Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

CUSTOMS Appeal No. 10708 of 2023 - SM

(Arising out of OIA-AHM-CUSTOM-000-APP-129-23-24 dated 24.07.2023 passed by Commissioner of CUSTOMS-Ahmedabad)

PAWAN VERMA **........Appellant**
SUBHASH VERMA, HOUSE NO. 395,
VILLAGE-MADANPUR DABAS NORTH WEST
DELHI-110081

VERSUS

C.C. AHMEDABAD **......Respondent**
OFFICE OF THE PR. COMMISSIONER OF CUSTOMS,
1ST FLOOR, CUSTOMS HOUSE,
OPPOSITE OLD HIGH COURT NAVRANGPURA,
AHMEDABAD-380009

With

CUSTOMS Appeal No. 10709 of 2023 - SM

(Arising out of OIA-AHM-CUSTOM-000-APP-130-23-24 dated 24.07.2023passed by Commissioner of CUSTOMS-Ahmedabad)

SHRI SUBHASH VERMA **........Appellant**
SUBHASH VERMA, HOUSE NO. 395,
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DELHI-110081

VERSUS

C.C. AHMEDABAD **......Respondent**
OFFICE OF THE PR. COMMISSIONER OF CUSTOMS,
1ST FLOOR, CUSTOMS HOUSE,
OPPOSITE OLD HIGH COURT NAVRANGPURA,
AHMEDABAD-380009

APPEARANCE:
Shri Rahul Gajera, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. 10409-10410/2024

DATE OF HEARING: 05.01.2024
DATE OF DECISION: 15.02.2024

RAMESH NAIR

The present appeals have been filed against Order-In-Appeal No. AHM-CUSTM-000-APP-129&130-23-24 dated 24-07-2023 by which Commissioner of Customs (Appeals) Ahmedabad has upheld the Order-In-Original dated 30-06-2020 interalia confiscating absolutely seven gold bars having foreign make marking and market value of Rs. 22,96,000/- seized from the possession of appellant, Shri Pawan Subhash Verma who was enroute to New Delhi from Surat in a car. Appellant, Shri Subhash Verma was also travelling in the same car and is the father of Pawan Verma.

1.1 Briefly the facts are that appellants are engaged in making jewellery at their shop, Shriram Jewellers situated at Begumpura Main Road, Section – 22, Rohini, New Delhi. They were travelling from Surat to New Delhi by car along with Shri Pramod and Shri Vishal Dabas on 29.10.2018 during which the officers of DGGI, Vadodara acting upon intelligence, intercepted the car around Vadodara Bharuch toll plaza. Shri Pawan Verma, when asked, informed the officers that he was carrying 1600 grams of Gold with him. The officers of DGGI after carrying out search of the car and of the appellants, so found the sixteen bars of gold wrapped in hanky plus plastic from jeans pant’s pocket worn by Shri Pawan Verma and passed on the proceedings to the officers of DRI, Ahmedabad.

1.2 The officers of DRI noticing the foreign make markings on the gold bars held a view that out of sixteen gold bars, seven gold bars appears to be of foreign origin and nine that had markings of MMTC – PAMP appears to be of Indian origin and proceeded to seize the same along with Hyundai Verna car on the premise that the said car was used for transportation and concealment of suspected smuggled gold. The officers further seized mobile phones from the possession of the appellants.

1.3 Shri Salim Daginawala, Gold assayer was called for identification of the metal, its purity, weight and value and by report dated 30.10.2018 he reported the purity of gold as 999, each bar weighed 100 grams, total 1600 grams and further reported that total market value as Rs. 52,48,000/Tariff value Rs. 46,71,984.

1.4 The officers recorded statements under section 108 of the Act of Shri Pawan Verma, Subhash Verma, Shri Pramod and Shri Vishal Dabas. The appellants in their statements have admitted that the seized gold weighing 1600 grams and 800 grams of gold purchased in the past from Shri Lalaji of Surat were of foreign origin. The sellers named by Shri Pawan Verma during panchnamas were investigated and report of call data records (CDR) from the telecom service provider were also received. While investigation could not trace from the given mobile numbers, the whereabouts of the sellers of gold namely Shri Lalaji, Rajubhai and Aftabbhai, from which calls were made to Shri Pawan Verma during the transaction and delivery of gold; the report of the deputy director, regional forensic science laboratory, Surat stated that no incriminating documents/records retrieved pertaining to smuggling of gold.

