CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70374 of 2022

(Arising out of Order-in-Appeal No.228-CUS/APPL/LKO/2022 dated 01.04.2022 passed by Commissioner (Appeals) Customs CGST & Central Excise, Lucknow)

Mr. Atul Kumar, **.....Appellant**
(R/o Ward No.5, Dafali Muhalla,
P.S. Garhwa, Dist. Garhwa Jharkhand-822114)

VERSUS

Commissioner of Customs, Lucknow **....Respondent**
(3/194, Vishalkhand-3, Gomti Nagar, Lucknow-226010)

APPEARANCE:

Shri Kartikeya Narain, Advocate for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**

FINAL ORDER NO.- 70411/2024

DATE OF HEARING : 16 May, 2024
DATE OF DECISION : 09 July, 2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.228-CUS/APPL/LKO/2022 dated 01.04.2022 passed by the Ld. Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow by which he has upheld the confiscation of seized gold weighing 1599.200 grams along with penalty of Rs.25,00,000/- under Section 112(b) of the Customs Act, 1962.[1]

2. Briefly stated, the facts of the case are such that the Appellant is a resident of Garhwa, Jharkhand and on 31.07.2019, when the Appellant was returning to Aligarh from Kolkata by Train No.12381, he was apprehended by GRP personnel at Pt. Deen Dayal Upadhyay Junction (Mughalsarai) Railway Station,

[1] The Act

and four gold bars were recovered from the Appellant. The recovered gold bars and the Appellant were then handed over by GRP to the Customs (Preventive), who seized the gold bars weighing 1599.200 grams and valuing Rs.54,37,280/- vide seizure order dated 31.07.2019. The statement of the Appellant was then recorded on 01.08.2019 to the effect that he works with his brother Sri Arun Kumar at his firm M/s G.S. India, the Appellant alongwith his brother and his Uncle's son Sri Santosh Kumar, are engaged in the said smuggling, he was bringing the said gold bars from one Sri Bablu of Kolkata residing at 4th Floor of an apartment situated in front of Royal Street Park, Nandi Bagan, Salkia, Howrah, on the directions of his elder brother Sri Arun Kumar and the said gold bars were to be delivered to M/s Kashi Jewellers, Birhana Road, Kanpur. In his statement, the Appellant also stated that he has no valid documents relating to the gold bars and he came to know that gold bars are smuggled into India from Bangladesh and foreign markings are erased at Kolkata and the gold bars in question are of foreign origin with markings erased. The Appellant was then arrested and produced before the Ld. CJM, who remanded the Appellant to judicial custody. During the course of further investigation, summons were issued to M/s Kashi Jewellers, Sri Arun Kumar and one Sri Santosh Kumar. One of the partners of M/s Kashi Jewellers stated that they purchased goods from Government Agencies and he denied any connection with the Appellant. Brother of the Appellant also appeared and stated that business partition between them took place in the year, 2016 and thereafter he has no business connection with the Appellant. Sri Santosh Kumar also tendered his statement to the effect that he has no connection with the Appellant and he has business relation only with the Appellant's elder brother Sri Arun Kumar.

3. At this stage, the Revenue again recorded statement of the Appellant on 28.08.2019 in District Jail, Varanasi after taking permission of the Court of Special CJM (Economic Offences), Varanasi. The statement was to the effect that the Appellant has no concern with the firm of his brother M/s G.S India, neither his

brother Sri Arun Kumar nor Sri Santosh Kumar are involved with the smuggling, the Appellant took the name of Sri Arun Kumar and Sri Santosh Kumar just to save himself, the Appellant does not know about the owner of M/s Kashi Jewellers, after taking possession of gold bars from Sri Bablu at Kolkata, the Appellant had to deliver the same to one Sri Pramod and that he does not know the phone numbers of Sri Bablu or Sri Pramod. Summons were also issued to Sri Bablu but the same were returned undelivered with postal comment "insufficient address". The Revenue also obtained the CDR of phone number of the Appellant.

4. Show Cause Notice[2] dated 16.01.2020 was issued proposing confiscation of 04 pcs of foreign origin gold weighing 1599.200 grams, valued at Rs.54,37,280/- under Section 111(b) & (d) of the Act and imposition of penalty on the Appellant under Section 112(a) & (b) of the Act. In reply to the SCN, the Appellant claimed that the seized gold was purchased by him in support whereof he also submitted copies of invoice and Bank statement.

5. The SCN was then adjudicated vide Order-in-Original No.12/JC/2021-22 dated 09.06.2021 wherein after referring to the facts noted above, the Adjudicating Authority, on the basis of statements of the Appellant, CDR showing his visits from Delhi to Kolkata and Delhi came to the conclusion that the said journeys were performed by the Appellant for purchasing and procuring the smuggled foreign origin gold bars from Kolkata and then selling the same in Delhi. The Adjudicating Authority also held that gold being a notified item under Section 123 of the Act, the onus of proof that the gold bars are not smuggled was on the Appellant and the Appellant has not produced any documents regarding sale/purchase/transportation/keeping of the recovered foreign origin gold bars. The Adjudicating Authority further held that the Appellant did not fulfill the eligibility criteria for import of gold to India and therefore the recovered gold bars are prohibited goods, liable to be absolutely confiscated. The copies

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[2] SCN

of invoices dated 24.11.2016 and 27.01.2017 produced by the Appellant were also held to be not related to the seized gold, as the same were issued well before 18 months of the seizure. The plea of the Appellant that statements were obtained under duress and coercion was also rejected on the ground of absence of any retraction. The Adjudicating Authority also imposed penalty of Rs.25,00,000/- on the Appellant under Section 112(b) of the Act.

