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YAMAL MANOJBHAI

v.

UNION OF INDIA & ORS.

(Writ Petition (Crl.) No. 55 of 2023)

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MAY 04, 2023

[KRISHNA MURARI AND SANJAY KAROL, JJ.]

- C *Customs Act, 1962 – ss.123, 127B – Seized goods specified u/s.123, remedy of settlement u/s.127B if available – Held: Per Krishna Murari, J. In cases of seizure within the customs area, s.123 cannot apply and the accused is entitled to the remedy of settlement – Decision passed by the Bombay High Court in Suresh Raheja case states the correct position of law – Per Sanjay Karol, J. Proviso to s.127B(I) specifies certain categories of goods that are barred from the jurisdiction of the settlement commission including goods mentioned u/s.123 and goods relating to NDPS Act – Thus, s.127B*
- D *would not apply for settlement in respect of the goods enumerated u/s.123 – In view of divergence of opinion, matter to be placed before the Chief Justice of India for appropriate orders – Constitution of India – Article 21.*

E *Union of India vs Suresh Raheja & Ors. 2011 (267) E.L.T. 487 (Bom.) – approved.*

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Lilavati Bai v. State Of Mysore AIR 1957 SC 521 : [1957] SCR 721 – referred to.

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Additional Commissioner of Customs v. Ram Niwas Verma 2015 SCC Online Del 11542; Commissioner of Customs v. Avinash Dawar & Anr. 2015 SCC Online Del 13875; Commissioner of Customs v. Jyotsana Chikarsal & Anr. 2019 SCC Online Del 6574; Additional Commission of Customs vs. Ashok Kumar 2016 (336) E.L.T 224 (Del); Tata Teleservices (Maharashtra) Ltd vs. Union Of India 2006 (201) ELT 529 (Bom) – referred to.

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Commissioner of Customs v. M. Ambalal (2011) 2 SCC 74 : [2010] 15 SCR 937; Northern Corporation v. Union of India (1990) 4 SCC 239 : [1990] 3 SCR 621; Dalip Singh v. State of U.P. and Ors. (2010) 2 SCC 114 : [2009] 16 SCR 111 – referred to.

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Union of India v. Suresh Raheja 2011 (267) E.L.T. 487 (Bom.); Additional Commissioner of Customs v. Ram

*Niwas Verma 2015 SCC Online Del 11542; A
 Commissioner of Customs v. Avinash Dawar and Anr.
 2015 SCC Online Del 13875; Commissioner of Customs
 v. Jyotsna Chikarsal and Anr. 2019 SCC Online Del
 6574; Commissioner of Customs v. Ashok Kumar Jain
 2013 (292) ELT 32 (Del.) – referred to.*

Case Law Reference

In the judgment of KRISHNA MURARI, J.

[1957] SCR 721	referred to	Para 40
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In the judgment of SANJAY KAROL, J.

[2010] 15 SCR 937	referred to	Para 3	C
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[1990] 3 SCR 621	referred to	Para 30
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[2009] 16 SCR 111	referred to	Para 31
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CRIMINAL ORIGINAL JURISDICTION : Writ Petition
 (Criminal) No.55 of 2023.

(Under Article 32 of The Constitution of India)

V. S. Nankani, Sr. Adv., Ashish Batra, Advs. for the Petitioner.

K. M. Nataraj, N. Venkatraman, ASGs, Vatsal Joshi, Raghav Sharma, Rajat Sharma, A. K. Sharma, Mukesh Kumar Maroria, V. C. Bharathi, Rupesh Kumar, H. R. Rao, A. K. Kaul, Ranjit Kant, Ms. Aakansha Kaul, Advs. for the Respondents.

The Judgments* of the Court were delivered by

KRISHNA MURARI, J.

1. The present writ petition filed under Article 32 of the Constitution of India raises an issue of huge importance of personal liberty under Article 21 of the Constitution of India, regarding the right of an accused under the Customs Act, 1962 (hereinafter referred to as the ‘Customs Act’) to settle the dispute as per provisions contained under chapter XIV A of the Customs Act.

2. The writ petitioner, who is a Non-Resident Indian (for short, ‘NRI’), was arrested on 04.10.2022 at the Delhi International Airport. It is the case of the respondent that petitioner had tried to smuggle high value goods, mainly watches through the green channel entrance, in order to escape from paying duty on the same.

* **Ed. Note:** In view of divergence of opinion in terms of separate judgments pronounced by Hon’ble Mr. Justice Krishna Murari and Hon’ble Mr. Justice Sanjay Karol, the matter was directed to be placed Hon’ble the Chief Justice of India for appropriate orders.