1.5 A request letter dated 19-3-2019 of Shri Pawan Verma to release gold provisionally was considered by the customs and nine gold bars each weighing 100 grams of MMTC- PAMP markings were only released provisionally as those nine gold bars were found to be of Indian origin. Further, Hyundai Verna car was also provisionally released vide letter dated 19-2-2019 from which the seized gold was found from the possession of appellant Shri Pawan Verma who was travelling in that car on the date of search by the officers.

1.6 Thereafter a show cause notice was issued to the appellants by which the appellants were called upon to answer as to why foreign-origin, smuggled, seven gold-bars of 100 grams each valued at Rs. 22,96,000/-

should not be confiscated absolutely under section 111(d) of the Customs, Act, 1962, nine gold-bars of 100 grams having market value of Rs. 29,52,000/- of MMTC – PAMP markings should not be confiscated under section 119 of the Act for having used for concealment of smuggled seven gold-bars, eight gold-bars each weighing 100 grams valued at Rs. 21,60,000/- purchased by the appellant in the past should not be confiscated absolutely under section 111 (d) of the Customs Act, 1962 and that penalty should not be imposed upon the appellants under section 112 (b) of the Act.

1.7 The Joint Commissioner of Customs adjudicated the show cause notice by which he ordered absolute confiscation of seven gold-bars having market value of Rs. 22,96,000/- seized from the possession of appellant-Shri Pawan Verma holding that the said gold bars had foreign make marking without any purchase details produced are to be held as smuggled ones. As regard, nine gold-bars with the MMTC–PAMP marking held to be of Indian origin and released provisionally, it was held that the same have been used for concealment of seven gold bars of foreign origin and hence liable to confiscation under section 119 of the Act and gave option of redemption fine of Rs. 7,00,000/- in terms of section 125 of the Act. It was further held that eight gold-bars of foreign origin were purchased in the past from Shri Lalaji as admitted in the statements of appellants and hence same are liable to confiscation under section 111(d) of the Act and since the said goods are not available for confiscation, redemption fine of Rs. 21,60,000 was imposed. He further imposed personal penalty of Rs. 10,00,000/- each on both the appellants under section 112 (b) of the Act. The adjudication order was upheld by the commissioner (appeals) and hence the present appeals of appellants.

2. Shri Rahul Gajera, learned counsel appearing on behalf of appellants, submits that in the first instance it is not even established that the said seven gold bars are of foreign origin. There is no verification done as regards the origin of gold and that verification report of gold assayer, shri Salim Daginawala does not report the Gold to be of foreign origin. The report dated 30.10.2018 prepared by the gold assayer Mr. Salim Daginawala mentioned at sr. 1 to 7 as gold bars with marking embossed of "Al ETIHAD DUBAI-UAE" for sr. 1 and sr. 2, "ARGOR HERAEUS SA Switzerland at sr. 3 and "AU ESG" at sr. 4 to sr. 7. However, the said Assayer, has only carried out verification of purity, weighment and value as reflected in para. 3 of the show cause notice confirmed vide para 30 of adjudication order but has not verified as to the origin of the said gold bars by the said report of Mr. Salim Daginawala. Without any verification as to the origin of the said gold, and merely on the basis of marking on the said gold bars, the learned Joint commissioner presumed that the said gold bars are of foreign origin and the same has been upheld by the learned Commissioner (Appeals) which is not legal and proper.

2.1 He further submitted that it is not sufficient to infer foreign origin nature of the gold bars merely because the same had foreign markings thereon; that it is common knowledge that local gold can also be imprinted to pass it off as foreign gold and that even assuming that seized gold is of foreign origin that itself is not enough to conclude smuggled nature of such gold as foreign gold can be legally imported into India and is not prohibited item. He relied upon the following decisions in this behalf:

- State of Maharashtra v Prithviraj Pokhraj Jain – 2000 (126) ELT 180 (Bom).
- Pukhraj Nihalchand Jain v Commissioner of Customs – 2003 (154) ELT 715

- Lalchand D. Kothari v Commissioner of Customs – 2001 (136) ELT 525

2.2 It was further submitted that admittedly gold seized from possession of the appellant was not found in concealed manner, and that it is inconceivable that nine gold bars held to be of Indian Origin were used to conceal seven gold bars having foreign markings. As regards the eight gold bars, it was submitted that there is no evidence in this behalf to establish that the same were smuggled gold and in any event allegation of purchase of such gold in the past based solely on the statements of appellants dated 30.10.2018 and 01.04.2019 is not tenable and deponents of the said statements having not examined in terms of section 138B of the Act, no reliance can be placed on such statements. Consequently, based on such statements, the case of the department that appellants have purchased smuggled gold fails. Reliance in this regard is placed on the following decisions:

- Jindal Drugs Pvt Ltd V UOI – 2016 (340) ELT 67 (P&H)
- J K Cigarettes Ltd V. Collector of Central Excise – 2009 (242) ELT 189 (Del.)

