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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 06 September 2024

Judgment pronounced on: 27 November 2024

+ W.P.(C) 3612/2024, CM APPL. 14845/2024 (Interim Relief) &
CM APPL. 26451/2024 (Interim Relief)

SABA SIMRANPetitioner

Through: Mr. Vishal Tiwari and Kumari
Nidhi Tripathi, Advocates.

versus

UNION OF INDIA & ORS.Respondents

Through: Ms. Pratima N. Lakra, CGSC
with Mr. Chandan Prajapati,
Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

1. The present writ petition has been preferred seeking the following reliefs:-

“(a) Issue of Writ/Writs in the nature of Certiorari by quashing the order dated 21.09.2023 and detention receipt dated 25.05.2023 to initiate strict action against respondent no. 3; and/or

(b) Issue of Writ/Writs in the nature of Certiorari or any other writ or direction in the nature thereof and direct the respondent no. 3 to release Petitioner’s gold ornaments that has been illegally detained/confiscated by Respondent no. 3 at the time when Petitioner was returning from Dubai after completing her movie shoot; and/or

(c) Issue of Writ/Writs in the nature of Certiorari or any other writ or direction in the nature thereof and direct the respondent no. 3 to pay



a compensation of Rs. 25,00,000/- for mental agony and harassment.”

2. The petitioner had travelled from Bengaluru to Dubai on 22 May 2023 for the shooting of her film. She returned on 25 May 2023 by an Indigo flight from Dubai at Delhi International Airport, Terminal-3 and opted for the green channel. She was intercepted by a Customs Officer after she had crossed the green channel. On her search, one plastic box containing 3 gold bangles, weighing 130 grams, 15 gold beads (parts of bracelets) weighing 89 grams were recovered. The recovered goods were detained vide Detention Receipt dated 25 May 2023.

3. Order-in-Original dated 21 September 2023 was passed concluding as under:-

“(i) I deny the 'Free Allowance' if any admissible to the Pax Ms. Simran Saba for not declaring the detained goods to the Proper Officer at Red Channel as well to the Customs Officer at Green Channel who intercepted her and recovered the detained goods from her.

(ii) I order absolute confiscation of the above said detained gold jewellery i.e. "One (1) copper colour gold bangle and two (02) black colour enamelled gold bangles having purity 916 weighing 130.00 Gram and Fifteen (IS) black colour enamelled gold beads having purity 965 weighing 89.00 gram collectively weighing 219.00 gram valued at Rs.12,02,960.00" (as on 25.05.2023) recovered from the Pax Ms. Simran Saba and detained vide DR/INDEL4 /25.05.2023/001951 Dated 25.05.2023, under Section 111(d), 111(i), 111(j) & 111(m) of the Customs Act, 1962;

(iii) I also impose a penalty of Rs. 1,20,000.00 (Rupees One Lakh Twenty Thousand Only) on the Pax, Ms. Simran Saba under Section 112a & 112b of the Customs Act, 1962.”

4. As is manifest from the extracts of the Order-in-Original reproduced hereinabove, the respondents have essentially borne in consideration the quantity and valuation limits as existing in the



Baggage Rules, 2016¹ to be applicable to every incoming passenger, irrespective of whether the jewellery and ornaments borne on the person or in the baggage is sought to be “imported”, had been “acquired” as opposed to being personal items or items of “*personal effect*”, an expression which is used in the 2016 Rules. According to the respondents, all jewellery and ornaments, personal or otherwise, is liable to be viewed as prohibited goods in addition to being subject to the restrictions contained in the 2016 Rules.

5. Suffice it to note that the issue of prohibited or restricted goods would arise provided the articles were being imported. While it is true that the **Customs Act, 1962**² defines the word ‘import’ as being the act of bringing an article into India from a place outside, the phrase ‘bringing into’ cannot possibly be construed as being applicable to “*personal effects*”. The phrase ‘bringing into’ would clearly connote an article acquired and being sought to be brought into India and thus crossing customs boundaries and becoming exigible to the levy of customs duty. If the expression “*personal effects*” were borne in consideration, it would include all items which are carried by an incoming passenger for satisfying daily necessities. That phrase could include jewellery and ornaments which are personal items. Since borne on the person or the baggage of that passenger, they would clearly not constitute import.