- A 3. On suspicion of the petitioner trying to smuggle goods through customs, a detailed examination of the person and baggage of the petitioner was conducted, and it resulted in the recovery of seven wrist watches, along with a few other high value goods. Since the petitioner appeared to have committed offences under Sections 132 and 135 of the Customs act, he was arrested on 05.10.2022. After the arrest, the petitioner herein then filed the present writ petition, wherein he sought for the issuance of directions for permission of home cooked food being granted to him.
- B 4. The petitioner, being an NRI, has been unable to travel outside India since 06.10.2022, and as such has been amenable to settle the dispute by approaching the settlement commission under Section 127 of the Customs Act, by paying the dues and any interest accrued thereon to the customs department in accordance with law. However, for a want of notice by the customs authorities to initiate the settlement process, the petitioner filed an I.A. seeking the same.
- C 5. In the abovementioned I.A. filed by the petitioner, an ex-parte order dated 20.02.2023 was passed by this Court, wherein the Commissioner of Customs was directed to issue a show-cause notice to the petitioner, to initiate the proceedings.
- E 6. The respondent then, on being served the abovementioned ex-parte order, filed an application for a recall of the said order. Several grounds were raised on the issue of jurisdiction of the Settlement Commission to hear the said matter. Both the parties were heard at length, and vide order dated 20.02.2023, the said ex-parte order was recalled.
- F 7. After the recall of order passed by this Court, both the parties argued at length on merits, and during the course of the said arguments, an apparent conflict between two judgments of the Bombay High Court and the Delhi High Court was brought to our notice by the petitioner, by way of an application for placing additional grounds, documents and G prayers. Thereafter, the matter was further argued on merits by the learned counsel for both the parties, and judgment was reserved.
- H 8. When the abovementioned conflict between the two High Court judgments was brought to our notice, it was pointed out to us by the learned counsel appearing on behalf of the petitioner that such conflict between the two High Court judgments, if left unnoticed, has the potential

to cause great harm to accused persons charged under the Customs Act, and deprive them of the power to invoke the remedy of settlement. A

ANALYSIS

9. The issue of settlement under the Customs Act, which will be discussed by us in detail below, essentially has the power to grant an accused a remedy to obtain immunity from prosecution and penalty as provided under Section 127(H) of the Customs Act. Such a right, if it remains under a cloud of ambiguity, may not only cause damage to the fundamental rights accrued to accused persons to live a dignified life without fear of incarceration, and may needlessly force certain accused persons to be deprived of a free life outside the languish of custody. Further, such a circumstance may also result in contrary views being taken by different adjudicating authorities in identical cases, with similar facts and circumstances. B C

10. The Settlement Commission, governed by chapter XIV A of the Customs Act, was inserted by virtue of Section 102 of the Finance (No.2) Act, 1998 (Act No. XXI of 1998), with the aim of settling issues of tax evasion by virtue of a disclosure by the tax offender. Such a disclosure, if made bona fide, allowed for the tax evader to gain immunity from either fine or penalty. While at first glance, it may seem that such a provision allows for offenders to escape penal consequences with no benefit caused to the government, however, a deeper analysis of the provisions would prove otherwise. The withholding of tax by tax offenders, unlike most other offences, directly impacts the revenue of the country. Further, due to the complexities arising from such disputes, the adjudication of the same often takes a very long time. In such a scenario, wherein a long length of time consumed to resolve tax disputes directly affects the revenue, and resultantly the welfare of the country, the legislature found it imperative for the enactment of a beneficial and time saving remedy, that would not only help the government in helping reclaim the tax amounts due, but also incentivize persons to do the same. It is out of these considerations that the Settlement Commission was born, and as such, this backdrop must always be kept in mind while adjudicating on issues of jurisdiction of the Settlement Commission. D E F G

PRELIMINARY OBJECTION

11. During the course of the hearing, a preliminary objection has been raised by the learned counsel appearing on behalf of the respondent H

- A stating that since the original relief sought for was limited to the grant of providing home cooked meals to undertrial prisoners, this court is not the appropriate forum to decide on the present question of law and resolve the conflict between the two High Court judgments.

12. In the present case at hand, as has been mentioned above, the
- B learned counsels appearing on behalf of both the parties have argued at length on the merits of the case and the point of law in question. The said ambiguity in the impugned point of law, caused by the conflicting decisions the two High Courts, has the potential to cause great harm to the fundamental rights of accused persons presently dealing with similar litigations, and future accused persons who might also have to deal with similar litigations.

13. In such a scenario, wherein such a length of time has been devoted by the parties and the court, this court sits in a unique position wherein it is equipped with all the necessary knowledge to clear the said ambiguity. If such an opportunity to clear the said ambiguity is not exercised
- D by this court, it would so happen that, at some point in the future, this court would again be tasked with answering the same question of law, for which, a great length of time would again be spent by the court, to complete the same task which could have been dealt with at an earlier time. Such a lack of exercise of its jurisdiction by the court would not
- E only increase the burden on the pendency of matters, but will also subject litigants from across the country to further pendency. It is therefore imperative that this court, at this instance, remedy such a mischief, to save the court and future litigants from multiplicity of proceedings and mischief caused by such ambiguity.

