IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

ORIGINAL SIDE

Present:

The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Aryak Dutt

APO 139 of 2018
With
WP No. 279 of 2016

Shri Gopal Saha
Vs.
Union of India & Anr.

And

APO 140 of 2018
With
WP No. 280 of 2016

Shri Ajgar Seikh
Vs.
Union of India & Anr.

And

APO 143 of 2018
With
WP No. 280 of 2016

Union of India & Anr.
Vs.
Ajgar Seikh

And

APO 144 of 2018

With
WP No. 279 of 2016

Union of India & Anr.
Vs.
Gopal Saha

For the Appellant in APO 139 of 2018 and APO 140 of 2018 and For the Respondent in APO 143 of 2018 and APO 144 of2018	:	Mr. Arijit Chakraborti, Adv. Mr. Nilotpal Chowdhury, Adv. Mr. Prabir Bera, Adv. Mr. Mainak Mazumdar, Adv.
For the Respondent in APO 139 of 2018 and APO 140 of 2018 and For the Appellant in APO 143 of 2018 and APO 144 of 2018	:	Mr. Bhaskar Prosad Banerjee, Sr. Adv. Mr. Abhradip Maity, Adv. Ms. Elora Pandit, Jr. Adv. Ms. Pooja Basak, Adv.
Hearing Concluded on	:	August 28, 2026
Judgement on	:	September 10, 2026

DEBANGSU BASAK, J.:-

1. We have heard four appeals directed against the judgement and order dated April 27, 2016 passed in two writ petitions.

2. By the impugned judgement and order, learned Single Judge has disposed of two writ petitions by modifying the adjudicating order dated November 24, 2015 passed by the Commissioner of Customs (Preventive), Kolkata and reduced the penalty imposed on the two writ petitioners.

3. Out of the four appeals, APO 139 of 2018 has been filed by the writ petitioner in WP No. 279 of 2016 while the writ petitioner in WP No. 280 of 2016 has filed the appeal being APO 140 of 2018. Customs Department has filed APO 143 of 2018 in respect of WP No. 280 of 2016 while APO 144 of 2018 is in respect of WP No. 279 of 2016.

4. For the sake of convenience, and since, the writ petitioners have urged the same grounds in their two appeals and have opposed the two appeals of the Department, they are referred to herein as the writ petitioners while the Department is referred to as Customs.

5. Directorate of Revenue Intelligence had issued a show cause notice dated October 3, 2013 against the writ petitioners under Section 124 of the Customs Act, 1962. Commissioner of Customs (Preventive) had passed the adjudicating order in original dated November 24, 2015 confiscating 272 pieces of gold weighing 36.856 Kgs valued at Rs. 10.07 crores under Section 111 (b) of the Act of 1962. The adjudicating authority had also imposed penalty of Rs. 10.07 crores on both the writ petitioners under Section 112 of the Act of 1962.

6. Learned Advocate appearing for the writ petitioners has contended that, the adjudicating authority lacked jurisdiction in passing the adjudicating order dated November 24, 2015. He has contended that, Section 112 of the Act of 1962 has no manner of application in the facts and circumstances of the present case. He has referred to Section 112 of the Act of 1962 in support of his contentions. According to him the learned Trial Judge has erred in determining the quantum of penalty under Section 112 of the Act of 1962 without determining the jurisdiction of the invocation of such provisions.

7. Learned Advocate appearing for the writ petitioners has contended that, the adjudicating authority imposed penalty without specifying which clause of Section 112 of the Act of 1962 was invoked. According to him, adjudicating authority has not specified the reasons for imposition of such penalty upon the writ petitioners particularly when, the two clauses of Section 112 of the Act of 1962 are disjunctive in nature. He has relied upon ***2005 (190) ELT 433 (S.C) (Amrit Foods Versus Commissioner of Central Excise, U.P.)*** in support of the contention that imposition of penalty without specifying the particular clause is a jurisdictional error and therefore cannot be sustained.

