
(2012) 09 AHC CK 0109

In the Allahabad High Court

Case No : Customs Appeal No. 364 of 2010 and Customs Appeal No. 1 of 2012

Zaki Ishrati

APPELLANT

Vs

Commissioner of Customs and Central Excise, Kanpur

RESPONDENT

Date of Decision : 13-09-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14
Customs Act, 1962 — Section 108, 110, 111(d), 112, 123
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 35(1)
Penal Code, 1860 (IPC) — Section 26

Citation : (2012) 10 ADJ 453 : (2013) 291 ELT 161

Hon'ble Judges : Sunil Ambwani, J; Aditya Nath Mittal, J

Bench : Division Bench

Advocate : A.K. Jain and Mr. Rajeev Chaddha, for the Appellant; S.P. Kesarwani, for the Respondent

Final Decision : Dismissed

Judgement

1. The Customs Appeal No. 364 of 2010 u/s 130 of the Customs Act, 1962 arises out of an order dated 28.4.2010 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi dated 28.4.2010 by which the CESTAT dismissed the appeal against the order of the Commissioner (Appeals) upholding confiscation of the gold treating them as gold with foreign marks, and holding that the appellant has failed to prove the illicit nature of the gold. The Commissioner (Appeals) by his order dated 28.4.2010 dismissed the appeal against the order of the Addl. Commissioner, Customs and Central Excise, Kanpur ordering for the confiscation of 1681.500 grams of gold biscuits and pieces u/s 111 (d) of the Customs Act, 1962. He had also imposed penalty of Rs. 50,000/- each upon Shri Faiyaz Ahmad and Syed Zaki Ishrati on 3.6.2005. The Customs Appeal No. 1 of 2012 u/s 130 of the Customs Act, 1962 arises out of an order passed by CESTAT, New Delhi dated 15.6.2011 by which it dismissed the application for rectification of alleged mistakes in the order of CSAT No. 510 of 2010-SM dated 28.4.2010. The application was filed u/s 129B (2) of the Customs

Act, 1962. It was dismissed as the CESTAT did not find any error on the face of the record warranting the recall of the order and for rehearing the appeal.

2. Brief facts giving rise to these appeals, as stated in the order of the Addl. Commissioner (Customs), Central Excise, Kanpur are as follows:-

Acting on an intelligence, a team of Customs & Central Excise officers of Agra Division visited the residential premises situated at 35/233 B, Indra Puri. At the time of visit, Sh. Faiyaz Ahme S/o. Sh. Ashiaz Ahmed R/o 28, Deep Nagar, manager of M/s. Zarafahan Chemical (P) Ltd., which is also situated in the same premises, was available. The officers executed the search warrant issued by the Asstt. Commissioner, Central Excise, Agra upon Sh. Faiyaz Ahmad before two independent witnesses and searched the residential portion. During the course of search, four gold biscuits marked as "JONSON MATHEY 9990 LONDON 10 TOLAS" weighing 466.550 gms. were recovered from a drawer of table kept in a room at ground portion of residential premises. Further 16 pcs comprising 8 gold biscuits (each biscuit cut into 2 pcs.) of foreign origin, wrapped in a paper & found hidden in grass of south lawn behind the main portion, were also recovered. Of the 16 pieces comprising 4 gold biscuits bore marking as:

PM 10 TOLAS

AF 999

SWISS ON ESSAYEUR ON REST 4 PCS FONDEUR

4 PCS.

and other pieces comprising remaining 4 gold biscuits bore markings as (1) "LUNGOLD SIVER 9999 FINDE GOLD HONGKONG" (2) 9999 (3) 100% PURE GOLD TEA BHANGE/GOLD (4) 9999 (5) 9999 (6) 5000 (7) Written in some foreign language not decipherable AND (8) 100% PURE GOLD 500 TEA BHANGE/GOLD DEALER. The 16 pcs. comprising eight gold biscuits were weighed and found to be 1214.950 gms. Sh. Narendra Parswani, and assayer, who was also called on the spot, tested the purity of the recovered gold biscuits and reported in his statement before the officers that the purity of the 20 biscuits/pcs. gold weighing 1681.500 gms. Was 99.99%. He also stated the total value of gold biscuits & pcs. thereof as Rs. 7,71,273/-.

