CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70099 of 2023

(Arising out of Order-in-Appeal No.87-CUS/APPL/LKO/2023 dated 01/02/2023 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

Commissioner of Customs (Preventive), Lucknow **.....Appellant**
(A-3/113, Siddhivinayak Building,
Vibhuti Khand, Gomti Nagar, Lucknow)

VERSUS

Shri Shamik Khanna, Prop. **....Respondent**

(M/s Tiara Enterprieses, Aminabad, Lucknow)

APPEARANCE:

Shri Manish Raj &
Shri Sarweshwar T. Khairnar, Authorised Representatives for the Appellant
Shri Vineet Kumar Singh, Advocate for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70178/2023

DATE OF HEARING : 31 October, 2023
DATE OF DECISION : 31 October, 2023

SANJIV SRIVASTAVA:

This appeal filed by the revenue is directed against Order-in-Appeal No.87-CUS/APPL/LKO/2023 dated 01/02/2023 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow. By the impugned order Commissioner (Appeals) has held as follows:-

"After evaluating the case in its entirety and keeping in mind the overall facts of the case alongwith judicial pronouncements of the jurisdictional Hon'ble CESTAT and Hon'ble High Court, I feel that the appellant has been able

to make a case for himself. In the appeal the limited issue challenged before me, is the denial of PR by the adjudicating authority. Since SCN in the case has already been issued and is pending adjudication, thus, without commenting anything on the merit or otherwise of the case but restricting myself to the point of admissibility of granting PR alone, I am of the view that I have binding precedence of order of jurisdictional Hon'ble CESTAT and Hon'ble High Court to follow on the subject matter. Respectfully following the ratio of the judgment passed by the jurisdictional Hon'ble CESTAT, Allahabad and the order of the Hon'ble High Court, Allahabad cited above, I am thus inclined to allow provisional release of the Indian Currency of Rs. 1.21 Cr. and Silver Bullion of 300/301 kgs (approx.) seized by the DRI and rejected by the adjudicating authority below, on furnishing bank guarantee of the full amount supported with cash security of 50% of the value, with inbuilt renewal clause, by the appellant. Bond value or the cash security will be with reference to the cumulative seizure value of the Silver Bullion and seized Indian Currency. On furnishing of such BG supported with Cash security as above, the department shall, pending adjudication, provisionally release the seized currency and Silver Bullion to the appellant forthwith."

2.1 On 05.07.2022 officers of DRI, Lucknow intercepted a vehicle, Tata Harrier bearing registration no. UP 63 AP 1819 and recovered 15 pieces of foreign origin gold weighing 2,297.840 grams, being smuggled from Bangladesh. Shri Vibhore Rastogi in his statement dated 06.07.2022 under Section 108 of the Customs Act, 1962 stated that the said gold was meant for delivery to the appellant. A search was conducted at the premises of the appellant on 06.07.2022 resulting in recovery of 180 kgs (approx.) foreign origin silver and cash Rs.1,21,00,000/- were seized. Appellant in his statement dated 07.07.2022 admitted to acquaintance of Shri Vibhore Rastogi and delivery of consignment of foreign origin gold to him on previous occasions.

2.2 On the basis of statement of appellant another follow up search was carried out at the premise of brother of the appellant resulting recovery of 120 Kgs (approx.) foreign origin silver.

2.3 Appellant vide letter dated 02.09.2022 requested for provisional release of 300 kgs (approx.) silver and cash Rs.1.21 crores. Joint Director, DRI, Lucknow informed vide letter dated 11.10.2022 that investigation in the matter is underway and the appellant was involved in illegal possession of 301 Kgs. (approx.) foreign origin silver and Rs.1.21 crores in lieu of sale proceed of smuggled goods. Appellant has been trying to derail the investigation by producing forged and fake documents and did not co-operate in the investigation, therefore, the seized goods must not be released.