6. Aggrieved with the adjudication order dated 09.06.2021, the Appellant preferred appeal before the Ld. Commissioner (Appeals) which was numbered as Appeal No.73-CUS/2021, which has been dismissed by the impugned order, wherein the findings recorded in the adjudication order have been upheld.

7. Ld. Counsel for the Appellant has contended that the Appellant has been falsely implicated in the matter, the subject gold bars were purchased by the Appellant from within the country as is evident from the two purchase invoices, genuineness of which has not been doubted by the two lower Authorities, the statements of the Appellant were recorded under duress and coercion hence cannot be solely relied to conclude that the subject gold bars have been smuggled from outside India, in absence of any foreign marking and purity on the subject gold bars and the recovery of subject gold bars at Pt. Deen Dayal Upadhyay Junction (Mughalsarai) Railway Station is a town seizure. Onus of proof that the subject gold was smuggled is on the Department not on the Appellant. The Department is not able to find the supplier of subject gold bars, Shri Babloo and the recipient Shri Pramod. This is only the story generated by the Department.

8. Ld. Authorized Representative for the Revenue reiterated the discussions and findings stated in the impugned order.

9. Heard both the sides and perused the appeal records.

10. On perusing through the records, I find that the entire case of the revenue is based on the fact of recovery of subject gold bars from the Appellant, the statements dated 01.08.2019 and 29.08.2019 and the call record details of the Appellant.

Although the Appellant has contended that both the statements were recorded under duress and coercion, then also by taking both the statements on face value, the statement dated 01.08.2019 records that he along with his two brothers was involved in smuggling of gold bars, he received the subject gold bars from one Sri Bablu at Kolkata, at the time when the subject gold bars came into his possession there were no foreign markings, he was informed by Sri Bablu that the subject gold bars were smuggled into India from Bangladesh and foreign markings were erased at Kolkata and also that the subject gold bars were to be delivered to M/s Kashi Jewellers, Kanpur. While the Revenue investigated the matter further but did not find any involvement of the brother of the Appellant, Sri Arun Kumar, Shri Santosh Kumar and M/s Kashi Jewellers. The statement of the Appellant was again recorded on 29.08.2019 and the said statement records a completely different story i.e. after receiving subject gold bars from Sri Bablu at Kolkata, the same were to be delivered to one Sri Pramod at Delhi.

11. In view of the aforesaid statements of the Appellant, it is clear that the statement regarding smuggling of subject gold bars from Bangladesh to India and foreign markings being erased at Kolkata, was not based on the personal knowledge of the Appellant but clearly based on what was told to the Appellant by Sri Bablu. Therefore, the evidence sought to be relied upon by the Revenue to sustain the charge of smuggling is clearly a hearsay evidence. Now, it is well settled that a hearsay evidence is inadmissible to prove a fact unless corroborated by substantive piece of evidence, as held in Neeraj Dutta vs. State (NCT of Delhi) (2023) 4 SCC 731. As regards corroborative substantive evidence, I find that let alone any corroborative substantive evidence, the Revenue has not brought on record any evidence to show that the subject gold bars were actually smuggled from Bangladesh into India. The Revenue has also failed to procure and bring the testimony of Sri Bablu on record, who as per Revenue, specifically knew the fact of smuggling and erasing of foreign markings. The mere fact that the summon

issued to Sri Bablu remained undelivered, never precluded the Revenue from taking custody of Sri Bablu and procure his testimony, in the manner known to law. Here it is also important to note that having found nothing incriminating against the brother of the Appellant, Sri Santosh Kumar and M/s Kashi Jewellers, the Revenue was also required to investigate the matter further in respect of Sri Pramod, who allegedly was the recipient of the subject gold bars. However, the Revenue also failed to procure the testimony of Sri Pramod on record and therefore the Revenue clearly failed to fill up the loose ends in the story of smuggling and delivery of goods at Delhi.

12. On the contrary, the Revenue has also not disputed the genuineness of the two invoices produced by the Appellant and the transactions reflecting in the bank accounts, to substantiate legal and valid ownership of the subject gold bars. By merely saying that it is beyond imagination that a person dealing in gold will not use the purchased gold for a period of more than 18 months, the Revenue cannot brush aside the existence and genuineness of two invoices, the purchase of gold by the Appellant and its legal ownership.

13. Thus, the Appellant clearly proved ownership of same quantity of gold against consideration on the strength of valid invoices. By bringing the two invoices on record, the Appellant discharged his initial onus and thereafter it was for the Revenue to establish that the two invoices does not relate to the subject gold bars. However, this onus has not been discharged by the Revenue in the present case as no enquiry has been made regarding consideration paid by the Appellant and its source etc. to prove that the two invoices are not related to the subject gold bars. Thus, in my opinion the two invoices showing legal ownership of subject gold bars cannot be rejected on the grounds stated in the impugned order.

14. The last piece of material relied upon by the Revenue is the call record details of the Appellant to show that the Appellant was present on more than one occasions at Delhi and Kolkata. This, in my opinion leads nowhere, as even if the Appellant

travelled to Delhi and Kolkata a few times, the same does not prove foreign origin of subject gold bars, illegal import of the same and involvement of the Appellant in any manner in smuggling of foreign origin gold bars.

15. I find that neither the foreign origin of the gold nor the nature of the same being smuggled is conclusively established other than merely relying on the conclusions drawn from the statements of the Appellant. I further find that no reasonable belief has been established that the impugned gold is liable to confiscation. The entire case of the Revenue appears to be based on presumptions and assumption, which however strong, cannot take place of substantive evidence. Once it is held that the subject gold bars are not liable for confiscation, the question of penalty under Section 112(b) on the Appellant does not arise and therefore the penalty imposed on the Appellant is set aside.

The appeal filed by the Appellant is allowed with consequential relief.

(Order pronounced in open court on – **09th July, 2024**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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