2.3 It was further submitted that had the said statement of the appellants been voluntary, they would not have admitted all sixteen gold bars to be of foreign origin; when admittedly nine out of the sixteen gold bars were released later by the department holding the same to be of Indian origin. It was further submitted that assuming that the seized seven Gold-Bars were liable to confiscation, in view of above submissions, the Commissioner (Appeals) should have set aside the absolute confiscation and should have given an option to the Appellant of redeeming the same on payment of fine. In this behalf he relied upon the following decisions:

- C C v India Sales International – 2009 (241) ELT 182
- Yakub Ibrahim Yusuf v CC- 2011 (263) ELT 685
- Gauri Enterprises v CC-2002 (145) ELT 706
- Alfred Menezes v CC – 2009 (236) ELT 587

2.4 It was further submitted that heavy reliance has been placed in the impugned order on the foreign marking on the gold purchased without bills to shift onus on the appellant to prove that the seized gold is not smuggled which is contrary to the aforesaid decisions wherein it is held that mere foreign markings or absence of purchase details is not enough to form reasonable belief under section 123 of the Act which is not even invoked in the show cause notice.

3. Shri H P Shrimali Learned Superintendent (AR), appearing on behalf of Revenue pointed out that once foreign make marking gold bars without bills is recovered from the appellant, the onus is upon the appellant to prove that the said gold is not smuggled one. In this behalf he relied upon the section 123 of the Act and findings in the impugned Orders.

4. I have carefully considered the submissions made by both the sides and perused the record. It can be seen that authorities below have placed heavy reliance on the fact that gold seized from the possession of appellant had foreign make markings to conclude that the same are smuggled in nature. In this behalf it is observed that Hon'ble Bombay High Court in the case of State of Maharashtra v Prithviraj Pokhraj Jain *supra* has held that foreign markings are not sufficient to establish the foreign origin of the goods and that such markings do not speak for themselves and are in the nature of hearsay evidence. It is held in the said judgment that no

presumption about the foreign origin of goods arises from the foreign markings unless there is evidence to show that the same were put by the particular foreign company in ordinary course of business. Admittedly, there is no evidence in the present case that the foreign markings appearing on the seized gold bars had indeed been put by the foreign companies whose markings they purport to be and that therefore as laid down in the aforesaid judgment of the High Court no presumption of the foreign origin of the goods can arise from such markings. It is further observed that even when established that the seized Gold Bars were of foreign origin, that by itself does not establish the smuggled nature of the gold, as import of gold into India is not absolutely prohibited and there is large quantity of gold which is legally imported and is available for sale in the local market and hence merely because the seized gold had foreign markings that itself is not sufficient to infer that the same was smuggled into India. Reliance in this behalf is also placed on the decision in the case of Lalchand D. Kothari v CC – 2001 (136) ELT 525 *supra*. It can be observed that section 123 would apply where in first place there must be some evidence to form a reasonable belief that the seized gold was of foreign origin. Where foreign markings are not sufficient for arriving at the conclusion that the goods are of foreign origin, there did not exist any evidence to form a reasonable belief that the seized gold was of foreign origin and much less there exist any evidence to form the reasonable belief that the seized gold was smuggled. Reasonable belief cannot be based on suspicion or speculation or merely on the ground that the person from whom seizure was effected was unable to account for the same and that to form reasonable belief there must be some evidence to show that the goods were brought into the country contrary to prohibition imposed by law. Since such prima facie evidence to form reasonable belief that the goods were of foreign origin and were brought into the country illegally was lacking, mere circumstance that after purchasing the gold bars from the sellers of gold at Surat and carrying it to Delhi without any further evidence to show that the gold bars were brought into India from abroad illegally cannot afford a ground for forming the reasonable belief that the same were smuggled into India. In view of above, there exist no circumstance for forming a reasonable belief that the seized gold is smuggled gold and consequently, section 123 has no application.