6. The quantitative restrictions which are introduced by virtue of Rules 3 and 4 of the 2016 Rules clearly apply to articles which are sought to be imported. However, and in our considered opinion, items

¹ 2016 Rules

² Act



which are personal in nature as opposed to those having been acquired with the intent to import would not be subject to those prescriptions.

7. The respondents would bid us to interpret the 2016 Rules as being confined to personal effects exclusive of jewellery, whether it be personal or otherwise. It is their contention that the monetary limits which are prescribed in the Proviso to Rule 3 as well as Rule 4(b) thereof would govern and be determinative of the value of jewellery that may be carried by an incoming passenger and allowed duty-free.

8. However, and in order to examine the correctness of this contention, it would be fruitful to refer to the legislative history of the rules pertaining to baggage as framed in exercise of the powers conferred by Section 79 of the Act.

9. If we were to travel back in time to the **Baggage Rules, 1998**³, it becomes apparent that those rules did not incorporate a definition of “*personal effects*” in explicit terms. Appendices A and B thereof, however, while declaring articles which would be allowed free of duty had provided that ‘*used personal effects, excluding jewellery*’ would fall under the aforesaid duty-free prescription. That prescription was to apply to all passengers of ages 12 and above and who were returning to India after an overseas trip of more than three days or three days or less.

10. In order to deal with certain perceived gaps in those Rules, and bearing in mind the absence of a definition of “*personal effects*”, the Ministry of Finance issued a clarificatory **Circular No. 72/98-Customs dated 24 September 1998**⁴ and which reads as follows:

³ 1998 Rules

⁴ Circular



**“Circular No. 72/98- Customs
dated 24/9/1998**

**F.No.520/136/92- CUS- VI
Government of India
Ministry of Finance
Department of Revenue, New Delhi**

Subject : Eighth Report of Estimates Committee (11th Lok Sabha) on disposal of passenger baggage detained at International Air ports; action taken by the Govt. on the recommendations contained in the forty-ninth report of Estimates Committee (10th Lok Sabha on the Ministry of Finance (Department of Revenue) Customs clearance at International Airport - Reg.

In the Estimates Committee (1994-95) of the 10th Lok Sabha, the Government had undertaken to review the Baggage Rules permitting the travellers to bring in Note Book Computers and other essential items so that harassment to the general passengers could be eliminated. The Committee has desired an expeditious review of the matter. The matter has been examined, under Tourist Baggage Rules, 1987, Notification No. 45/ 92-Cus (NT) dated 19/6/92 was issued listing the personal effects which could be imported temporarily free of duty. This list included 14 items of day to day use of the tourist.

2. The Tourist Baggage Rules was replaced by the Baggage Rules, 1994 which contained a chapter on concession for tourists. In Rule 11, the personal effects imported by the tourists temporarily have been allowed duty free entry and the explanation of Rule 11 defined the wording 'personal effect' such as clothings and other articles, new or used, which a tourist may personally and reasonably required taking into account of circumstances for his visit but excluding all merchandise imported for commercial purposes. The list contained in Notf. 92, though the Notn. has expired, continue to the guiding the customs formations at the Airport to give this benefit.

3. The Baggage Rules, 1998 issued vide Notn. No. 30/ 98-Cus(NT) dated 2/6/98 has provided for import of duty free goods by tourists in Regulation 7 as contained in Appendix 'E' of the said rules. There is no definition for personal effects in the present Baggage Rules. However, for the sake of uniformity it is considered necessary to reiterate that the personal effects would include the following goods:

- (i) Personal jewellery
- (ii) One camera with film rolls not exceeding twenty
- (iii) One video camera/ camcorder with accessories and with video cassettes not exceeding twelve



- (iv) One pair of binoculars
- (v) One portable colour television (not exceeding 15 cms in size)
- (vi) One music system including compact disc player
- (vii) One portable typewriter
- (viii) One perambulator
- (ix) One tent and other camping equipment
- (x) One computer (laptop/ note book)
- (xi) One electronic diary
- (xii) One portable wireless receiving set (transister radio)
- (xiii) Professional equipments, instruments and Apparatus of appliances including professional audio/ video equipments
- (xiv) Sports equipments such as one fishing outfit, one sporting fire arm with fifty cartridges, one non-powdered bicycles, one canoe or ranges less than 51 metres long, one pair of skids, two tennis rackets, one golf set (14 pcs. With a dozen of golf balls).
- (xv) One cell phone.