2.4 Additional Commissioner, Customs (Preventive) taking note of the above, rejecting the request for provisional release by observing as follows:-

> *"6 In this case, I find that as informed by DRI that the investigation in the matter is still on and the applicant was involved in illegal possession of 301 Kgs (approx) foreign origin silver and INR 1.21 crore as sale proceeds of smuggled goods. The applicant has from day one produced fake and forged document and has tried to derail investigation. Shri Shamik Khanna alias Rishi Khanna has not cooperated with the ongoing investigation till date. Therefore, DRI, Lucknow is of the opinion that the seized goods may not be released and they strongly oppose the submissions made by the applicant. Further Section 123 of Customs Act, 1962 provides that in case of seizure of silver under Customs Act, 1962, the burden of proof shall lie on the person from whose possession silver was recovered, failure to this the seized silver would be considered as smuggled one. Since the accused persons could not produce any valid document in thois regard, therefore, application for provisional release of seized goods i.e.*

approx 300 Kgs Silver and Rs. 1,21,00,000/- cash cannot be acceded to at this moment and therefore rejected.

7. Lastly, this order being interim in nature does not cast any comment on the merit or demerit of the investigation. In no way it influences the interest of the party or the Department in any judicial or quasi judicial proceedings."

2.5 This order was challenged before the Commissioner (Appeals), who vide the impugned order have allowed the goods to be provisionally released subject to conditions imposed by him.

2.6 Aggrieved revenue have filed this appeal on the following grounds:-

i. *The learned appellant authority mentioned that the appellant has received advance money from M / s Hanhnar Enterprises towards purchase of impugned silver. However, investigation carried out in the instant case reveals that M / s Hanhnar is a shell company managed by the appellant to transact his earning from the activity of smuggling. The seized money is the sale proceeds of the smuggled gold and has been correctly seized under Section 110 of the Customs Act, 1962.*

ii. *The Commissioner (Appeals) has relied upon the case of Ramchandra Vs Collector of Customs reported in 1992 (60) ELT 277 and held that as per records of the case none of the ingredients as exist in this case.*

The findings of Commissioner (Appeals) is not correct and unacceptable as the Commissioner (Appeals) as all above four conditions as held by the Hon'ble Tribunal were satisfied in the present case. These four conditions are -

a. there was a sale, which was illegal;

b. the sale was of smuggled gold and illegally procured foreign origin silver;

c. the buyer and seller were having the knowledge that they are dealing with smuggled silver & gold;

d. the buyer and the seller have accepted that they were actively involved in the smuggling activity in the case of foreign origin gold whereas in the case of foreign origin silver the applicant provided incorrect address of supplier.

iii. *It has been mentioned by the appellant authority that the cash book register has been verified by the CA M / s Anchal Rastogi, therefore, the same is correct, is not proper in as much as the appellant has also misguided the CA and has produced wrong facts before her.*

iv. *Regarding silver bullions, M / s Auspicious Ornament Pvt. Limited, Agra stated under Section 108 of the Customs Act, 1962 that they are not dealing with the imported silver whereas the silver seized was of foreign origin. As per the provisions of Section 123 of the Customs Act, 1962, the onus was on the appellant to prove that the silver was legally imported into India which he failed to do so. The appellant authority failed to take cognizance of this fact.*

v. *Further, in the case of Union of India and Ors. Vs Raj Grow Impex LLP and Ors. in Civil Appeal No(S) 2217-2218 of 2021 the Hon'ble Supreme Court vide Judgement/ Order dated 17.06.2021 held that the seized goods are liable to absolute confiscation.*

vi. *The learned appellant authority has also discussed the case of Mayank Agarawal Vs Commissioner of Customs (Prev.) Lucknow, Customs Appeal No 01 of 2022 dated 08.09.2022 in which Hon'ble High Court upheld order of the Hon'ble CESTAT, Allahabad passed in the case C/A/70082/2022-CU/DB dated 28/03/2022 granting provisional release of the seized gold, with only modification that the amount of cash security enhanced from 30% to 50%. In the present case the appellant authority in discussion and finding part has not discussed the condition of the aforesaid order of Hon'ble High court which further holds that "the release of gold shall abide by* *proceedings arising out of show cause notice dated 02/11/2021 issued under Section 124 of the Customs Act, 1962." In this regard, it is also submitted that the case mentioned by Commissioner (Appeals) was based on specific circumstances where adjudication proceedings were also guided by Hon'ble Court and the same cannot be accepted as a precedence.*

vii. *Smuggling of foreign origin Gold and Silver have wide ranging detrimental ramifications for the Indian economy as its linked to generation and distribution of Black Money. Smuggling as per Section 2(39) of the Customs Act, 1962 is established in this matter and the goods and cash are liable for confiscation and penalty to imposed on accused persons. Hon'ble Supreme Court of India in the case of State of Gujarat Vs Mohanlal Jitamalji Porwal & Anr AIR 1987 SC 1321, has observed that -*

