IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos.C/55449, 55248 & 55450/2014-CU[DB]

(Arising out of Order-in-Original No. 07/Commissioner/LKO/2013 dated 05/08/2014 passed by Commissioner of Customs, Lucknow)

Shri Mridul Agarwal (in A. No.C/55449/2014)**,**

Shri Shakil Ahmad Khan (in A. No.C/55248/2014) **&**

Shri Satish Kumar (in A. No.C/55450/2014) **Appellants**

Vs.

Commissioner of Customs, Lucknow **Respondent**

Appearance:

Shri K.K. Srivastava, Advocate (in A. No.C/55248/2014) &
Shri Kapil Vaish, Chartered Accountant, (for others) for Appellants
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 12/10/2017
Date of Pronouncement : 22/05/2018

FINAL ORDER NOs-70944-70946/2018

Per: Anil Choudhary

Appellant (Shri Shakil Ahmad Khan, further S.A. Khan for short) works alongwith his friend Mr. Shakil in his shop which is situated near Pachkauri Hotel, Ghantagar, Bahraich. The other two appellants are engaged in jewellery business.

2. That on 27/11/2013, a team of Customs (Preventive) Officers of Lucknow Commissionerate intercepted the appellant (Shri S.A. Khan) when he was travelling by UPSRCT Bus No. UP33T9412 on Barabanki – Bahraich Road near Ram Nagar Railway Crossing.

3. That a statement of appellant (Shri S.A. Khan) was recorded on 27/11/2013 at Customs Commissionerate, Lucknow wherein he stated that he has been doing business of making gold & silver ornaments for the last 20 years; that he is educated upto class 12th; that the gold carried by him had been handed over to him by Mr. Mridul Agarwal of Bahraich (About 1 kg) and Shri Satish Kumar of Bahraich (About 700 grms.); that the gold had been handed over to him at his shop at about 11:00 AM in Bahraich; that he does not know name and address of the person to whom the goods were to be delivered; that the said Foreign Origin Gold has been smuggled into India through Nepal by the said Shri Mridul Agarwal and Shri Satish Kumar; that it had been handed over to the appellant for delivery at Lucknow. That he had under taken to deliver the said gold at Lucknow on a remuneration of Rs.1200/-.

4. That on the belief that the Foreign Origin Gold had been illegally imported from Nepal into India, in contravention of Section 111 of Customs Act, 1962 and

Notification No.9/96 dated 22/01/1996 issued there under, was liable to confiscation under Section 11 of Customs Act, 1962, was seized under Section 110 of Customs Act, 1962.

5. That Shri Krishan Kumar Agarwal F/o Shri Mridul Agarwal in his statement dated 28/11/2013 stated that he owned a firm in the name of M/s Krishan Kumar Sarraf; that Shri Mridul Agarwal looks after the said shop and was in Lucknow for some work on that day; that he had prior information of recovery of gold from the possession of Mr. Shakil Ahmad Khan and as per his knowledge the said gold was given to Mr. Shakil Ahmad Khan by his son and that Shri Mridul Agarwal could only tell about the documents pertaining to purchase of said gold. He also contended that as per his knowledge, he had not imported the gold from foreign country and used to purchase the same from local and outstation shopkeepers only.

6. That Shri Satish Kumar (also known as Shri Satish Agarwal) in his statement dated 28/11/2013 denied the ownership of the seized foreign origin gold. He further stated that he knows Shri Shakil Ahmad Khan as an artisan of jewellery; that he was in the business of gold and silver ornaments; that he was not engaged in procuring foreign origin gold.

7. That Shri Mridul Agarwal in his letter dated 30/11/2013 expressed his ignorance about the gold recovered from Mr. Shakil Ahmad Khan.

8. That a statement of Shri Mridul Agarwal recorded on 05/12/2013 wherein he stated that he knew the appellant (Mr. Shakil Ahmad Khan) as an artisan of jewellery and he use to make jewellery and do repair works for him. He had no other relation with him; that he had not given/handed over any gold to the appellant; he had no connection with the seized foreign origin gold; that the appellant (Shri S.A. Khan) had falsely taken his name and that he was not engaged in any illegal work like smuggling. He also alleged that he had given some jewellery to appellant few days back for repairing but appellant was not returning the same and he had scolded him badly for that 3-4 days back and probably for that reason of anger, appellant had involved/implicated him in the case. With regard to telephonic call with the appellant on 27/11/2013, Mr. Mridul Agarwal stated that the said call was in connection with business and return of jewellery.