4.1 The authorities below clearly entertained erroneous view that failure on the part of the Appellant to provide any purchase documents indicates only to the fact that it was smuggled from abroad. The said finding is totally unsustainable in law. It can be seen from the foregoing discussion that Section 123 of the Customs Act 1962 can be invoked only if it is first established by evidence that the seized gold was of foreign origin, and that for Section 123 to apply, there must be evidence to show that the seized goods are of foreign origin. In the present case there is no such evidence. As held by the Hon'ble Bombay High Court in the case of State of Maharashtra v Prithviraj Pokhraj Jain – 2000 (126) ELT 180 (Bom), foreign markings are not sufficient for arriving at the conclusion that the goods are of foreign origin. Further, there is no evidence that seized gold was smuggled into India. The said allegation of the smuggled nature of gold is not supported by any evidence at all since no person is alleged to have so smuggled the said gold identified and found. In view of above, confiscation of seven gold bars cannot be sustained.

4.2 Similarly, no assumption can be made in respect of eight gold bars as foreign origin and smuggled gold alleged to have been purchased from Shri Lalaji from Surat in the past. The said allegation is solely based upon the statements dated 30.10.2018 and 01.04.2019 of appellants in which there is admissions that all sixteen gold bars were of foreign origin which contradicts with the fact that out of those sixteen, nine gold bars were released as the same were held to be of Indian Origin. Further, no other details shown from the statements as to how such gold can be said as foreign origin or smuggled. This shows that statements are not reliable. Moreover, no deponents of the statements have been examined/cross examined by the adjudicating authority in terms of mandate of section 138B of the Act and as such no reliance can be placed on such statements which are not relevant in view of settled legal position in this behalf by the following decisions:-

- Jindal Drugs Pvt Ltd V UOI – 2016 (340) ELT 67 (P&H)
- J K Cigarettes Ltd V. Collector of Central Excise – 2009 (242) ELT 189 (Del.)

4.3 It has been held in the above decisions that statements of deponents are not relevant piece of evidence where deponents of such statements have not been examined/cross-examined in terms of section 138B of the Act. In view of above, confiscation of eight gold bars under section 111(d) of the Act and redemption fine so imposed of Rs. 21,60,000/- is not tenable.

4.4 As regards confiscation under section 119 of Customs Act, 1962 upheld in respect of nine gold-bars on the premise that the said gold-bars were obtained without any bill/invoice/bill of entry etc. and were used for concealment of smuggled goods in order to camouflage the identity of seven foreign origin smuggled gold bars; Undisputedly, the gold bars were not found in concealed state from the appellants. There is no evidence to show that appellant knew or had reason to believe that the gold bars were of smuggled nature. As per the show cause notice para 11.1, report dated 17.1.2019 of the Deputy Director Forensic Science Laboratory, Surat no incriminating documents/records retrieved from the mobile phones of the appellants pertaining to smuggling of gold was found. There was thus no evidence of preparation of the appellants to buy foreign origin smuggled gold, in absence of which question of using the said nine gold bars for the purpose of concealment of seven gold bars does not arise. Even otherwise, it is inconceivable that one would purchase nine gold bars only for the purpose of concealing seven gold bars. As discussed above, the seven gold bars itself cannot held as foreign origin smuggled gold; the nine gold bars cannot be said as imported contrary to any prohibition imposed by or under the Act or any other law as provided under section 111(d) of the Act. In that view, imposition of fine of Rs. 7,00,000/- in lieu of confiscation under section 125 of the Customs Act, 1962 imposed as regards the above nine gold bars cannot be sustained.

4.5 As regards, Hyundai Verna Car, learned Commissioner (Appeals) has upheld the confiscation under Section 115 of the Customs Act, 1962 with an option to pay fine of Rs. 1,00,000 in lieu of confiscation under Section 125 of the Customs Act on the ground that appellant used Hyundai Verna Car for carrying/transporting and concealing seven foreign origin smuggled /nine MMTC -PAMP gold bars. He has further held that the car through which appellants were travelling had been bought from Shri Sanjiv Kumar, New Delhi through verbal agreement and the transfer of ownership was yet to be happened and thus car still does not belong to the appellant as the transfer of registration was pending and that in that view appellant is not even authorized to raise contention on the confiscation of the car. Admittedly appellant was found in possession of the car, undisputedly seized gold was not found concealed manner in the car, further in view of above discussion, it is not established that seized gold was smuggled one. Consequently, section 115 of the Act is not applicable and hence confiscation of car and redemption fine so imposed also cannot be sustained.

5. In view of foregoing, the impugned order is liable to be set aside. Since confiscation of gold is not tenable, fine and penalty is also cannot be sustained. Accordingly, the impugned orders are set aside. Appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 15.02.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Raksha