4. It may kindly be noted that while Notn. No. 45/92 defined personal effects as articles both new or used and Rule 11 of Baggage Rules 1994 allowed personal effects of tourists for duty free import, the Baggage Rules 1998 allows only used personal effects of the tourists. It is not the intention of the Board to verify the newness of every product which a traveller brings so long as it is not *prima facie* new goods in their original packagings which can be disposed of off hand.

Sd/-

(Vijay Kumar)

Under Secretary to the Govt. of India”

11. As is evident from a reading of paragraph 3 of the aforementioned Circular, the competent authority clarified that the phrase “*personal effects*” would include “personal jewellery”. The respondents thus consciously sought to introduce a distinction between “personal jewellery” and the word ‘jewellery’ per se as it appears in the Appendices. The clear intent of that Circular appears to have been to include personal items of jewellery or ornaments within the meaning of the expression “*personal effects*”.



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12. When the aforesaid 1998 Rules came to be amended in 2006, by virtue of the **Baggage (Amendment) Rules, 2006**⁵, the stipulation with respect to articles allowed entry free of duty remained the same except for the increased monetary limits of INR 35,000/-, 15,000/- and 3,000/- which came to be incorporated. Appendices A and B, as they stood in the 1998 Rules and post the 2006 Amendment, read as follows:

**“Appendix A
(See rule 3)**

(1)	Articles allowed free of duty (2)
All passengers of and above 10 years of age and returning after stay abroad of more than three days.	Used personal effects, excluding jewellery, required for satisfying daily necessities of life. Articles other than those mentioned in Annex. I upto a value of Rs. 35,000 if these are carried on the person or in the accompanied baggage of the passenger.
All passengers of and above 10 years of age and returning after stay abroad of three days or less.	Used personal effects, excluding jewellery, required for satisfying daily necessities of life. Articles other than those mentioned in Annex. I upto a value of Rs. 15,000 if these are carried on the person or in the accompanied baggage of the passenger.
All passengers upto 10 years of age and returning after stay abroad of more than three days.	Used personal effects, excluding jewellery, required for satisfying daily necessities of life. Articles other than those mentioned in Annex. I upto a value of Rs. 12,000 if these are carried on the person or in the accompanied baggage of the passenger.
All passengers upto 10 years of age and returning after stay abroad three days or less.	Used personal effects, excluding jewellery, required for satisfying daily necessities of life. Articles other than those mentioned in Annex. I upto a value of Rs. 3,000 if these are carried on the person or in the accompanied baggage of the passenger.

⁵ 2006 Amendment



Explanation. – The free allowance under this rule shall not be allowed to be pooled with the free allowance of any other passenger.

APPENDIX B
(See rule 4)

(1)	(2)
Passengers of and above 10 years of age and returning after stay abroad of more than three years	Used personal effects, excluding jewellery, required for satisfying daily necessities of life. Articles other than those mentioned in Annex. I upto a value of Rs. 6,000 if these are carried on the person or in the accompanied baggage of the passenger.
Passengers upto 10 years of age and returning after stay abroad of more than three days.	Used personal effects, excluding jewellery, required for satisfying daily necessities of life. Articles other than those mentioned in Annex. I upto a value of Rs. 1500 if these are carried on the person or in the accompanied baggage of the passenger.

Explanation. – The free allowance under this rule shall not be allowed to be pooled with the free allowance of any other passenger.”

However, even up to this stage of the amendment process, “*personal effects*” were not defined in the Rules.

13. When the 2016 Rules ultimately came to be promulgated, Rule 2(vi) specifically introduced a definition with respect to “*personal effects*”. As noticed in the preceding parts of this judgment, Rule 2(vi) while defining “*personal effects*” explicitly excludes items of jewellery. The word ‘jewellery’ as it now appears in that definition clause must necessarily be read in conjunction with the previous versions of the Baggage Rules which operated from time to time as well as the clarificatory Circular referred to above. However, both



Rules 3(a) as well as 4(b) employ the phrase “used personal effects” and which expression existed even in the prior versions of the rules and have been noticed hereinabove.