8. Referring to the merits of the matter, learned Advocate appearing for the appellants has contended that, the writ petitioner in WPO 279 of 2016 is alleged to be the intended buyer/recipient of the gold seized by the authorities. According to him, since the seized gold had never reached such writ petitioner therefore, the question of such writ petitioner dealing with the same does not arise. Such writ petitioner cannot be imputed with prior knowledge or the Department cannot be held to have reasons to believe about the involvement of such writ petitioner in the seized gold. Therefore, according to him, the pre-requisite conditions for invoking Section 112 of the Act of 1962 are absent. In support of such contention, he has relied upon orders passed by the CESTAT in ***Gagan Karel v. Commissioner of Customs (Preventive)*** [Final Order no. 75104/2025 dated 23.01.2025], ***Suresh Maruti Patil V. Commissioner of Customs (Preventive)*** [Final Order no. 76269/2025 dated 02.05.2025] and ***Kailash Pareek*** @ ***Kailash Sharma Pareek v.***

Commissioner of Customs (Preventive) *[Final Order no. 77417-77419/2025 dated 17.09.2025]*

9. Referring to the two appeals of the Department, learned Advocate appearing for the writ petitioners has submitted that, the seized gold were not prohibited goods as there was no specific prohibition on importation of gold issued under the Act of 1962. In support of the contention that, gold has to be classified as prohibited within the meaning of the Act of 1962, to be treated as such, learned Advocate appearing for the writ petitioners has relied upon Sections 2 (14), (25), (33) of the Act of 1962. He has also relied upon Sections 11, 11B and 125 of the Act of 1962.

10. Learned Advocate appearing for the writ petitioners has contended that, the statutory scheme under the Act of 1962, makes a clear distinction between dutiable and prohibited goods. The Act of 1962 has separate provisions for redemption of confiscated goods. He has contended that, the Central Government from time to time issued notifications under Section 11 of the Act of 1962. However, till date no notification issued by the Central Government under Section 11 of the Act of 1962 has included gold as a prohibited item prohibiting its importation into India. He has referred to the notification dated July 20, 1984 issued under Section 11B of the Act of 1962 and contended that, the same was rescinded by the notification dated January 15, 1993. According to him, gold is, therefore, neither notified as prohibited under Section 11 or under Section 11 B of the Act of 1962. Therefore, according to him, importation of gold is not per se prohibited under the Act of 1962. In support of his contentions that gold was not a prohibited item under the Act of 1962 he has relied upon Judgment and Order dated January 2, 2025 passed by the Madras High Court in WP No. 61 of 2022 ***(N. Kaliyamoorthy Versus The Commissioner of Customs)***, Judgment and Order dated January 2, 2025 passed by the Madras High Court in WP No. 15217 of 2021 ***(Smt. Jhansi Rani Versus The Principal Commissioner of Customs)***, and ***2022 (382) ELT 345 (All) (Commissioner of Customs, Aliganj, Lucknow Versus Rajesh Jhamatmal Bhat and Another)***

11. Relying upon ***2025 SCC OnLine SC 2019 (Kaveri Plastics Versus Mahdoom Bawa Bahrudeen Noorul)*** learned Advocate appearing for the writ petitioners has contended that, a penal provision in a statute has to be construed strictly. He has contended that, since gold was not prohibited under the Act of 1962, therefore, Section 112 (i) has no manner of application.

12. Learned Advocate appearing for the Customs has contended that, the writ petitioners initially challenged the constitutional validity of Section 129E of the Act of 1962 which they had later given up as recorded by the order dated April 27, 2016.

13. Learned Advocate appearing for the Customs has relied upon Section 2 (39) of the Act of 1962 to contend that, such definition encompasses any act of commission. He has contended that, when any item which is brought from outside India by a person to avoid the revenue and not comply with the statutory stipulations then such an action or omission on the part of such person is smuggling and the same attracts penal consequences. He has referred to Section 2 (33) of the Act of 1962 to contend that, gold is a prohibited item. He has contended that, gold cannot be freely imported by any person. Foreign Trade Policy and Reserve Bank of India regulations have imposed prohibition and restriction on the import of gold. Such restrictions and regulations by the Reserve Bank of India and the Foreign Trade Policy is connected with the balance of payment and foreign exchange reserve of the country.

14. Learned Advocate appearing for the Customs has contended that Section 111 of the Act of 1962, provide for confiscation of improperly imported goods and that, importation of any goods contrary to the prohibition imposed by or under any other law for the time being in force can be confiscated.

15. Learned Advocate appearing for the Customs has relied upon Sections 114, 119, 120, 121, 123 and 126 of the Act of 1962 in support of the contention that, gold was a prohibited item. He has contended that, a smuggled good cannot be classified as a smuggled dutiable goods or a smuggled prohibited good. He has contended that, learned Judge erred in distinguishing between smuggled dutiable goods and smuggled prohibited goods.

16. Learned Advocate appearing for the Customs has contended that, since the goods confiscated were smuggled into India the same was correctly treated under Section 112(i) of the Act of 1962 by the Adjudicating Authority.