On being queried, Sh. Faiyaz Ahmad could not produce any evidence showing lawful import or acquisition of the recovered gold biscuits and pcs. of gold biscuits or permission of the Reserve Bank of India as required for import of recovered gold biscuits.

Since no documents/evidences showing the licit import of recovered gold biscuits & pcs. of gold biscuits, could be produced, the officers under the reasonable belief that the recovered gold had been smuggled and thus liable to confiscation under the Customs Act, 1962, seized the 1681.500 gms. gold valued at Rs. 7,71,273/- under Sec. 110 of the Act *ibid*.

Besides admitting the recovery and seizure of contraband gold biscuits & pcs. thereof as mentioned above, Sh. Zaki Ishrati Managing Director of M/s Zarafshan Chemicals (P) Ltd. 10-B, Saresh nagar, Agra, in response to summons issued upon him, in his voluntary statement dated 01.12.94 admitted the recovery and seizure of 1681.500 gms. gold biscuits of foreign markings totally valued at Rs. 7,71,273/- on 10.8.94 from the residential premises situated at 10-B, Saresh Nagar, Agra.

Therefore S/Sh. Faiyaz Ahmad and Zaki Ishrati were served with a notice C. No. VIII (10) Cus/Gold/2/94/1574-76 dated 25.1.96 to show cause to the undersigned as to why 1681.500 gms. gold biscuits and pieces thereof of foreign origin totally valued at Rs. 7,71,273.00 should not be confiscated under Sec. 111(d) of the Customs Act, 1962 and why penalty not be imposed upon them under Sec. 112 of the Customs Act, 1962.

In reply to the aforesaid show cause notice, Sh. Faiyaz Ahmad vide his letter received in this office on 21.3.95 stated that the assayer report was doubtful in as much as he was not competent and authorized to assess gold biscuits that the report simply indicates that the gold pieces bear foreign markings & no origin of country has been mentioned, that the purity of the gold had been assessed by the assayer as 999 but in quite a few pieces the figures written were 9999 & these figures did not prove that the gold was of foreign origin.

Sh. Faiyaz Ahmad further stated that his initial statement was recorded under duress and his revised statement was not an after thought but was based on facts. He also requested for personal hearing and cross examine the assayer.

Sh. Zaki Ishrati also stated similar to what Sh. Faiyaz Ahmad ad already stated as aforesaid.

3. Learned counsel for the respondents raised the objections to the seizure on the ground that except four gold biscuits, which were recovered from the drawer of the table in the premise of "Jonson Mathey London Brand", covered under Receipt No. 170 dated 6.7.1994 of Khairati Ram Das Roz, Delhi (for five biscuits), the 16 pieces did not bear any country or origin. On some of these pieces the number 999 was described and on some pieces it was 9999 and on other pieces 5000 was described. If 999 refers to purity of gold, the other pieces could not be taken as of purity of 5000. On some pieces the description in Hindi script was found and therefore it was difficult to say that all the gold pieces seized were of foreign origin. In the Assayer's report dated 10.4.1994 the purity of gold was mentioned as 999. The assayer did not examine the marking as 0000 and 5000 in giving his opinion about the purity. He mentioned the purity in casual way but did not stress upon cross-examination of the assayer.

4. The case was adjudicated by Addl. Commissioner, Customs and Central Excise, Kanpur. By his order in original dated 10.4.1996 he directed seizure of 1681.500 grams of gold biscuits and pieces thereof, absolutely, u/s 111 (d) and also personal penalty of Rs. 50,000/- on Shri Faiyaz Ahmad and Shri Zaki Ishrati u/s

112 of the Customs Act, 1962.

5. The appeals filed by Shri Faiyaz Ahmad and Shri Zaki Ishrati before the Commissioner (Appeals), Allahabad were dismissed on 20.2.1997. The CEGAT, New Delhi decided the appeals against the order of the Commissioner (Appeals), Allahabad vide its final order dated 28.10.1998 and remanded the case back to Adjudicating Authority with directions to re-adjudicate the case after examining the matter afresh, particularly with reference to the retracted statement dated 12.8.1994 of the Manager and after providing an opportunity to the appellants.