14. Rule 2(vi) of the 2016 Rules essentially adopts the same concept of ‘used personal effects’ as was intended under the 1998 Rules, and by way of abundant caution, a definition now stands placed in the 2016 Rules and which purports to define the expression “*personal effects*” with sufficient clarity. However, the same would not detract from the distinction which the respondents themselves acknowledged in the Circular and intended customs officers to bear in mind the distinction which must be recognised to exist when construing and identifying ‘personal jewellery’ as opposed to ‘jewellery’ *per se*.

15. The expression ‘jewellery’ as it appears in Rule 2(vi) would thus have to be construed as inclusive of articles newly acquired as opposed to used personal articles of jewellery which may have been borne on the person while exiting the country or carried in its baggage. Thus, personal jewellery which is not found to have been acquired on an overseas trip and was always a used personal effect of the passenger would not be subject to the monetary prescriptions incorporated in Rules 3 and 4 of the 2016 Rules.

16. This clearly appeals to reason bearing in mind the understanding of the respondents themselves and which was explained and highlighted in the clarificatory Circular referred to above. That Circular had come to be issued at a time when the Appendices to the 1998 Rules had employed the phrase “used personal effects, excluding jewellery”. The clarification is thus liable to be appreciated in the aforesaid light and



the statutory position as enunciated by the respondents themselves requiring the customs officers to bear a distinction between “personal jewellery” and the word “jewellery” when used on its own and as it appears in the Appendices. This position, in our considered opinion, would continue to endure and remain unimpacted by the provisions contained in the 2016 Rules.

17. This Court had an occasion to consider the issue of ornaments and jewellery being carried as part of baggage and whether the same would qualify as “smuggling” as defined under the Act in **Pushpa Lakhmal Tulani vs. Add. Commissioner, Customs**⁶ albeit in the context of the rules which applied then. The issue of gold ornaments and the application of the rules governing baggage regulation came to be answered in the following terms: -

“19. We are of the view that there is no substance in any of the contentions raised on behalf of the Respondent. Insofar as the issue of jurisdiction is concerned, we are of the view that after three years of the matter remaining pending in this Court with more than 25-30 hearing before different Benches, it would not be equitable to relegate the Petitioner to the statutory remedy. Moreover, learned Counsel for the Petitioner has raised a jurisdictional issue, namely, whether the Respondent Authorities in fact had the jurisdiction in law to issue a show-cause notice in the facts of this case. It is his contention that there was no reason for the Petitioner to declare the personal jewellery brought in by her since they were her personal effects. If this contention is found to be correct, it would follow that the Respondents did not exercise their jurisdiction in accordance with law and in fact had no jurisdiction to issue a show-cause notice. This jurisdictional issue can, of course, be gone into by us in exercise of powers under Article 226 of the Constitution and we do not think it appropriate to relegate the Petitioner to the statutory remedy.

20. Insofar as the question of the intention of the Petitioner to take back the jewellery to England is concerned, we do not think the air

⁶ 2006 SCC OnLine Del 1069



ticket sought to be relied upon by learned Counsel for the Respondent is of much consequence. The ticket, we find, was purchased by the Petitioner in April, 2002, that is, seven months before the date of departure. There could be a change in date by few days here and there particularly because it is a first class ticket and therefore that is of no consequence. Moreover, we cannot ignore the contention of the Petitioner to the effect that her parents are in Indonesia and she had plans of proceeding to Indonesia. She had stated that she had planned to purchase return air tickets from Delhi to Jakarta (Indonesia)/Singapore, as she had been doing so in the past, while in Delhi and she also produced evidence of her similar previous purchases before the Respondents.

21. Some of the jewellery items items purchased by the Petitioner were for her personal use and some were intended to be left with her parents in Indonesia. One of the items confiscated by the customs was a silver panther which was valued in U.K. Pound Sterling 9,460/- for which the Petitioner did not claim exemption from VAT because it was to be taken back to England by the Petitioner. To this extent, the conduct of the Petitioner appears to be consistent and bona fide.