17. In support of his contentions learned Advocate for the Customs has relied upon the policy guidelines regarding import of gold by the Customs, Foreign Trade Policy existing at that point of time issued by the Ministry of Commerce, ***(2023) 9 Centax 328 (Del) (Nidhi Kapoor Versus Principal Commissioner and Additional Secretary to the Government of India & Ors.), (2024) 17 Centax 261 (Del) (Rameshwar Tiwari Versus Union of India), (2025) 35 Centax 160 (Del) (Rahul Goyal Versus Commissioner of Customs (Preventive)), (2024) 23 Centax 27 (Raj) (Om Prakash Soni Versus Union of India), (1983) 13 ELT 1620 (SC) (State of Maharashtra Versus Natwarlal Damodardas Soni), (2010) 260 ELT 487 (SC) (Commissioner of Customs (Preventive), Mumbai Versus M. Ambala and Company), (2016) 341 ELT 65 (Mad), (Malabar Diamond Gallery Private Limited Versus The Additional Director General DRI, Chennai) 2003 (4) SCC 325 (Collector of Customs, Bombay Versus Elephanta Oil & Industries Ltd, Bombay), 2026 SCC Online Guj 2959 (Vishal Dhirubhai Gabani***

Versus Additional Commissioner of Customs Surat), 2021 SCC Online SC 429 (Union of India and Others Versus Raj Grow Impex LLP and Others) 2022:CHC-OS:7733-D Commissioner of Customs (Preventive) West Bengal Versus M/s. Mayur Enterprises*, *2020 SCC Online SC 675 (Union of India and Others Versus Agricas LLP and Others).

18. Acting on the basis of specific intelligence, Directorate of Revenue Intelligence (DRI) had intercepted and seized gold weighing 36.856 kgs on April 8, 2013 along with other items and documents. Nine persons from whose possession the gold were recovered had been examined under Section 108 of the Act of 1962. Such persons had named Mr Gopal Saha, the writ petitioner in WPO 279 of 2016, as the prospective recipient of the gold. At least four of the persons from whose possession a portion of the gold was recovered had stated that, they had received a portion of the seized gold from the other writ petitioner namely Ajgar Sheikh.

19. DRI had examined the subscriber detail records as well as call detail records of the mobile phones of the intercepted persons and the writ petitioners. From the statements made by various persons as also the subscriber detail record, and call details records DRI had formed an opinion that the seized gold were smuggled into India through unauthorised land route of Indo-Bangladesh border and that all the nine persons and the two writ petitioners were involved. The nine persons intercepted by DRI had collected a portion of the seized golds from Ajgar Seikh and were supposed to deliver the same to Gopal Saha. Gopal Saha was the mastermind with Ajgar Sheikh acting as an accomplice.

20. A show cause notice dated October 3, 2013 had been issued to which, Gopal Saha had submitted a reply dated December 9, 2013 while Ajgar Sheikh had submitted a reply dated December 31, 2013. They had been given personal hearing by the Adjudicating Authority.

21. By the Adjudicating Order dated November 24, 2015, the Commissioner of Customs (Preventive) had directed confiscation of the seized gold valued at Rs. 10.07 crores under Section 111 (b) of the Act of 1962. He has imposed penalty of Rs. 10.07 crores on both the writ petitioners as the mastermind and kingpin as also the principal accomplice, under Section 112 of the Act of 1962. He has awarded penalties on the other nine persons.

22. The writ petitioners had a statutory alternative remedy in respect of the Adjudication Order dated November 24, 2015. Writ petitioners had the right to file an appeal under Section 129A of the Act of 1962. However, the writ petitioners had chosen to challenge the adjudication order by way of writ petitions under Article 226 of the Constitution of India.

23. It is trite law that, notwithstanding the availability of a statutory alternative remedy, a writ petition is maintainable if the writ petitioner establishes, violation of fundamental rights, breach of the principles of natural justice, the order impugned to be wholly without jurisdiction and the order impugned to be perverse. A writ Court is concerned with the decision-making process rather than the decision itself. A writ Court is not called upon to re-appreciate the evidence and substitute the finding in the impugned order acting as a Court of appeal.

24. The appellants had approached the writ Court assailing the constitutional validity of Section 129E of the Act of 1962. However, they had given up such challenge as recorded by the order dated April 26, 2016. They had, however, continued with the writ petitions on the contention that the seized gold was not prohibited goods and therefore imposition of penalty by the Adjudicating Authority was without jurisdiction.