"...... An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest....."

viii. *The adjudicating authority, while holding the goods as prohibited, based on the decision of the Hon'ble Supreme Court in the case of Om Prakash Bhatia v. CC reported at 2003 (155) ELT 423 (SC), has decided not to give an option to the Appellant to redeem the goods on payment of fine. From the scrutiny of the said decision of the Hon'ble Supreme Court, it emerges that the Hon'ble Court was interpreting the scope of expression prohibition' used in Section 111 of the Customs Act, 1962, and held that this expression 'prohibition' also includes all types of* *'restriction' and hence confiscation is valid even in the case of the restricted goods i.e. silver."*

3.1 We have heard Shri Manish Raj & Shri Sarweshwar T. Khairnar, Authorised Representatives appearing for the appellant-revenue and Shri Vineet Kumar Singh learned Counsel appearing for the respondent-assessee.

3.2 Arguing for the appellant-revenue learned Authorized Representative reiterates the grounds stated in the review order and in the appeal. In their view it is a clear case where provisional release should not have been allowed.

3.3 Learned Counsel appearing for the respondent submits that-

- Learned Commissioner (Appeals) has passed the order by following the decision of this Tribunal in the case of Mayank Agarwal Final Order No.70082 of 2022 dated 28.03.2022, which has been upheld by the Hon'ble Allahabad High Court (Lucknow Bench).
- The decisions relied upon in the appeal memorandum are not in any case related to the case of provisional release.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 We find that the issue involved in the matter is only for provisional release of the seized goods in terms of Section 110A. Section 110A of the Customs Act, 1962 is reproduced bellow:-

> ***"110A.*** *Provisional release of goods, documents and things seized pending adjudication.—Any goods, documents or things seized under section 110, may, pending the order of the adjudicating officer, be released to the owner on taking a bond from him in the proper form with such security and conditions as the Commissioner of Customs may require."*

4.3 From the plain reading of the said Section, it is quite evident that provisional release of the seized goods in terms of Section 110A goods, document and things seized, pending adjudication has been allowed as a right to the person who claims ownership of the said goods, documents and things. The only requirement is that at the time of release the bond in proper form with security and conditions as adjudicating authority may impose, should be taken from him.

4.4 The only grounds stated by the Additional Commissioner in Order-in-Original for not allowing the provisional release of the seized goods and Indian currency is that respondent was not cooperating with the investigation proceedings. The ongoing investigation cannot be ground for the denial of right to the provisional release of seized goods conferred on the respondent by the Customs Act, 1962. It seems that the Additional Commissioner, while passing this order has not acted as quasi judicial authority but an agent of investigating team of DRI officers and have instead of implementing the rule of law has decided to implement the will of the investigating authorities. Such an approach or interference in quasi judicial functioning by the investigating authorities is totally uncalled for and is condemned. The quasi judicial function ask for application of judicial mind to the issue in hand. If respondent was not cooperating with the investigation appropriate action as provided in law should have been taken by the authorities responsible, might be they are ignorant of the law in this regard. Commissioner (Appeal) has considered the issue purely on the basis of judicial principles and the decided the appeal on the basis of the judicial precedence available. Revenue/ Committee of Commissioners seem to be aggrieved by the judicial application of mind by the Commissioner (Appeal) in the issue raised before him in the appeal filed before him.