22. The overall circumstances show that even though she brought jewellery of a huge amount into the country, the Petitioner did not seem to have the intention to smuggle the jewellery into India and to sell it off. If jewelleries were to be sold in India, its cost was only about Rs. 25 lakh. is not understood why a person should import jewellery of Rs. 1.27 crores and try to smuggle it in, only to sell it for Rs. 25 lakh. The benefit of doubt must, therefore, go to the Petitioner.

23. We also find from the record that out of the 28 packages that were brought into the country by the Petitioner, as many as 11 items were used jewellery. In fact photographs have been filed on record and which were apparently placed before the adjudicating authority indicating that 11 items have been used by the Petitioner over the years.

24. Insofar as the question of the original packing of the goods is concerned, we do not think that much reliance can be placed by them Respondent. There is no doubt that the jewellery was very expensive. It is common knowledge that jewellery is a delicate item and is put in especially designed boxes so that it may not get damaged while in transit. If these expensive items are put in other boxes, it may cause loss due to breakage to the owner of the jewellery. Learned Counsel for the Petitioner gave us an example of a laptop computer which is packed in the original bag and continues to be retained in that bag all along. Since a laptop computer



continues to be retained in the original bag, it does not mean that the tourist owner is going to sell that item in the black market or in the gray market in India. There can be some exceptions to this Rule. One has to look at the matter in a pragmatic way and one should appreciate that jewellery cannot be treated as other personal effects such as clothing, etc. We have also considered another possible situation. What if the Petitioner had worn the jewellery that she was carrying with her in her hand baggage. Could the Respondents still have confiscated it? Could they have claimed that it was not her “personal effects” and that she had imported it to sell it in India? To our mind the answer has to be in the negative. This is because it could not be said that the jewellery was new goods packed “in their original packaging”, much less to say that it could “be disposed of off-hand”. The expression “new” connotes that which is not at all used. It does not include “like new”.”

18. The decision of this Court in *Pushpa Lekhumal Tulani* ultimately came to be affirmed by the Supreme Court in **Directorate of Revenue Intelligence and others vs. Pushpa Lekhumal Tulani**⁷. We deem it apposite to extract the following passages from the decision of the Supreme Court hereunder: -

“13. Insofar as the question of violation of the provisions of the Act is concerned, we are of the opinion that the respondent herein did not violate the provisions of Section 77 of the Act since the necessary declaration was made by the respondent while passing through the green channel. Such declarations are deemed to be implicit and devised with a view to facilitate expeditious and smooth clearance of the passenger. Further, as per the International Convention on the Simplification and Harmonisation of Customs Procedures (Kyoto 18-5-1973), a passenger going through the green channel is itself a declaration that he has no dutiable or prohibited articles. Further, a harmonious reading of Rule 7 of the Baggage Rules, 1998 read with Appendix E (2) (quoted above), the respondent was not carrying any dutiable goods because the goods were the bona fide jewellery of the respondent for her personal use and was intended to be taken out of India. Also, with regard to the proximity of purchase of jewellery, all the jewellery was not purchased a few days before the departure of the respondent from UK, a large number of items had been in use for a long period. It did not make any difference whether the jewellery is new or used. There is also no relevance of the argument that since all the jewellery is to be taken out of India, it was, therefore,

⁷ (2017) 16 SCC 93



deliberately brought to India for taking it to Singapore. Foreign tourists are allowed to bring into India jewellery even of substantial value provided it is meant to be taken out of India with them and it is a prerequisite at the time of making endorsements on the passport. Therefore, bringing jewellery into India for taking it out with the passenger is permissible and is not liable to any import duty.

14. The learned Senior Counsel brought to our notice that even as per EXIM Code Numbers 7113 19 20 and 7113 19 30 of ITC (HS) Classification of Export and Import items as on 1-4-2002, the import of gold jewellery studded with diamonds or with other precious stones, is freely allowed. Similarly, the learned Senior Counsel rightly submitted that the invocation of Section 80 of the Act is of no use as this section applies only to dutiable and prohibited goods. The accusation of not declaring the goods to the Customs Authority and evading duty alleged to be due thereupon has no legal basis.