6. During the pendency of the remand proceedings Shri Faiyaz Ahmad died on 18.11.1998. Shri A.K. Jain appearing for Shri Zaki Ishrati has challenged the proceedings on the ground of irregularities committed by the officers at the time of seizure, the deficiency in the show cause notice and also the affidavit of Shri Faiyaz Ahmad dated 12.8.1994, retracting his statement.

7. A written brief was filed by Shri A.K. Jain on behalf of Shri Zaki Ishrati on 12.1.1994 raising following issues:-

(A) The assayer Sh. Narendra Ku. Paraswani was not an approved valuer under the Customs Act, 62, he did not have the required equipment to test the purity of gold and that the seized gold should have been sent to the Govt. of India Mint to test its purity.

8. The Adjudicating Authority held that Shri Narendra Kumar Parswani of M/s Bhajandas and Bros. Jewellers, Agra was called by the customs officers to make an on the spot assessment of the weight and purity of the seized gold, which is the usual practice in such cases. Shri Parswani gave a certificate of gross and net weight and value of the gold. He did not certify the purity of the gold pieces. He mentioned the marking of purity inscribed on the metal and gave his independent opinion after conducting the "kasauti test", which has its own limitations, but is considered as sufficient proof. The adjudicating authority observed:-

As regards sending the gold to Govt. of India Mint to test its purity, I find that no such demand was made by the party on or before the date of sending reply to the show cause notice therefore the same cannot be acceded to at this stage of denovo adjudication. Moreover, no such procedure has been prescribed under customs law.

9. The Adjudicating Authority found that assayer was not approved valuer under the Customs Act as no valuer has been approved under the Customs Act at Agra, the party in their reply to the show cause notice and also at the time of personal hearing did not contest that the four gold biscuits recovered from the drawer of the table were of foreign origin and claimed that the four pieces recovered at the time of search on 10.8.1994, was the balance quantity out of five pieces of foreign gold purchased from "Kharati Ram Des Raj Delhi" under Receipt No. 170 dated 6.7.1994. Having accepted that the gold biscuits are of foreign origin, they

were not permitted to contest the position. As regards the 16 pieces of gold comprising of 8 gold biscuits recovered from beneath the grass of the lawn attached to the premises, the Panchnama mentioned that they contained inscriptions of foreign language. The concealment of these gold pieces and the foreign marking were found sufficient to create a reasonable belief of gold being of foreign origin, which in the absence of any evidence for their import by the party becomes smuggled gold. The Adjudicating Authority observed that once this reasonable belief is the basis for seizure u/s 110, the burden lies upon the appellant to prove that they are not smuggled nature of items notified u/s 123 (2) of the Customs Act, 1962. No valid proof of the non-foreign original of these goods was brought on record and thus the department's case of foreign original of the seized goods was unrebutted and proved.

10. The Adjudicating Authority found that Shri Zaki Ishrati and Shri Faiyaz Ahmad, Manager of Zarafahan Chemical (P) Ltd. had in response to the summons appeared before the Superintendent, Central Excise, Agra on 1.12.1994 and in their statements recorded separately u/s 108 of the Customs Act, 1962 stated that the four gold biscuits bearing foreign marks seized on 10.8.1994 from the premises at 10B Suresh Nagar, Agra were part of five gold biscuits, which they had purchased from M/s Kharati Ram Des Raj, Delhi under Bill No. 170 dated 6.7.1994. Out of these one was melted in the manufacturing premises of the company for making liquid gold. Both of them, however, pleaded ignorance about the 16 pieces of gold comprising of 8 gold biscuits recovered from the grass in the lawn. They stated that the same must have been kept by someone to implicate them. They did not accept the ownership of the 16 pieces of gold.

11. The prosecution relied upon the statement of Shri Faiyaz Ahmad, Manager dated 10.8.1994 u/s 108 of the Customs Act, 1962, wherein he stated that all the seized biscuits and pieces of gold were purchased by him on 9.8.1994 from Choti Saraf, Firozabad on cash payment without any bill or voucher. Shri Faiyaz Ahmad repeated the statement on 11.8.1994. Subsequently, by his affidavit dated 12.8.1994 he retracted the statement, however, the source of acquisition of the gold was not retracted. The Adjudicating Officer did not accept the argument that the gold was recovered in the factory-cum-office premise, a part of which is used by Shri Zaki Ishrati as guest house. The prosecution stand found support from the Panchnama and the statement of Shri Faiyaz Ahmad that the gold was recovered from the residential portion.

