show cause notices and at the time of adjudication, make a request to the authority for cross examination, which shall be considered in accordance with law.

24. We find on perusal of the statements, dated 13.02.2021, of Shri Abhishek Kumar & Shri Ritesh Kumar; Shri Abhishek Kumar that the so-called confession about the gold being smuggled is very general in nature. We find that nowhere they have been questioned as to how the gold in question was smuggled from Myanmar to India. No critical details about the persons who carried the gold from across the border, what was place of crossing the international borders, what was the mode of transport and how the finances were arranged etc. were neither asked by officers nor stated by the accused. The facts claimed to have been confessed regarding the alleged smuggling of the impugned Gold are very general in nature. It would be very naïve to expect that the accused would confess the most minute details, even if they actually smuggled the impugned goods. What is intriguing is that the officers did not even put the relevant and pertinent questions to unearth or establish the act of smuggling. As such, it is not open for the department to draw conclusions from a general statement to particularize the details about the impugned goods. As admittedly, the gold having no foreign markings, the onus would be on department to prove the smuggled nature of the same. This onus was not discharged. Moreover, the provisions of Section 138B of the Customs Act have not been complied with and therefore, the sanctity of the statement recorded under section 108 has been lost and consequently, it cannot be conclusively relied upon.

25. In view of the above discussion we find that in the instant case, presence of reasonable belief is not established as the seizure took place at a place not specified under a Section 111(H), as notified under Section 6 of the Customs, Act, 1962; there were no foreign markings on the gold pieces seized and that the purity was only 98.52% and 96.73% by weight. Therefore, the claim of reasonable belief is nothing but a presumption that the gold bars/pieces were of smuggled nature. It is not supported by any corroborative evidence. It appears that Revenue attempts to bring in reasonable belief that the goods are liable for confiscation, after the goods are seized, basing solely on the statements of the persons and brushing aside the submissions of the appellants on the licit procurement of the gold in the domestic market. This is not acceptable. Reasonable belief contemplated in Section 110 of Customs Act, 1962, should exist to the satisfaction of the officers and any authority at least to an extent wherein the same does not take the colour of assumptions and presumptions. Reasonable belief is not established in the instant case. It is another matter that the persons involved may have committed any offence, in respect of the gold carried, punishable under any other law for time being in force. It itself does not make goods liable for confiscation under Customs Act and persons involved liable for penalty. The Revenue requires to prove that the gold is of smuggled nature even when it is notified under Section 123. Efforts to prove the existence of 'Reasons to believe' after the seizure of the impugned goods, is like reading the provisions of the repealed Gold Control Act, while interpreting the provisions of the Customs Act.

26. Hence, we are of the considered opinion that the provisions of Section 123 are not invited. Even assuming that the same are attracted, the appellants have discharged the burden which is not negated conclusively, by

the department. Going by various judicial pronouncements, we find that Revenue needs to prove the smuggled nature of goods with cogent evidence. It is another matter that the persons involved may have committed any offence, in respect of the gold carried, punishable under any other law for time being in force. It itself does not make goods liable for confiscation under Customs Act and persons involved liable for penalty. The proceedings were vitiated in not following the procedure laid down under Section 138B of the Customs Act, 1962. Principles of Natural Justice have also been violated in not providing the verification report of DRI to the appellants, depriving them of an opportunity to defend themselves. In view of the same, we find that the impugned order is not sustainable and is liable to be set aside.

27. In the result, both appeals are allowed.

(Pronounced in open court on **05.05.2025**)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)