- F 14. In so far as maintainability of the present writ petition on grounds of deviation from the initial prayer is concerned, it has been held in a catena of judgments that this Court, under writ jurisdiction, is not bound by the relief sought and can go beyond the original relief in order to meet the ends of justice. Further, in such a situation where there is a conflict of opinion on a legal issue between two High Courts, mere
- G technical objections can not be allowed to stand in the way of exercising our powers conferred by way of Article 32 of the Constitution of India.

- H 15. The reason why Article 32 is given such importance is because the state as an organ, if left without checks and balances, has the potential to become a tyrannical institution that can take the civil and individual liberties of its people for granted. To curb this inclination of the state at

its very roots, the constitutional scheme envisaged an organ within the state machinery, namely the judicial organ, which is vested with the powers to interfere with the tyrannical tendencies of the state. This organ, with the Apex Court being at the helm of it, though functions within the state, in cases of violations of fundamental rights, also combats against it.

16. Further, the Constitution of India, amongst all the other rights conferred by it, has placed civil and individual liberties at the highest pedestal. These civil and individual liberties, that act as a sword and a shield against the state, find their translation from ideal to enforceable rights through Part III of the Constitution.

17. One such right under Part III of the Constitution, which shields its people from the tyranny of the state, is Article 32 of the Constitution, which in itself is a fundamental right falling within part III of the constitution, that exists to protect other fundamental rights. By way of Article 32, any action of the state that violates the fundamental rights of a person, or causes harm to civil or individual liberties, is within the purview of scrutiny of the Court.

18. During the constituent assembly debates, when the question of the ambit of Article 32, which was then Article 25 of the draft constitution, was posed, the makers of the Constitution deliberated extensively on the scope of the said article and the extent of its powers. It was during these debates when Dr. B.R Ambedkar, very famously stated that Article 32 is the very soul of the constitution. The said quote by Dr. B.R Ambedkar is being extracted herein:-

“Now, Sir, I am very glad that the majority of those who spoke on this article have realised the importance and the significance of this article. If I was asked to name any particular article in this Constitution as the most important—an article without which this Constitution would be a nullity—I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance.”

19. Further, Father Jerome D’Souza, a Member of the Constituent Assembly, while emphasizing on the importance of Article 32 of the Constitution of India stated as follows:-

“I should like to draw the attention of the House, Sir, to the implications of this article, implications which possibly are

- A *not obvious at the first reading. This House, and through this House the Legislatures that have to rule this country in future, by a laudable and significant act of self-denial or self-abnegation, places under the power of a Supreme Judicature the enforcement of certain laws and certain principles, and remove them from the purview and the control of the Parliaments which will be elected in future years. They wish to put these rights beyond the possibility of attack or change which may be brought about by the passions and vicissitudes of party politics, by placing them under the jurisdiction of judges appointed in the manner provided for later on in this Constitution. Sir, it is because we all believe,—and that is the implication of this chapter of fundamental Rights,—that man has certain rights that are inalienable, that cannot be questioned by any humanly constituted legislative authority, that these Fundamental Rights are framed in this manner and a sanction and a protection given to them by this provision for appeal to the Supreme Court.*
- B *As I said, Sir, the implication of this is that an individual must be protected even against the collective action of people who may not fully appreciate his needs, his rights, his claims. And the sacredness of the individual personality, the claims of his conscience, are, I venture to say, based upon a philosophy, an outlook on life which are essentially spiritual. Sir, if all our people and their outlook were entirely materialistic, if right and wrong were to be judged by a majority vote, then there is no significance in fundamental rights and the placing of them under the protection of the High Court. It is because we believe that the fullest and the most integral definition of democracy includes and is based upon this sacredness of the individual, of his personality and the claims of his conscience, that we have framed these rights.*
- C *I say, Sir, further that in the last analysis we have to make an appeal to a moral law and through the moral law to a Supreme Being, if the highest and the fullest authority is to be given and the most stable sanction to be secured for these fundamental rights. Sir, Mahatma Gandhi, in one of his unforgettable phrases, referring to the desire to have a secular*
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Constitution and to avoid the name of the Supreme Being in it, cried out, “You may keep out the Name, but you will not keep out the Thing from that Constitution”. And, Sir, I believe that these fundamental rights and their implications are really tantamount to a confession that beyond human agencies and human legislatures there is a Power which has to be submitted to, and there are rights which have to be respected.

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By this article we give to our Supreme Judicature a power, a status and a dignity which will call from them the highest qualities of integrity and uprightness. The full meaning of this article should be borne in mind when we come to that Part of the Constitution beginning with article 103, when we shall have to scrutinize the steps by which an upright and absolutely fair judiciary will be established in this land. When we consider that Part, let us recall these Rights and make sure that all these various provisions will be enforced in a just and fearless manner.”