25. By the impugned judgement and order, learned Single Judge has held that, gold was not prohibited goods and therefore set aside the order imposing penalty under Section 112 (i) of the Act of 1962 and remanded the matter for limited purpose of imposition of such other quantum of penalty that may be permissible.

26. The issues that have fallen for consideration in the four appeals are as follows: –

(i) whether gold is a prohibited item within the meaning of the Act of 1962, and

(ii) was the adjudicating authority correct in imposing penalty under Section 112 (i) of the Act of 1962.

27. On the first issue, the parties have relied upon various provisions of the Act of 1962 and also various notifications. It would be apposite to set out some of the provisions of the Act of 1962 which the parties have relied upon in support of their respective contention on the first issue which are as follows:-

"2. Definitions.

(14) "dutiable goods" means any goods which are chargeable to duty and on which duty has not been paid;

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

(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;

(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113;

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

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

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

(a) the maintenance of the security of India;

(b) the maintenance of the public order and standards of decency or morality;

(c) the prevention of smuggling;

(d) the prevention of shortage of goods of any description;

(e) the conservation of foreign exchange and safeguarding of balance of payments;

(f) the prevention of injury to the economy of the country by the uncontrolled import or export of [gold, silver or any other goods];

(g) the prevention of surplus of any agricultural product or the product of fisheries;

(h) the maintenance of standards for the classification, grading or marketing of goods in international trade;

(i) the establishment of any industry;

(j) the prevention of serious injury to domestic production of goods of any description;

(k) the protection of human, animal or plant life or health;

(l) the protection of national treasures of artistic, historic or archaeological value;

(m) the conservation of exhaustible natural resources;

(n) the protection of patents, trade marks[, copyrights, designs and geographical indications];

(o) the prevention of deceptive practices;

(p) the carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India;

(q) the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security;

(r) the implementation of any treaty, agreement or convention with any country;

(s) the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India;

(t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige;

(u) the prevention of the contravention of any law for the time being in force; and

(v) any other purpose conducive to the interests of the general public.

(3) Any prohibition or restriction or obligation relating to import or export of any goods or class of goods or clearance thereof provided in any other law for the time being in force, or any rule or regulation made or any order or notification issued thereunder, shall be executed under the provisions of that Act only if such prohibition or restriction or obligation is notified under the provisions of this Act, subject to such exceptions, modifications or adaptations as the Central Government deems fit.

11-B. Power of Central Government to notify goods

If, having regard to the magnitude of the illegal import of goods of any class or description, the Central Government is satisfied that it is expedient in the public interest to take special measures for the purpose of checking the illegal import, circulation of disposal of such goods, or facilitating the detection of such goods, it may, by notification in the Official Gazette, specify goods of such class or description.

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

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

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;

(c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an 1 [arrival manifest or import manifest] or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32 , other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45 ;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34 ;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the

permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77 ;

(m) [any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 [in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of section 54 ;

(n) any dutiable or prohibited goods transitted with or without trans-shipment or attempted to be so transitted in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

(q) any goods imported on a claim of preferential rate of duty which contravenes any provision of Chapter VAA or any rule made thereunder.

SECTION 112. Penalty for improper importation of goods, etc.-

Any person, -

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

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

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

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A , to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in

the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;

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

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

28. Writ petitioners have relied upon a notification issued under Section 11 of the Act of 1962, Notification No./93-Cus- Dated January 15, 1993 while the Customs have relied upon a notification bearing No. DGEP/EOU/G & J/16/2009 dated September 4, 2013 and Circular No. 34/2013-Customs dated September 4, 2013 issued by the Customs Department on the first issue.

29. The Delhi High Court in ***Nidhi Kapoor (supra)*** has noted that importation of gold into India is highly regulated and bulk importation of gold item would only be affected by the nominated banks and agencies or business houses in the manner laid down by the Foreign Trade Regulation as well as RBI Circulars or by eligible passengers in the manner provided by the relevant regulations. It has held that, importation of gold is a prohibited item within the meaning of Section 2(33) of the Act of 1962 and that, redemption in case of importation of gold which brought into India illegally in the form of smuggling does not entitle the owner or importer for automatic release/redemption of such item and therefore as a necessary corollary a decision to allow release/redemption of the goods confiscated with or without imposition of fine in addition to payment of requisite duty is vested in the discretion of the Adjudicating Officer. ***Rahul Goyal (supra)*** has applied the principles laid down in the ***Nidhi Kapoor (supra).***

30. The Delhi High Court in ***Rameshwar Tiwari (supra)*** has held that, gold imported contrary to the prohibition imposed for its import is liable to be confiscated under Section 111 of the Act of 1962.