15. With regard to the intention of the respondent to take back the jewellery to England is concerned, we do not think that the air ticket sought to be relied upon by DRI is of much consequence. In the reply-affidavit dated 20-10-2014 filed before this Court by the respondent herein, it has been submitted that the so-called enquiry conducted by the appellant DRI subsequent to the passing of the judgment by the High Court was admittedly done after the expiry of more than 1185 days. The respondent herein left for London on 1-3-2007 on Jet Airways Flight No. 9W-0122 and returned to Delhi on 6-3-2007 on Jet Airways Flight No. 9W-0121. It has been further mentioned in the reply-affidavit that the fact of return of the respondent herein to India has been deliberately concealed by the appellant DRI. In fact, the respondent had travelled to London to attend a doctor's appointment with her daughter who was unwell at the relevant time. Further, there is no restriction in UK law which prohibits a person claiming VAT in London from re-importing the items on which VAT has been claimed at a later date. Also, from the present facts and circumstances of the case, it cannot be inferred that the jewellery was meant for import into India on the basis of return ticket which was found to be in the possession of the respondent. Moreover, we cannot ignore the contention of the respondent that her parents at the relevant time were in Indonesia and she had plans of proceeding to Indonesia. Some of the jewellery items purchased by the respondent were for her personal use and some were intended to be left with her parents in Indonesia. The High Court has rightly held that when she brought jewellery of a huge amount into the country, the respondent did not seem to have the intention to smuggle the jewellery into India and to sell it off. Even on the examination of the jewellery for costing purposes, it has come out to be of Rs 25 lakhs and not Rs 1.27 crores as per DRI. The High Court



was right in holding that it is not the intention of the Board to verify the newness of every product which a traveller brings with him as his personal effect. It is quite reasonable that a traveller may make purchases of his personal effects before embarking on a tour to India. It could be of any personal effect including jewellery. Therefore, its newness is of no consequence. The expression “new goods” in their original packing has to be understood in a pragmatic way.

16. We are of the considered opinion that in the absence of any facts on record about the nature and mode of concealment and also any finding of the lower authority that jewellery was kept in a way to evade detection on examination of the baggage, it has to be held that there was no concealment as such. It is seen that the respondent chose the green channel for clearance of her baggage. She committed no violation of law or infraction of any instruction for clearance of the baggage through the green channel as she being a tourist had no dutiable goods to declare under the Baggage Rules. The presumption that the jewellery found in her baggage cannot be considered as personal effects owing to its high monetary value is rebutted herewith and we hold that the respondent was entitled to import personal jewellery duty free.”

19. A more elaborate consideration of the question which stands posited before us appears in a judgment penned by a learned Single Judge of the Kerala High Court in **Vigneswaran Sethuraman vs. Union of India**⁸. Dealing firstly with the applicability of the Baggage Rules, 1998 and their impact on jewellery borne by a passenger on his person, the High Court pertinently held as follows:-

“15. Section 77 of the Act stipulates that the Owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer. The term “baggage” is defined in Section 2(3) of the Act to include unaccompanied baggage. Motor vehicles are excluded from the purview of the said definition. The declaration under’ Section 77 is to be made by the owner of the baggage. The term baggage ordinarily connotes suitcases or bags or containers in which a traveller carries his/her goods or belongings. Section 2(22) of the Act defines the term goods to include baggage. Having regard to the stipulations in Section 77 and the definition of the term “baggage” occurring in Section 2(3) of the Act, the body of a passenger cannot be said to be baggage. In the instant case, the gold chain was worn by the petitioner and was not carried in his baggage.

⁸ 2014 SCC OnLine Ker. 28775



It was therefore not necessary for the petitioner to declare the gold chain worn by him. Section 80 of the Act clarifies the position. Section 80 stipulates that the baggage of a passenger, which contains any article which is dutiable or the import of which is prohibited, may be detained at the request of the passenger for the purpose of being returned to him on his leaving India. The term baggage thus connotes something which is distinct and different from the passenger who has brought the baggage. Section 81 of the Act empowers the Central Board to frame regulations regarding the declaration of the contents of any baggage, its custody, examination, assessment to duty and clearance of baggage and transit of baggage from One customs station to another or to a place outside India. Going by the stipulations in Sections 77, 80 and 81 of the Act, I am persuaded to take the view that the provisions therein can have no application to the instant case where the petitioner, a tourist coming from Sri Lanka had on his person a gold chain which he was wearing and was not kept concealed in his body. Such being the situation, clauses (1) and (m) of Section 111 of the Act can have no application.