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20. It is in this background that Article 32 of the Constitution of India has been brought into force, to ensure that the Supreme Court is always equipped to tackle the other organs of the state, especially in circumstances wherein civil and individual liberties guaranteed by the fundamental rights are at risk.

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21. Further, It has come to our notice that in the cases of Additional Commissioner of Customs v. Ram Niwas Verma¹, Commissioner of Customs v. Avinash Dawar & Anr², and Commissioner of Customs v. Jyotsana Chikersal & Anr³, the High Court of Delhi has taken a contrary view from the decision of the Bombay High Court. In my humble opinion, such an ambiguity in law has been caused because of the lack of an authoritative pronouncement on the subject matter by this Court. This lack of certainty in the law, has led to differential outcomes of similarly situated persons in different jurisdictions.

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22. In such a circumstance, where similarly situated persons are becoming victim to differential outcomes, this court must clarify such an ambiguity, by resolving the conflict between the two sets of judgments,

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¹2015 SCC Online Del 11542

²2015 SCC Online Del 13875

³2019 SCC Online Del 6574

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- A to ensure that the mischief caused by the conflicting views is erased, and the certainty in law is restored.

23. In light of the abovementioned discussions, we are not inclined to agree with the preliminary objections raised by the respondent, regarding maintainability of the petition on mere technicalities and B accordingly reject the same.

CONFLICT BETWEEN THE TWO SETS OF HIGH COURT JUDGMENTS

24. During the course of arguments on merits, the learned counsel appearing on behalf of the petitioner herein placed strong reliance on the C judgment of Union Of India vs Suresh Raheja & Ors⁴. The petitioner in the abovementioned case was caught trying to smuggle goods through the green channel of entry. The seizure of the impugned goods therein, similar to the present case at hand, was conducted within the customs area. Subsequent to the seizure, the petitioner therein was amenable to D settle the dues, and seek relief under Section 127 of the Customs Act, however, the goods seized were explicitly mentioned in Section 123 of the Customs Act, which put a bar on settlement of cases under Section 127 B of the said Act. The relevant paragraph of the said judgement is being extracted herein:-

- E *"It is further required to be borne in mind that in so far origin of the goods is concerned, there is no dispute in respect of both the jewellery as well as the watches. Therefore, the contention of the Petitioner that the Respondents had failed to discharge the burden cast by Section 123 of the said Act is mis-founded. Once the origin of the goods was not in dispute, the Respondents as held by the Settlement Commission were entitled to invoke the jurisdiction of the Settlement Commission and, therefore, the bar contained in the proviso to Section 127B could not have come in their way. The finding of the Settlement Commission in the aforesaid factual background that the Respondents herein, who were the Applicants before the Settlement Commission, fulfill all the conditions laid down in Section 127(B) (1) of the said Act, can be said to be a possible view in the said factual background."*
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25. While deciding on the said issue, it was held by the High Court of Bombay that if an accused is caught within the customs area, the bar on Section 127 of the Customs Act on goods mentioned under Section 123 of the same Act is redundant, and the accused is entitled to the remedy of settlement.

26. Learned counsel appearing on behalf of the respondent, per contra, relied on the judgement of Additional Commission of Customs vs Ashok Kumar⁵. In this case, while the settlement application of the petitioner was deemed to be maintainable, however, in paragraph 10 of the said judgment, a passing reference was made by the court stating that the goods found on the person of the petitioner, since they did not find mention under Section 123 of the Customs Act, were not barred by Section 127 of the same Act. The relevant paragraph of the abovementioned judgment is being reproduced herein:-

“It is not in dispute that the present case is not covered by any of the provisos to Section 127B(1) of the Act. In other words, it does not fall under any of the excluded categories of cases. It may be noted at this stage that the decision in Additional Commissioner of Customs v. Shri Ram Niwas Verma (supra), was a case where imported goods were covered under the third Proviso to Section 127B(1) and, therefore, the said decision is distinguishable on facts.”

27. To clear this cloud of ambiguity, and to settle the conflict between these two sets of High Court judgments, we must first analyze Section 123 and Section 127 B of the Customs Act. For the sake of convenience, the relevant Sections are being reproduced herein:-

123. Burden of proof in certain cases.

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

(a) *in a case where such seizure is made from the possession of any person,—*

(i) *on the person from whose possession the goods were seized; and*

⁵2016 (336) E.L.T 224 (Del)

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- A *(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;*
- (b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]*
- B *(2) This section shall apply to gold 2[and manufactures thereof] watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify.*
- C **127B Application for settlement of cases.**
- (1) Any importer, exporter or any other person (hereinafter referred to as the applicant in this Chapter) may, in respect of a case, relating to him make an application, before adjudication to the Settlement Commission to have the case settled, in such form and in such manner as may be specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification²⁵⁴ [or otherwise] and such application shall be disposed of in the manner hereinafter provided: Provided that no such application shall be made unless,—*
- (a) the applicant has filed a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer;*
- (b) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and*
- (c) the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB:*
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Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending in the Appellate Tribunal or any court: Provided also that no application under this sub-section shall be made in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed: Provided also that no application under this sub-section shall be made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975 (51 of 1975).