12. Shri Faiyaz Ahmad had retracted the statement by his affidavit on 12.8.1994. Shri Zaki Ishrati, however, did not retract his statement. His statement recorded in question answer form before the Superintendent (P), Central Excise, Agra on 1.12.1994 on question Nos. 9 and 10 reads as follows:-

Q.9 Do you know that four gold biscuits of foreign making weighing 466.550 gms were recovered from a drawer of a table kept in a room in the residential portion and sixteen pieces of foreign marked gold biscuits weighing 1214.950 gms from

the grass in the lawn.

Ans.9 (Sh Ishrati) Yes I believe the above mentioned gold was recovered from the premises.

Q.10 Do you possess import document of the above said recovered gold?

Ans.10 (Sh Ishrati) The 4 gold biscuits which were recovered from the drawer of a table kept in the room in the residential portion were purchased from M/s Kharati Ram Des Raj. Dehi under a proper receipt No. 170 dt. 06.07.94.

13. The Adjudicating Officer thus did not find any infirmity in the show cause notice regarding the recovery of the gold.

14. The Adjudicating Officer found that the statements were recorded u/s 108 of the Customs Act, 1962 before the Gazetted Officer. The wrong mention of the provision namely Section 14 of the Central Excise Act, would not render the statements inadmissible or take away their evidenciary value.

15. On the question of admissibility of the statements the Adjudicating Officer relied upon K.I. Pavunny Vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin, ; Bhagwan Singh v. State of Punjab, AIR 1952 (SC) 214 and Balbir Singh Vs. State of Punjab, in which the Supreme Court held that confession can form the basis for conviction. If it is retracted, it must be tested whether the confession is voluntary. The burden of proof that the confession was not voluntary and was obtained by threat or coercion is on the accused. If the retracted confession is believed to be voluntary and true, it may form the basis of a conviction but the rule of practice and prudence required that it should be corroborated by independent evidence.

16. The Adjudicating Officer, thereafter, considered the judgments of the Supreme Court in Kashmira Singh Vs. State of Madhya Pradesh, and Vallabharaya Swami Varu (Deity) of Swarna, represented by its Executive Officer Vs. Deevi Hanumancharyulu and Others, and found that since the statement of persons are corroborated by recoveries, and the parties has not adduced any evidence to be established that the statements were recorded under duress or coercion, the statements will carry full evidenciary value.

17. The demand for cross-examining the panch witnesses was not accepted on the ground that on the report received from Agra Division, the panch witnesses were not traceable. As regards the cross-examination of the assayer, it was found that his report was in the capacity of expert, and the experts are not generally allowed to be cross-examined. The two jewellers, whose statements were recorded were not relied upon by the prosecution and therefore the request to produce them as witnesses was not accepted. The Addl. Commissioner, Customs, Central Excise, Kanpur thus passed the order of confiscation of gold biscuits and imposition of penalty on both Shri Faiyaz Ahmad and Shri Syed Zaki Ishrati.

18. The Commissioner (Appeals), Customs and Central Excise, Kanpur gave following reasons to reject the appeal:-

I have carefully examined the case records, grounds of Appeal and also the written submission made by the Appellants, through their Advocate, at the time of personal hearing and observe that the officers visited the premises and seized the 1681.500 Gms. of gold biscuits and pieces on a reasonable belief that they were of foreign origin and smuggled into India. Shri Faiyaz Ahmad could not produce any evidence showing lawful import or acquisition of the recovered gold and further Shri Zaki Ishrati in his statement dated 01.12.94 has also accepted that the gold biscuits were of foreign origin. The Manager of the Appellants retracted his statement of 10.08.94 on 12.08.94, but Shri Zaki Ishrati, Managing Director has voluntarily accepted in his statement dated 01.12.94 admitted that the gold biscuits were of foreign brand. It is also clear that the Manager himself retracted the statement, but could not produce anything, which can prove their lawful possession, acquisition of the gold. The initial statement dated 10.8.94 and 11.8.94 were also recorded u/s 108 of Customs Act, 1962 and before the Superintendent, a Gazetted Officer, who later on endorsed the same. The adjudicating Officer has given his findings on the issue of retraction of the statement and I am convinced with the findings observe that this statement does not anyhow affect the case. The concealment of the gold in the grass and the marking in foreign language inscribed on them are sufficient to create a reasonable belief that the goods were of foreign origin and brought into India and thus the burden lies on the Appellants to prove that the goods were not smuggled into India, but the Appellants have lawful possession of the same. The Appellants could not produce any document showing their lawful possession, further they have stressed only on the points, which were not relevant of the case. On going through the entire case records and submission of the Appellants, I am of the opinion that foreign gold in question was not imported into India by lawful means and thus the confiscation of the same is upheld and once it is proved, the Appellants have rightly been penalized.