31. The Rajasthan High Court in ***Om Prakash Soni (supra)*** has dealt with a challenge to the Constitutional validity of Sections 114, 115 and 108 of the Customs Act,

1962. It has held, after considering various authorities on the subject that, gold comes within the meaning of prohibited goods under the Act of 1962 when it is smuggled.

32. ***Natwarlal Damodardas Soni (supra)*** has held that, possession of gold in contravention of law is a punishable offence. It has held that, the expression "acquires possession" in Section 135(1) of the Act of 1962 is of very wide amplitude and will include acquisition of possession by a person in a capacity other than as owner or purchaser.

33. ***M. Ambala and Company (supra)*** has held that, goods imported into India without a licence under the Import Control Act cannot be treated to be lawfully "imported goods" within the definition of Section 2(25) of the Act of 1962.

34. The Madras High Court in ***Malabar Diamond Gallery Private Limited (supra)*** has held that, the expression "subject to prohibition in the Act and any other law for the time being in force" appearing in Section 2(33) of the Act of 1962 has wide connotation and meaning. It has held that, such clause should be interpreted in the context of the scheme of the Act of 1962 and not to be confined to a narrow meaning that gold is not enumerated as prohibited goods to be imported into the country. It has expressed the view that, a narrow construction and meaning if given would defeat the object of the Act of 1962.

35. ***Elephanta Oil & Industries Ltd, Bombay (supra)*** has noted that, power of levy of penalty under Section 112 for improper importation of goods is different from the power of confiscation of goods under Section 125 of the Act of 1962. It has observed that, the two Sections operate in different fields namely one requiring imposition of penalty and the other providing for confiscation of imported improper goods. It has held that, levy of fine in lieu of confiscation under Section 125 is in addition to levy of penalty imposable under Section 112 of the Act of 1962.

36. The Gujarat High Court in ***Vishal Dhirubhai Gabani (supra)*** has noted the impugned judgment and order and did not apply the ratio there.

37. ***Raj Grow Impex LLP (supra)*** has discussed the principles to be applied for exercise of discretion under Section 125 of the Customs Act, 1962. It has further considered the effect of the notification issued by Central Government under the Foreign Trade (Development and

Regulation) Act, 1992 and consequential trade notices issued by the Directorate General of Foreign Trade.

38. A Coordinate Bench of this High Court in ***M/s Mayur Enterprises (supra)*** referring to Supreme Court Judgment of ***Raj Grow Impex LLP (supra)*** has held that, Foreign Trade (Development and Regulation) Act, 1992 allowed the Central Government to regulate importation of betel nuts.

39. ***AGRICAS LLP and Others (supra)*** has held that, the Foreign Trade (Development and Regulation) Act, 1992 is in addition to and not in derogation of the provisions of any other law for the time being in force. It has noted that, Central Government continues to and have as the authority to impose quantitative restrictions of import of goods under the Act of 1992.

40. One of the objectives if not the predominant objective of the Act of 1962 is to ringfence domestic trade and commerce against unauthorized intrusion and extrusion of goods. In order to facilitate achievement of such objective, the Act of 1962 makes various provisions. In the context of the four appeals before us, we are concerned with smuggling of gold into India.

41. Section 2(25) of the Act of 1962 has defined imported goods to mean any goods brought into India. It does not include goods which have been cleared for home consumption. Section 2(39) of the Act of 1962 has defined smuggling in relation to any goods to mean any act or omission which will render such goods liable to confiscation under Section 111 or 113. Section 111 of the Act of 2013 has provided for confiscation of improperly imported goods. While Section 113 has allowed confiscation of goods attempted to be improperly exported.

42. Section 2(33) of the Act of 1962 has defined prohibited goods to mean any goods the import or export of which is subject to any prohibition under the Act of 1962 or any other law for the time being in force. It however, does not include any goods in respect of which, the condition permitted for import or export have been complied with.

43. Section 2(33) of the Act of 1962 has encompassed not only goods which are prohibited under the Act of 1962 but also goods which are subject to prohibition under any other law for the time being in force. Section 11 of the Act of 1962 has vested powers on the central Government to prohibit importation or exportation of goods.