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(1A) Notwithstanding anything contained in sub-section (1), where an application was made under sub-section (1) before the 1st day of June, 2007 but an order under sub section (1) of section 127C has not been made before the said date, the applicant shall within a period of thirty days from the 1st day of June, 2007 pay the accepted duty liability failing which his application shall be liable to be rejected.”

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28. Section 123 of the Customs Act 1962, states that if an accused is caught by the authorities in the act of smuggling goods, the burden of proof, which originally vests with the prosecution, is reversed, and the same is transferred from the prosecution to the defense. In simpler terms, this would mean that in such cases, it is the accused who is tasked with proving his innocence, rather than the prosecution proving the accused person's guilt.

29. This discharge of burden of proof, in our opinion, can only happen in cases where there is a reasonable possibility of the accused being innocent. In the present case at hand, the petitioner herein was caught with the impugned goods within the customs area. In such a scenario, where the impugned goods are found on the person of the accused and within the customs area, any chance of the accused being innocent becomes an impossibility, since the illegal act is caught in the heat of the crime.

30. Since the discharge of burden proof, rather, the question of burden of proof itself becomes redundant in cases of seizures within the customs area, by default, the provision that mandates such a task also

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- A becomes redundant. In light of the abovementioned discussion therefore, in cases of seizure within the customs area, Section 123 of the Customs Act cannot apply and hence, the decision in the ***Suresh Judgement (Supra)*** passed by the High Court of Judicature at Bombay states the correct position of law. It must also be noted that the abovementioned decision of the High Court of Bombay was impugned in appeal before this Court, and vide order dated 14.09.2011, this Court had concurred with the decision of the High Court and dismissed the appeal of the revenue. Since the facts and circumstances of the case herein are identical to the abovementioned case, we find no cogent reason to take a different view herein.
- B 31. In light of the abovementioned facts and discussions, we are of the opinion that judgment rendered by the High Court of Bombay in the ***Suresh judgment (Supra)*** expounds the correction position of law, and we concur and approve the same.
- C 32. While the conflict between the two sets of High Court judgments has been brought to an end, certain other issues flowing from the said interpretation, in our opinion, must also be clarified.
 - D 33. The learned counsel for the respondent, through his submissions, contended that a non-declaration of goods, as mandated by Section 77 of the Customs Act, ousts the jurisdiction of the Settlement Commission.
 - E To bring clarity to the said contention, we must first shed light on the two modes of clearance of incoming passengers, which are the red channel mode of entry and the green channel mode of entry.
 - F 34. When an incoming passenger goes through customs verification, he has two options of clearances, which are the red channel mode of entry and the green channel mode of entry. When an incoming passenger avails the red channel mode of entry, it is accepted by the passenger that they have goods that are liable for duty, and hence, by virtue of their own admission, are mandated declare the goods that require duty as per Section 77 of the Customs Act.
 - G 35. If a passenger opts for the green channel mode of entry, it implies that the passenger, by virtue of not opting for the red channel mode of entry, is stating that he has no goods that are liable to duty, and hence, it is deemed that they are making a declaration under Section 77 of the Customs Act of carrying “Nil” dutiable goods.
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36. However, if a passenger decides to opt for the green channel of entry, but, is still found with goods that are subject to the levy of duty, they become liable to confiscatory and penal action as per the Customs Act. Since they become subject to the penal provisions of the Customs Act, by default, it must also be implied that they are given the benefit of settlement as per the same Act. No surgery in such a scenario can be done, wherein the accused is held liable of the penal consequences of the act, however, is denied the benefit of remedy under the same Act.

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37. Further, if we were to accept the proposition that a non-declaration under Section 77 of the Customs Act would automatically bar the incoming passenger from availing the benefit of settlement, in light of our observation that an entry through the green channel mode implies a declaration of “Nil” goods under Section 77 of the Act , the provision of settlement would become irrelevant and defunct, since no accused would ever be able to avail the benefits of settlement.

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38. Therefore, in light of the above discussion, we see no reason as to why such a person cannot opt for a statutory remedy of settlement, and therefore reject the objection of the respondents in this regard.

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39. We then come to the last issue that warrants our consideration. The learned counsel appearing on behalf of the respondent contended that any person who importing the impugned goods at the instance of another person, is a smuggler, and as such, the Settlement Commission cannot be approached in such cases.