4.5 We note that this issue has been considered by the Tribunal in the case of Mayank Agarwal Final Order No.70082 of 2022 dated 28.03.2022 and even in case of seized gold Tribunal has allowed the provisional release by observing as follows:-

> *12. In these circumstances, at this stage, we hold that the said gold can be released provisionally. Therefore, relying on the decision of this Tribunal in the case of* ***Its My Name Pvt Ltd vs. Additional Director General (ADJ.)***

(supra), we hold that balance of convenience in allowing provisional release lies in favour of the appellant. Therefore, we allow the provisional release of the seized gold on the following terms:-

(A) Bond for full value of the seized goods, and

(B) The bond be backed by Bank Guarantee of 30% of the value of the gold with auto renewal clause in favour of the Revenue Authority.

13. Subject to fulfillment of the above stipulated conditions, the Revenue Authority is directed to release the seized gold forthwith or within 7 working days to the appellant.

14. In view of this, the appeal for provisional release of the seized gold is allowed with conditions imposed hereinabove."

4.6 This order was challenged by the revenue before the Hon'ble Allahabad High Court (Lucknow Bench) and the appeal filed by the revenue was dismissed by observing as follows:-

Learned counsel for the appellant has inter alia argued that the order passed by the Tribunal is unsustainable in the eye of law for the reason that the petitioner has failed to cooperate in response to the show cause notice issued to him on 2.11.2021. At this stage, we take note of the fact that other WRIT - C No. - 30305 of 2021; Mayank Agrawal Vs Addl. Director General Directorate Of Revenue Lko.And Ors relating to the same subject matter has been disposed of today i.e. 8.9.2022 in terms of the order passed by us which reads as under:

"Heard learned counsel for the petitioner and Sri Digvijay Nath Dubey, learned counsel appearing for opposite party.

Learned counsel for the petitioner has confined his prayer only to the extent that the objections filed by him before the Commissioner of Neutral Citation No. - 2022:AHC-LKO:50320-DB Customs (Preventive) in response to the show cause notice dated 2.11.2021 *may be directed to be disposed of in accordance with law. The show cause notice has been issued under Section - 124 of the Customs Act, 1962.*

The petitioner is stated to have filed his objections on 1.2.2022.

Sri Digvijay Nath Dubey, appearing for opposite party does not have any objection to the prayer.

Accordingly, we hereby direct the Commissioner of Customs (Preventive) to deal with the petitioner's objections against the show cause notice dated 2.11.2021 and finalize the same by passing a reasoned and speaking order expeditiously, preferably, within a period of two months from the date of production of a copy of this order alongwith the application. It is made clear that this Court has not dealt with the issue at hand on merits.

The writ petition is accordingly disposed of."

Looking to the fact that the objections have already been filed before the competent authority in so far as the seizure of the gold is concerned, the order passed by the Tribunal assailed on the ground urged before us has lost its relevance. The release of the seized gold, however, is bound to be secured against an adequate bank guarantee. The Tribunal having considered the matter has already directed the respondent to furnish bond for full value of the seized gold. We hereby affirm the first condition imposed by the Tribunal.

In so far as the release of gold on the basis of bank guarantee of 30% of the value of the gold with auto renewal clause is concerned, we hereby modify the said clause and provide that the respondent shall extend bank guarantee to the tune of 50% of the value of the gold with auto renewal clause in favour of the revenue authority. On fulfilling the two conditions modified above, the gold seized by the revenue is directed to be released forthwith and preferably within a period of 10 days. The release of gold *shall abide by the proceedings arising out of show cause notice dated 2.11.2021 issued under Section 124 of the Customs Act, 1962*."

4.7 The ratio of these two orders has been followed by the Commissioner (Appeals) while allowing the provisional release of the seized goods and currency. We do not find any merits in the appeal which goes against the decision of the Jurisdictional High Court. The appeal filed by the revenue goes contrary to the well settled principles of judicial discipline.