16. That takes me to the question whether the petitioner had imported or attempted to import or brought to Indian Customs Waters for the purpose of being imported, gold ornaments, contrary to any prohibition imposed by the Act or any other law, so as to attract clause (d) of Section 111 of the Act. Necessarily therefore the question whether the Act or any other law prohibits a tourist coming to India from wearing gold ornaments arises for consideration. The second respondent has in the impugned order held that a foreigner cannot import even a single gram of gold free of duty or on payment of duty. He does not however refer to the law which imposes the prohibition. The learned counsel appearing for the respondents was also not able to bring to my notice any provision in the Act or the Baggage Rules, 1998 to that effect. No provision in any other law to that, effect was also brought to my notice, in the absence of any prohibition imposed by the Act Or any other law to the effect that a foreign tourist arriving in India cannot wear gold ornaments On his person or wear gold ornaments of 24 carat purity, clause (d) of Section 111 could not have been invoked to confiscate the gold chain worn by the petitioner. The gold chain was not concealed in any package and therefore it could not have been confiscated invoking clause (i) of Section 111. Even if it was dutiable, as it was not concealed in any manner in any package either before or after it was unloaded, it could not have been confiscated invoking clause (i) of Section 111 of the Act. At best, only the duty payable could have been levied. There is also yet another reason why the impugned action cannot be sustained. Even assuming for the sake of arguments that a foreign tourist arriving in India cannot wear gold ornaments on



his/her person in view of an express provision of law in that regard (such a statutory provision was not brought to my notice and it is not referred to in Ext. P3 order), the respondents should have informed the petitioner that he cannot wear it for the reason that the import of it is prohibited and given him the option of having the goods detained for the purpose of being returned to him on his leaving India as contemplated in Section 80 of the Act. The respondents have not stated in Ext. P3 that such an option was extended to him and therefore for that reason also, the impugned order is liable to be set aside.

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21. I shall now consider whether the Baggage Rules, 1998 prohibit a tourist Of foreign origin from bringing even a single gram of gold free of duty or on payment of duty to India as stated by the second respondent in Ext. P3. Rule 7 of the Baggage Rules, 1998 stipulates that a tourist arriving in India shall be allowed clearance free of duty, articles in his *bona fide* baggage to the extent mentioned in column (2) of Appendix E. The petitioner is a tourist of foreign origin. This fact is not in dispute. Going by entry (b) in Appendix-E, tourists of foreign origin, other than those of Pakistani origin coming from Pakistan, coming to India by air can be allowed clearance free of duty (i) his or her used personal effects and (ii) : articles other than those mentioned in Annexure-I, up to a value of Rs. 8000 for personal use of the tourist or as gifts and travel souvenirs if these are carried on the person or in the accompanied baggage of the passenger. Annexure I referred to in Appendix E is extracted below for easy reference:—

1. Firearms.
2. Cartridges of fire arms exceeding 50.
3. Cigarettes exceeding 200 or cigars exceeding 50 or tobacco exceeding 250 gms.
4. Alcoholic liquor or wines in excess of two litres.
5. Gold or silver, in any form, other than ornaments.

22. The effect of the aforesaid stipulations in Appendix-E and Annexure-I of the Baggage Rules, 1998 is that a tourist of foreign origin coming to India by air is not entitled to duty free clearance of firearms, cartridges of fire arms exceeding 50 numbers, cigarettes exceeding 200 or cigars exceeding 50 or tobacco exceeding 250 gms, alcoholic liquor or wines in excess of two litres and gold or silver in any form other than ornaments. It is evident from the Baggage Rules, 1998 that the restriction or prohibition is on the duty free clearance of gold or silver in any form other than as ornaments and not on the import as such. It is not stipulated in the Baggage Rules, 1998 that a foreign tourist who is coming to India by air



cannot wear a gold chain or even his/her wedding ring. In the absence of an express provision in the Baggage Rules, 1998 prohibiting a foreign tourist entering India from wearing a gold chain or other gold jewellery, I am of the considered opinion that the impugned order was passed without any legal foundation.