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40. This contention made by the learned counsel appearing on behalf of the respondents, in our opinion, is also bad in law. In the case of Tata Teleservices (Maharashtra) Ltd vs Union Of India 2006⁶, the High Court of Judicature at Bombay, while deciding on a similar issue, by relying on the Constitution Bench judgment of this court in the case of Lilavati Bai v. State Of Mysore⁷, gave the phrase “or otherwise”, as mentioned in Section 127 B of the Act, an expansive interpretation, and held that the jurisdiction of the Settlement Commission can be invoked by a person who has committed smuggling, fraud or deliberate

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⁶(201) ELT 529 (Bom)

⁷AIR 1957 SC 521

- A misdeclaration. The relevant paragraph of the judgment delivered by the High Court of Bombay is being reproduced herein:-

- “46..... *On the contrary, in the Customs Act, the provision makes it mandatory that the Applicant can file an application only after show cause notice is issued, which show cause notice as we have pointed out hereinabove, would pertain even to confiscation. i.e. to say the person who has committed fraud or smuggling or deliberate misdeclaration would only receive such show cause notice and such a show cause notice is essential ingredient before making an application....*”
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- C 41. Further, the abovementioned judgment of the Bombay high court was impugned in the Supreme Court by way of an appeal, and the same was dismissed by this Court vide order dated 03.08.2011, further fortifying the judgment of the High Court.
- D 42. On the basis of the abovementioned discussions, we are of the opinion that the contention of the respondent even in this regard is liable to be rejected.

CONCLUSION

- E 43. By way of additional submissions made by the petitioner, it has been brought to our notice that the Commissioner of Customs has issued a show cause notice to the petitioner. Since a show cause notice has already been issued, no direction is that regard is warranted. If an application of settlement is filed by the petitioner, the same shall be dealt with by the Settlement Commission on its own merits and in accordance with law and the procedure prescribed u/s 127H of the Customs Act.
- F However, we deem it appropriate to observe that, if at all, the Settlement Commission would deem fit, it can always seek further report from the “Commission (Investigation)” appointed within the Settlement Commission even after issuance of the show cause notice for this one time opportunity of settlement.
- G 44. We refrain from making any observations on the merits of the case and leave the same for consideration by the Settlement Commission.
- H 45. The Writ petition along with application therein are, accordingly, disposed of.

SANJAY KAROL, J.

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1. I have perused the erudite opinion proposed by my esteemed brother, Hon'ble Mr. Justice Krishna Murari. Respectfully, I am unable to persuade myself to agree; hence, I separately pen down my conclusions.

2. Two issues arise for consideration before us; **One** whether a settlement remedy under Section 127B of the Customs Act, 1962, would be available for the seized goods, which are specified under Section 123 of the said Act? **Two**, would, in the attending facts, the exercise of powers under Article 32 of the Constitution of India be appropriate?

Nature, Scope, Purpose and Scheme of Customs Act

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3. The Customs Act, 1962 (hereafter referred to as the Act) was enacted to consolidate the provisions relating to sea customs, land customs and air customs into one comprehensive measure. It is an act to sternly and expeditiously deal with smuggled goods and curbs the dents on the revenue thus caused. The act provides for the confiscation of goods and imposition of penalties when any goods are imported contrary to prohibitions imposed [**Commissioner of Customs v. M. Ambalal, (2011) 2 SCC 74** (2-Judge Bench)].

4. To understand the legislative intent behind the Act, it is important to discuss the scheme therein.

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5. Chapter II of the Act relates to the appointment of customs officers and their powers under the Act.

6. Chapter III specifies the appointment of customs ports and airports wherein imported goods shall be unloaded, and export goods shall be loaded & cleared.

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7. Chapter IV empowers the Central Government to prohibit the importation or exportation of goods for the purposes mentioned therein, such as maintaining the security of India and preventing smuggling.

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8. Chapter IVA provides for the detection of illegally imported goods and the prevention of their disposal.

9. Chapter V specifies the imposition of customs duties and exemption therefrom.

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- A 10. Chapter VII pertains to the clearance of imported and exported goods. This chapter also deals with the procedure employed when goods are not cleared.
- B 11. Chapter XI elucidates special provisions regarding baggage, goods imported or exported, and the required declaration. In this Chapter, Section 83 allows for the duty rate and tariff to be imposed on goods imported or exported.
- C 12. Chapter XIII provides for powers relating to searches, seizure and arrest. In this Chapter, an officer of customs is empowered to arrest a person under Section 105 if he has reason to believe that such a person may have made a false declaration (Section 132), obstructed a customs officer (Section 133) or evaded customs duty that is liable to be paid (Section 135). Furthermore, Section 108B penalises failure to furnish information as directed by the proper officer.
- D 13. Chapter XIV allows for the confiscation of goods and the imposition of penalties. Sections 111 and 112 thereunder enumerate a list of goods which are liable for confiscation and the penalty thereof. Section 123 reverses the burden of proofs of certain specified seized goods.
- E 14. Chapter XIVA contains the mechanism for the settlement of cases.
- F 15. Chapter XVI of the Act lays down offences and prosecution under the Customs Act. This chapter imposes, as a penalty, imprisonment for certain offences. They are: making a false declaration relating to customs (Section 132; may extend to 1 year), obstruction of an officer of customs (Section 133; may extend to 1 year), refusal to be X-rayed (Section 134; may extend to 6 months) and evasion of duty or prohibitions (Section 135; may extend to seven years).
- G 16. Given the above, it is evident that the scheme of the act involves the imposition of customs duty, confiscation of goods and consequences of skirting or attempting to skirt the same in the form of varied penal consequences, including imprisonment. This follows the purpose of the Act, as noted by this Court in **Ambalal** (*supra*), which is to sternly and expeditiously deal with goods smuggled into India in contravention of the prohibitions within the law.
- H 17. Considering the intention of the Act as above, I now discuss the sections pertaining to the controversy at hand: Section 123 and Section 127B of the Act.