4.8 Addressing "Lawyers' meet 2015" organized by the bar council of India on "Public litigation Policy and Access to Justice" on 25.07.2015 stated as follows:

> *"We have envisaged a National Litigation Policy 2015 to contain frivolous or unwarranted litigation by and against the Government. This will address the problem of increasing load on the judicial system. The policy outlines mechanism to reduce filing of cases by or against the Government. It aims at avoiding unwarranted litigation and making the Government as an efficient and responsible litigant by having recourse, inter alia, to alternative dispute resolution mechanism."*

4.9 In case of Pirthwi Singh & Ors. [CIVIL APPEAL NO. OF 2018 (Arising out of Diary No. 8754 of 2018) WITH (IA No. 52059 of 2018, IA No. 52058 of 2018, IA. No.52056 of 2018 and IA No. 52057 of 2018), Hon'ble Supreme Court vide order dated 24.04.2018 observed as follows:

> *"8. The Union of India must appreciate that by pursuing frivolous or infructuous cases, it is adding to the burden of this Court and collaterally harming other litigants by delaying hearing of their cases through the sheer volume of numbers. If the Union of India cares little for the justice delivery system, it should at least display some concern for litigants, many of whom have to spend a small fortune in litigating in the Supreme Court.*

9. On 23rd June, 2010 the Union of India released the 'National Legal Mission to Reduce Average Pendency Time from 15 Years to 3 Years' and this document is called 'National Litigation Policy'. The vision/mission of the National Litigation Policy is as follows:

"1. The National Litigation Policy is based on the recognition that Government and its various agencies are the pre-dominant litigants in courts and Tribunals in the country. Its aim is to transform Government into an Efficient and Responsible litigant. This policy is also based on the recognition that it is the responsibility of the Government to protect the rights of citizens, to respect fundamental rights and those in charge of the conduct of Government litigation should never forget this basic principle.

"EFFICIENT LITIGANT" MEANS

- *Focusing on the core issues involved in the litigation and addressing them squarely.*
- *Managing and conducting litigation in a cohesive, coordinated and time-bound manner.*
- *Ensuring that good cases are won and bad cases are not needlessly persevered with.*
- *A litigant who is represented by competent and sensitive legal persons: competent in their skills and sensitive to the facts that Government is not an ordinary litigant and that a litigation does not have to be won at any cost.*

"RESPONSIBLE LITIGANT" MEANS

- *That litigation will not be resorted to for the sake of litigating.*
- *That false pleas and technical points will not be taken and shall be discouraged.*
- *Ensuring that the correct facts and all relevant documents will be placed before the court.*

- *That nothing will be suppressed from the court and there will be no attempt to mislead any court or Tribunal.*

2. Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the court decide," must be eschewed and condemned.

3. The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the Goal in the National Legal Mission to reduce average pendency time from 15 years to 3 years. Litigators on behalf of Government have to keep in mind the principles incorporated in the National mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases. Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority." [Emphasis supplied by us]

10. None of the pious platitudes in the National Litigation Policy have been followed indicating not only the Union of India's lack of concern for the justice delivery system but scant regard for its own National Litigation Policy.

11. The website of the Department of Justice shows that the National Litigation Policy, 2010 is being reviewed and formulation of the National Litigation Policy, 2015 is under consideration. When this will be finalized is anybody's guess. There is also an Action Plan to Reduce Government Litigation which was formulated on 13th June, 2017.

12. Nothing has been finalised by the Union of India for the last almost about 8 years and under the garb of ease of *doing business, the judiciary is being asked to reform. The boot is really on the other leg.*

13. Interestingly, the Action Plan mentions, among others, two interesting steps to reduce pendency: (i) Avoid unnecessary filing of appeals –appeals should not be filed in routine matters – only in cases where there is a substantial policy matter.

(ii) Vexatious litigation should be immediately withdrawn.

14. These pendency reduction steps (particularly (ii) above) have been conveniently overlooked as far as this appeal is concerned."

4.10 It is not understood as to how officers responsible for implementing a Central Law - Customs Act, 1962, holding high positions of "Commissioner" in the justice delivery system as per the Act, ibid, direct contrary to the provisions of the law as have been interpreted by the Higher Judicial Forums including the Jurisdictional High Court. The appeal filed itself goes contrary to the principles of judicial discipline which are so sacrosanct for establishing rule of law. For this reason, we direct that copy of this order should be given to the Chief Commissioner of the zone and Member Investigation/ Member Customs for taking necessary action and to ensure that such practices is avoided.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Akp