19. The CESTAT considered the circumstances in which the gold biscuits were recovered. On the knowledge or concern about 16 pieces of gold seized from beneath the grass of the garden, it observed that under the circumstances in which the gold was seized, and on formation of reasonable belief that it was smuggled in nature, the burden was squarely on the appellant to prove that the gold was procured by them legally. No such evidence was led.

20. The CESTAT found that the letters of Swarnkar Sangh, Shree Sarafa Committee and Agra Jewellers Association that the gold carrying foreign mark need not necessarily be of foreign origin, may be theoretically possible, unless some forgery was done, was not acceptable on the ground that the Adjudicating Authority has come to conclusion that the seized gold was of foreign origin and that the appellant had failed to discharge the burden of proof as contemplated u/s 123 of the Customs Act.

21. The CESTAT found that the statement of Shri Faiyaz Ahmad was clearly incriminating in nature. He sent retraction in the form of telegram and also in the form of affidavit filed in person before the Magistrate, and sent it to Collector of Central Excise, Kanpur. In the overall context including the circumstances in which the gold was seized, his subsequent retraction was not treated to have taken away the effect of statement, as the retraction was not addressed to the officer to whom the statement was given. At the most the retraction could be treated as representation or a complaint to the Collector of Central Excise, Kanpur. Shri Faiyaz Ahmad was arrested and produced before the Magistrate. No complaint was made to the Magistrate at the time of remand, to the involuntary nature of the statement.

22. So far as the statement of Shri Zaki Ishrati, the appellant before us, the CESTAT found that it was not disputed by the department that the officer recording statement did not append his signatures on the statement and claimed that his statement cannot be treated as statement u/s 108, is to be accepted. The CESTAT found that the statement, which can be considered as letter or communication from Shri Jaki Ishrati was made in his own hand and was apparently delivered to the Investigating Officer. If it was taken as report to the Investigating Officer, its validity and evidenciary value could not be underestimated. The CESTAT found the reliance upon the statement/ report dated 1.12.1994 of Shri Zaki Ishrati also to be justified. In his statement Shri Zaki Ishrati had clearly stated that he has no concern or knowledge to the gold recovered from the back of the building under the grass and he was unaware as to how it reached there. He as Managing Director of the Company feigned about the gold recovered from the lawn and stated that he was not concerned with the same. Subsequently, he claimed that the entire gold seized in the recovery proceedings including gold from the lawn belongs to him. This contradictory statement was also strange and was treated to be a circumstances in the failure to discharge the burden that the gold biscuits were legally procured.

23. The application for rectification of the alleged mistakes in the CESTAT order dated 28.4.2010 filed by Shri Zaki Ishrati, the appellant was rejected by the CESTAT after discussing the facts on following reasoning:-

7. From the above, the following emerges:-

a) The order was dictated in the open Court in the presence of representatives from both sides. The order is also subject to further appellate remedy as provided under the law.

b) A wrong application dated 1.6.2010 was admittedly filed which was received on 8.6.2010 and a correct application was subsequently filed which was received on 14.6.2010. There are wide variations in the contents and tenor of the applications received on 8.6.2010 and 14.6.2010 and the submissions are based on hearsay and not supported by any affidavit of his counsel.

c) The prayer in the correct application is for recall of the order and rehearing the

appeal which is beyond the scope of application for rectification of mistake as contemplated u/s 129(B)(2).

d) The application proceeds on the presumption that all grounds mentioned in the appeal memo have been actually canvassed by the learned advocate during the hearing. It also overlooks the fact that arguments by both sides precede dictation of the order. After the hearing is over, when the order being dictated is going against any party, they cannot be allowed to plead fresh grounds, as such a procedure is not a healthy one. The application also proceeds on the assumption that the only submissions which have been specifically discussed in the order have been considered by the Tribunal. It also overlooks that whatever submissions not specifically discussed did not find favour with the Tribunal. The non acceptance of the submissions/view points urged on behalf of either party cannot be treated as errors or mistakes that too apparent on face of records.