18. Section 123 of the Act elucidates the burden of proof in certain cases. It reads as follows: A

"123. Burden of proof in certain cases.—

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

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person; C

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized. D

(2) This section shall apply to gold [and manufactures thereof], watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."

19. Section 127B of the Act pertains to the application procedure for the settlement of cases by a person in respect of a case pending adjudication. Importantly, the proviso to the said states that no application shall be made concerning goods to which Section 123 applies. It reads as follows: E

"127B. Application for settlement of cases.—

(1) Any importer, exporter or any other person (hereinafter referred to as the applicant in this Chapter) may, in respect of a case, relating to him make an application, before adjudication to the Settlement Commission to have the case settled, in such form and in such manner as may be specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules G H

- A *including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification [or otherwise] and such application shall be disposed of in the manner hereinafter provided :*
- B *Provided that no such application shall be made unless,—*
 - (a) *the applicant has filed a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer;*
 - (b) *the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and*
 - (c) *the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB:*
- D *Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending in the Appellate Tribunal or any court : Provided also that no application under this sub-section shall be made in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed : Provided also that no application under this sub-section shall be made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975 (51 of 1975)."*

(Emphasis Supplied)

- G 20. The Petitioner contends that Section 123 of the Act would not apply in the present case for Settlement, as the goods of admitted foreign origin stand seized within the customs area upon crossing the green channel. The Petitioner has placed reliance on the judgment of the Bombay High Court in **Union of India v. Suresh Raheja, 2011 (267) E.L.T. 487 (Bom.)**, wherein the High Court observed that in a situation where there is no dispute as to the origin of the goods, the bar contained in the proviso to Section 127B would not come in the way, in respect of H the specified goods under Section 123.

21. Furthermore, the Petitioner contends that the legislative object is to open doors for settlement and not to rigidly construe beneficial provisions in a mechanical manner that would prevent settlement of cases.

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Analysis and Reasoning

22. This is the plain and simple construction of the statute. On a plain reading of Sections 127B and 123, it is evident that the proviso to Section 127B(1) specifies certain categories of goods are barred from the jurisdiction of the settlement commission. These include goods mentioned under Section 123 and goods relating to the NDPS Act. Therefore, recourse under Section 127B cannot be made if any of the above goods are involved

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23. Even without any controversy about the origin of the goods, Section 127B of the Act would not apply for settlement in respect of the goods enumerated under Section 123 as this goes against the statutory scheme of penal consequences for committing certain offences such as for evading duty, as alleged in the present case, under Section 135.

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24. Hence, the contention of the Petitioner that the legislative intent is for settlement of all cases cannot be accepted.

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25. Further, Section 127B lays down specific conditions for its application, and the proviso provides categories of goods wherein settlement cannot be undertaken. This makes it evident that Section 127B is not meant to be applied in all categories of cases. Only in the following circumstances can an application be made to the settlement commission:

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- a) the applicant has filed a bill of entry, or a shipping bill, in respect of the import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer;
- b) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees;
- c) the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB: and
- d) the proviso to Section 127B is not attracted.

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- A 26. Furthermore, as discussed above, the scheme of the Act involves payment of fines and/or imprisonment for offences enumerated under Chapter XVI. All offences, under the Act, cannot be permitted to go before the Settlement Commission under Section 127B. This would make the legislative intent behind the proviso to Section 127B, which bars certain goods, including those mentioned under Section 123 and goods which are prohibited under the Narcotic Drugs Psychotropic Substances Act, 1985, redundant. *Importantly*, as a consequence of such an interpretation being accepted, the power to prohibit the importation of goods for the maintenance of security of India under Section 11, the powers of arrest under Section 105, the power to summon under Section 108, confiscation under Section 111 and offences for which imprisonment may be given from Sections 132 to Section 135 would have no application, thereby making the respective legislative provisions in effect, null. As prayed for by the Petitioner, such an interpretation would allow a person importing goods without declaration to evade confiscation and criminal prosecution by simply taking recourse under Section 127B. The deterrent of criminal prosecution would stand vitiated.