44. Prohibited goods within the meaning of Section 2(33) of the Act of 1962 is not limited to goods which have been so prohibited by virtue of exercise of powers under Section 11 of the Act of 1962. It involves prohibitions that have been imposed by other laws also. A good which may not have been prohibited under exercise of powers under Section 11 of the Act of 1962 nonetheless would fall within Section 2(33) as a prohibited goods and attract the mischief of the Act of 1962.

45. In the facts and circumstances of the present case, it is not in dispute that importation of gold was subject to prohibition by virtue of notifications issued by the Reserve Bank of India from time to time. Bulk importation of gold is governed by the circulars and notifications issued by the Reserve Bank of India while importation of gold by a passenger is governed by the Baggage Rules.

46. None of the writ petitioners fall within the agencies identified by the Reserve Bank of India circulars authorised to import gold in bulk. It is not the case of the writ petitioners that they were intercepted at a port as a passenger carrying gold in excess of the permissible limit under the Baggage Rules.

47. Customs authorities have proceeded against the writ petitioners under Section 111 and 112 of the Act of 1962 after having issued a notice under Section 124 of the Act of 1962. In the facts and circumstances of the present case, the question therefore, is whether the seized gold had been imported by an agency authorized by the Reserve Bank of India in its notifications and circulars or the persons from whom the golds were seized were passengers carrying such gold at a port of entry and were therefore governed by the Baggage Rules.

48. In order to assess whether, the seized goods were prohibited goods within the meaning of the Act of 1962 or not, not only prohibition issued under the Act of 1962 is required to be considered but also any prohibition that have been issued under any other law for the time being in force. If there is a prohibition on importation of the goods seized issued under the Act of 1962 or any other law for the time being in force, then, such seized goods would fall within the definition of prohibited goods as appearing under Section 2(33) of the

Act of 1962 and have to be proceeded against under the Act of 1962. The persons involved would also have to suffer the consequences under the Act of 1962.

49. Under the Act of 1962 the test is whether the intercepted or seized goods are prohibited by dint of exercise of powers under Section 11 of the Act of 1962 or by virtue of any prohibition issued under any law for the time being in force. If the answer is in the affirmative then the Customs Authorities including the Adjudicating Authority is required to treat the seized goods as prohibited goods and proceed accordingly.

50. Once, the seized goods fall within the definition of Section 2(33) of the Act of 1962 then, a proceeding initiated after issuance of a show cause notice under Section 124 of the Act of 1962 would attract the provisions of Section 112(i) of the Act of 1962.

51. Section 112 of the Act of 1962 has made a distinction between prohibited goods and dutiable goods other than prohibited goods amongst others. Levy of penalty in the two situations are different. In case of prohibited goods, the penalty must not exceed the value of the goods or Rs. 5,000 whichever is greater. In case of dutiable goods other than prohibited goods then, the penalty is much lesser.

52. In the facts and circumstances of the present case, since, the seized goods have fallen within the definition of Section 2(33) of the Act of 1962, that is, prohibited goods, therefore, the Adjudicating Authority has rightly imposed penalty at the rate of which, such penalty is attracted in respect of prohibited goods.

53. It is trite law that when a challenge is thrown to an order of the Adjudicating Authority being without jurisdiction the test is to evaluate whether or not the provisions of the Act under which the adjudicating authority was functioning, vested such Adjudicating Authority with the decision making power or not. Quoting of wrong section in the order impugned will not vitiate the order impugned in the event, the Adjudicating Authority has the power to pass the order impugned.

54. In the facts and circumstances of the present case, therefore, the order of the Adjudicating Authority cannot be faulted merely because it has not specified provision of Section 112 of the Act of 1996 it has invoked. The impugned order is a speaking order and has specified that the seized goods were prohibited goods and therefore proceeded to impose penalty in terms of the provisions of Section 112(i) of the Act of 1962. The Adjudicating Authority has the power to invoke Section 112(i) of the Act of 1962 against the writ petitioners.

55. In view of the discussions above, the first issue is answered by holding that gold is a prohibited item within the meaning of the Act of 1962. The second issue is answered by holding that, the Adjudicating Authority was correct in imposing penalty under Section112(i) of the Act of 1962 against the writ petitioners.

56. Appeals of the writ petitioners namely, APO 139 of 2018 and APO 140 of 2018 are dismissed. Appeals of the Customs namely, APO 143 of 2018 and APO 144 of 2018 are allowed. Impugned judgment and order is set aside. Order of the Adjudicating Authority is upheld.

[DEBANGSU BASAK, J.]

57. I agree.

[ARYAK DUTT, J.]