e) Certain grounds on which the application has been made is also on erroneous appreciation of facts for example, the ground that the original authority did not invoke section 123 of the Customs Act in his order, which is clearly erroneous. Similarly, the ground that there is no allegation against the applicant in the show cause notice is also clearly erroneous.

f) The fact remains that not all grounds in the appeal memoranda were argued during personal hearing. Whatever grounds argued before the tribunal by the learned Advocate have been considered and not found acceptable. This application in my considered opinion, stands filed merely because the appeal has been decided against the applicant.

g) There are no errors on the face of the records warranting recall of the order and for rehearing the appeal.

8. In view of the above, I hold that the application is devoid of merits and deserves to be rejected. Accordingly, application is rejected.

24. Shri A.K. Jain, representing the appellant submits that Shri Parswani, the assayer did not state in his report that he was approved by the department for ascertaining the purity of gold. He was approved as valuer of income tax department and was not competent to assess gold. The panchnama did not mention the word "fine gold". The assayer in his report had mentioned the pieces of gold as "fine gold". The assayer did not indicate the country or origin in assessing purity as 0.999/-. Quite a few pieces did not indicate foreign origin and thus report is unreliable. At the time of personal hearing the assayer was not allowed to be cross-examined inspite of request.

25. Shri A.K. Jain submits that inspite of repeated and continuous requests, the seized gold was not sent to the Government of India's Mint to ascertain its purity as well as country of its origin. The statement of late Faiyaz Ahmad dated 11.2.1994 did not bear the signature of Central Excise/ Customs Officer. He submits that the purity of gold cannot be ascertained by "kasauti check" and the

expression "tolas" is never used in gold biscuits of foreign origin.

26. Shri Jain has relied upon the circumstances in which Shri Narandra Kumar Parswani, the valuer; Shri Vikas Gupta and Shri Radhey Krishna Verma, panch witnesses, Vimal Chandra Jain and Praveen Kapoor were not summoned for cross-examination. In order to prove that the pieces of gold were of foreign origin, the Adjudicating Authority should have sent the same to the mint for testing.

27. Shri Jain submits that certificate of Gold Dealers Association, Agra and other certificates of Sarafa Associations should have been taken into consideration. The bail application of late Faiyaz Ahmad was considered by the Chief Judicial Magistrate, Agra. An affidavit was also filed on behalf of Shri Faiyaz Ahmad before the Special Judicial Magistrate, Kanpur on 23.8.1994. The bail order dated 31.8.1994 by the Special Judicial Magistrate, Agra should also have been taken into consideration as evidence in the denovo adjudication order. Shri Jain relied upon Customs v. Dina Aruna Gupta, 2011 (274) ELT 323 (Del) in which the Delhi High Court observed in para 32 as follows:-

32. Normally, the test applied for testing gold is furnace test but the same was not applied or resorted to in the present case. There is no evidence on record that P.W. 3 Sr. Ramesh Chand Aggarwal was possessing any proficiency in the matter of testing gold. The certificate/report Ex. P.W. 1/F does not contain any data. Whereas the certificate must contain actual data and not mere opinion. Further, the gold of foreign origin has to be proved by the authentic manner. Law is well settled that mere marking cannot be taken as a proof of the gold for origin of the gold as markings and labels. In such a situation, the statement of the accused u/s 108 of the said Act has no consequence.

28. Shri Jain has relied upon Commissioner of Customs (Import), Mumbai v. Konkan Synthetic Fibres, 2012 (278) ELT 37 (SC) in which it was held that in fiscal or taxation laws, while ascertaining the scope or expression use in a particular entry, the opinion of the experts in the field of trade should not be ignored, rather it should be given due importance. In Asstt. Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd., 2008 (230) E.L.T. 385 (SC) the Supreme Court held that in case of application for rectification of mistake a patent manifest and self-evident error, which does not require elaborate discussion of evidence or argument can be said to be an error apparent on the face of record and can be corrected while exercising the certiorari jurisdiction. An error apparent means an error which strikes on mere looking and does not need long drawn-out process of reasoning on points, where there may conceivably be two opinions.