It is observed that the Delhi High Court has taken a view contrary to that taken by the Bombay High Court in this regard.

26.1 In Additional Commissioner of Customs v. Ram Niwas

- E **Verma, 2015 SCC Online Del 11542** (2-Judge Bench of the Delhi High Court), there was a recovery of 6452 grams of gold from the Respondent therein. He was crossing through the green channel but was intercepted by the Customs Officer. The Court stated that it is evident that no application for settlement can be made if it relates to goods to which S.123 applies.

26.2 In Commissioner of Customs v. Avinash Dawar & Anr.,

2015 SCC Online Del 13875 (2-Judge Bench of the Delhi High Court), the Settlement Commission held that since there is an admission of illicit importation, shifting of burden as contemplated under Section 123 of Customs Act, is not required. The Court, while setting aside this order,

- G stated that upon a plain reading of the provisions, an application under Section 127B could not be made in respect of ‘gold’, which is specifically an item listed under Section 123 applies.

26.3 The decisions in Ram Niwas Verma (Supra) and Avinash Dawar (Supra) have been followed in **Commissioner of Customs v.**

- H **Jyotsna Chikersal and Anr., 2019 SCC Online Del 6574** (2-Judge

Bench of the Delhi High Court)where a recovery of 6 gold bars was made from the Respondent therein. No declaration or disclosure was made in the disembarkation slip or the customs area. The Court held that a conjoint reading of these two provisions clearly bears out that the jurisdiction of the Commission to settle cases involving goods referred to in Section 123(2) is excluded.

26.4 Significantly, in the abovementioned cases, the decision of the Delhi High Court in **Commissioner of Customs v. Ashok Kumar Jain, 2013 (292) ELT 32 (Del)**, wherein settlement application under 127B was allowed for watches recovered, has been distinguished on the ground that the said decision did not consider Section123 and the consequent bar therein.

26.5 It is also pertinent to note that the reasoning in **Suresh Raheja (supra)** was given in the facts and circumstances of that case, wherein the entire baggage, including the watches, had become wet and affected by the floods.

27. In the present case, the recovery from the Petitioner was on crossing the green channel at the Delhi airport on 05.10.2022, wherein the officers of the Investigating Agency apprehended him with dutiable goods, including watches of admitted foreign origin. Watches is one of the categories of goods mentioned in Section 123 of the Act. Since there is a recovery of goods to which Section 123 applies, the same is a bar for the Petitioner to approach the Settlement Commission. The matter, in my view, is fit to be remitted to the adjudicating authorities to take appropriate action, as per law.

Writ Jurisdiction under Article 32

28. I have considered the law on the merits of the dispute; however, it is also essential to consider the maintainability of the present proceedings since the Petitioner has invoked Article 32 of the Constitution of India.

29. It is well-settled law that this Court has wide powers when the violation of fundamental rights is alleged under Article 32 of the Constitution. However, such intervention must be made on a case-by-case basis and only when a fundamental right question arises.

30. In **Northern Corporation v. Union of India, (1990) 4 SCC 239** (2-Judge Bench), this Court dealing with the issue of enforcement of the provisions of the Customs Act, in a petition filed

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- A under Article 32, observed that the Petitioner has no fundamental right as such to clear any goods imported in accordance with the law. Furthermore, it was held that it could not be contended that enforcing provisions of the Act would breach fundamental rights which entitle a citizen to seek recourse to Article 32 of the Constitution. Therefore, the writ petition was rejected.
- B 31. In **Dalip Singh v. State of U.P. & Ors., (2010) 2 SCC 114** (2-Judge Bench), the imperative nature of putting forward all facts and seeking an appropriate relief was reiterated.
32. The Petitioner approached this Court through Writ Petition No. 55/2023, praying only for the grant of a writ of mandamus for home-cooked food for under-trial prisoners (This question is pending consideration by this Court in other writ petitions). Only subsequently was an Interlocutory Application filed seeking the relief concerning the merits of the present dispute, i.e. direction to Respondent No. 2 (Customs Authority) for settlement under Section 127B of the Customs Act, 1962.
- C 33. This approach taken by the Petitioner, in my view, is unwarranted and undesirable if not malafide for not exhausting the appropriate alternative remedies. Under the garb of relief purportedly relating to fundamental rights, the relief sought in the instant IA, is statutory in nature- under the Act i.e. for an application of settlement to be decided.
- E 34. Recourse to the fundamental right to approach this Court has to be permitted in cases where the fundamental rights of the Petitioner have been infringed. Herein, no such infringement is made out. No material has been brought on record displaying that the Customs Department has proceeded in a manner contravening the Constitutional mandate.
- F 35. Therefore, given the above, the present application is liable to be dismissed on maintainability. It is also to be noted that the practice of circumventing the well-established principles for the exercise of the power of Article 32 should not be encouraged.
- G In the abovementioned terms, the writ petition, along with interlocutory applications, are disposed of.