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26. It is evident from a reading of the aforesaid notifications that they are notifications issued in exercise of the powers conferred on the Central Government Under sub-section (1) of Section 25 of the Customs Act, 1962 exempting gold and silver in any form but excluding ornaments studded with stones or pearls; from customs duty/as specified in the First Schedule to the Customs Tariff Act, 1975 to the extent mentioned in the notifications. A foreigner cannot claim the benefit of the said notification. It applies only to Indian citizens. The notifications do not prohibit import of gold or gold ornaments, but only exempt duty to the extent mentioned therein. The reliance placed on Notification No. 117/1992- Cus., is therefore, misconceived : The term “smuggling” is defined in Section 2(39) of the Act. As per the said definition 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 of the Act., As I have held that the order of confiscation was passed without any legal foundation, the finding in Ext. P3 that the petitioner attempted to smuggle the gold chain cannot be sustained, consequently, I hold that the order of confiscation and the levy of penalty are liable to be set aside.

27. The Customs Act, 1962, or the Baggage Rules, 1998 do not stipulate that a foreign tourist entering India cannot wear gold ornaments on his person. The Customs Act, 1962 and the Baggage Rules, 1998 do not provide sufficient warning to foreign tourists entering India that wearing a gold chain is prohibited. The Act and the Rules do not even remotely indicate that a foreign tourist entering India cannot wear a gold chain on his person, in other words, foreign tourists entering India are in a boundless sea of uncertainty as to whether it is prohibited or not. As the Customs Act, 1962 and the rules framed there under contemplate confiscation and levy of penalty as also prosecution, the State has a duty to specify with a degree of certainty as to what is prohibited and what is not, without leaving it to the foreign tourist to guess what is prohibited and what is not.”

20. The learned Judge proceeded further to enter the following remarks with respect to a lack of clarity in the rules itself as would be



manifest from a reading of Para 30 of the report: -

“30. The principle laid down in the aforesaid decisions is founded on a universal sense of fairness or reasonableness. The apprehension voiced by the Apex Court in *Kartar Singh v. State of Punjab* [(1994) 3 SCC 569] and by the Supreme Court of United States in *Jay Giaccio v. State of Pennsylvania*, (1966) 382 US 399; ‘has proved to be true in the instant case where, without the backing of a law which expressly prohibits a foreign tourist entering India from wearing a gold chain’ the respondents have, relying on a notification which has no application, confiscated the gold chain worn by the petitioner holding that he is not entitled to import. free of duty or on payment of duty even a single gram of gold. If that were the law, what fate will befall foreign tourists with gold capped teeth who arrive in India. Though the learned counsel appearing for the respondents submitted that the gold chain worn by the petitioner was of 24 carat purity, which is prohibited, no statutory stipulation to that effect was brought to my notice. In the absence of a statutory prescription in express terms to the effect that a foreign tourist “entering India should not wear 24 carat gold jewellery much less gold jewellery, I am of the opinion that the impugned order cannot be sustained. The Apex Court has in *Whirlpool Corporation v. Registrar of Trade Marks; Mumbai* ((1998) 8 SCC 1: AIR 1999 S.C. 22) reiterated the proposition that the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution of India is not affected in spite of alternative statutory remedies in cases where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. In the view that I have taken it has to be necessarily held that the order of confiscation passed in the instant case is one without a legal foundation. I therefore overrule the contention of the learned counsel appearing for the respondents that the petitioner should be relegated to the alternative statutory remedies available to him.”

21. When tested on the aforesaid principles, it becomes apparent that the Joint Commissioner of Customs has clearly misconstrued the scheme as well as the objectives of the 2016 Rules. In the absence of the case of the petitioner having been tried or evaluated on the basis of the postulates that we have enunciated hereinabove, we find ourselves unable to sustain the order impugned.



22. Accordingly, and for all the aforesaid reasons, the Order-in-Original dated 21 September 2023 is hereby quashed and set aside. The matter shall in consequence stand remitted to the Joint Commissioner who shall evaluate the prayer for release bearing in mind the observations appearing hereinabove.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

NOVEMBER 27, 2024/RM/RW