29. We have perused the records, and considered the submissions.

30. In Noor Aga Vs. State of Punjab and Another, , the Supreme Court considered the explanation to Section 35(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985. It was held that the words "reason to believe" is question of fact. In para 37 the Supreme Court held:-

37. It is the consistent view of this Court that "reason to believe", as provided in several provisions of the Act and as defined in Section 26 of the Penal Code, 1860 on the part of the officer concerned is essentially a question of fact. The procedures laid down under the Act being stringent in nature, however, must be strictly complied with.

31. In Union of India (UOI) Vs. Padam Narain Aggarwal etc., , the Supreme Court discussed the object and enquiry u/s 108 of the Customs Act and held in paragraphs 39, 40 and 41 as follows:-

39. As already noted in the earlier part of the judgment, Sections 107-09 confer power on Custom Officers to examine persons, to summon them to give evidence and to produce documents. Section 108 which is a material provision, reads thus:

108. Power to summon persons to give evidence and produce documents.--(1) Any gazetted officer of customs duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.

(2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorized agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject, respecting which they are examined or make statements and produce such documents and other things as may be required;

Provided that the exemption u/s 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

This section does not contemplate magisterial intervention. The power is exercised by a Gazetted Officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him. The provision thus enables the officer to elicit truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident.

40. As held by Constitution Bench of this Court in Romesh Chandra Mehta Vs. State of West Bengal, , a person called upon to make a statement before the

Custom Authorities cannot be said to be an accused of an offence. It is, therefore, clear that if a person is called upon to make a statement u/s 108 of the Act and a summon is issued for the said purpose, he is bound to comply with such direction. This view has been reiterated in several cases thereafter.

41. In *The Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. and Others*, this Court stated:

11. Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the magistrate at that stage. The entire idea behind the provision is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost.

(emphasis supplied)

It is thus clear that statements recorded u/s 108 of the Act are distinct and different from statements recorded by Police Officers during the course of investigation under the Code.

32. The scope of Section 123 of the Customs Act, 1962 was discussed by the Supreme Court in *Union of India and Others Vs. Rajendra Prabha and Another*. It was held that where the authorities on the basis of materials on record, which may be sufficient in the circumstances of the case came to conclusion that gold biscuits have been in possession of the respondents were liable for confiscation and respondents committed offence u/s 112, even without taking option of presumption u/s 123, the department could have directed confiscation as the burden in such case falls upon the person from whose possession such gold biscuits of foreign markings were seized. In this case the Supreme Court held that the High Court could not have interfered with the findings of the authorities on the ground that the department had failed to discharge initial burden of proving that the goods were smuggled.

33. The four gold biscuits recovered from the drawer of the appellant were of foreign origin. The appellant produced receipt No. 170 dated 6.7.1994 from Khairati Ram Desraj Delhi for purchase of five biscuits out of which one was stated to have been melted. The appellant thus proved the valid possession of these four biscuits. Regarding 16 pieces of gold comprising of eight gold biscuits recovered from beneath the grass of the lawn attached to the premises, the suspicion of the authorities cannot be doubted. The concealment of these gold pieces with foreign markings were sufficient to create reasonable belief that the gold being of foreign origin, in the absence of any evidence of their valid import

was smuggled gold. The burden thus u/s 123 (1) was on the appellant to prove that the goods were either non-foreign origin or were validly purchased. Shri Faiyaz Ahmad tried to retract his statement that he had not purchased the gold recorded, on 10.8.1994, which was not accepted by the adjudicating officer. Shri Zaki Ishrati, however, did not retract his statement.

34. We do not find any error in the findings recorded by the CSTAT that the appellant had given the statement recorded on 10.8.1994 u/s 108 of the Customs Act under any coercion. The statements recorded u/s 108 were therefore rightly accepted for exercising powers of seizure.

35. No other ground was pressed.

36. We do not find any error in the reasoning given by the customs authorities and the Tribunal that the accused had failed to discharge burden.

37. We also do not find any good ground at this stage to consider the prayer of learned counsel for the appellant to send the gold biscuits now to the mint for ascertaining its purity as well as the country of its origin. No such prayer was made, before the customs authorities. The custom appeals are dismissed.