9. That another statement of Shri Shakil Ahmad Khan was recorded on 13/01/2014 wherein he stated that he had taken 4 pairs of payal each kardhani and 2 pairs each of toda approx weighing 1 kg (all silver) for repair and

polish from each, of the aforesaid Shri Mridul Agarwal and Shri Satish Kumar and that he had returned the aforesaid jewellery on 07/01/2014. He again reiterated that the seized foreign origin gold was delivered to him on 27/11/2013 by the said Shri Mridul Agarwal and Shri Satish Kumar through their servants. The appellant also stated that on earlier two occasions also, said Shri Mridul Agarwal and Shri Satish Kumar have given him gold for delivery at Lucknow.

10. That a joint show cause notice dated 15/05/2014 was issued to Mr. Shakil Ahmad Khan, Shri Mridul Agarwal and Shri Satish Kumar. It proposed to:-

(a) Confiscate the seized gold weighing 1700.73 grms under Section 111(b) & 111(d) of Customs Act, 1962 for contravention of Section 111 of Customs Act, 1962 and Notification No.9/96 dated 21/11/1996 and also the provision of Notification No.63/94 dated 21/11/1994 issued under Section 7(i)(c) of Customs Act, 1962.

(b) Confiscate the packing material under Section 118 of Customs Act, 1962.

(c) Impose penalty under Section 112 of Customs Act, 1962 on Mr. Shakil Ahmad Khan.

(d) Impose penalty under Section 112 of Customs Act, 1962 on Shri Mridul Agarwal and Shri Satish Kumar.

11. That the show cause notice *interalia* alleged as under:-

(a) The 1700.73 grms (14 pieces) foreign origin gold was owned by Shri Mridul Agarwal (1 kg) and Shri Satish Kumar (700 grms.).

(b) Mr. Shakil Ahmad Khan has failed to produce any document pertaining to import or otherwise purchase of seized goods.

(c) Shri Mridul Agarwal and Shri Satish Kumar has smuggled the gold into India from Nepal through unauthorized routes and had handed over the same to Mr. Shakil Ahmad Khan for delivery in Lucknow.

(d) The Shri Shakil Ahmad Khan, Shri Mridul Agarwal and Shri Satish Kumar were involved in such carrying and smuggling of foreign origin gold in past also in similar manner to fetch profit.

(e) The aforesaid Shri Shakil Ahmad Khan, Shri Mridul Agarwal and Shri Satish Kumar were fully aware that carrying and smuggling of foreign origin gold into India from Nepal through unauthorized routes and selling the same in India is prohibited and attracts penal action under the Customs Act, 1962.

(f) As per call details of the cellular phone number 9451642049 and the bus tickets for journeys between Bahraich and Lucknow, it is evident that Shri Shakil Ahmad Khan used to regularly travel between Bahraich and Lucknow and had frequent telephonic conversation with Shri Mridul Agarwal and Shri Satish Kumar on journey dates over their aforesaid cellular phone numbers from different locations between Bahraich and Lucknow.

(g) Statements of Mr. Shakil Ahmad Khan (Appellants herein), Shri Mridul Agarwal, Shri Satish Kumar and Shri Krishan Kumar were full of contradiction.

12. That in response to the aforesaid show cause notice dated 15/05/2014, appellant submitted its defence reply dated 11/06/2014. It was submitted that :-

(a) Appellant is an artisan and has been working for making jewellery for the last 25 years.

(b) That the entire case of the appellant was incorrect and he had wrongly been implicated by the officers. He denied his involvement in movement and/or smuggling of said gold.

(c) On 27/11/2013, he was going to Lucknow for the treatment of his wife Mrs. Tajni Begum. At Ramnagar Railway Crossing, the Customs Officers checked the bus and asked every passenger about a black packet. The officers asked about his profession when he told that he is a gold artisan, the officers dragged him, alleging that the gold belongs to him.

(d) Due to false implication of the appellant in the said case, and in the absence of proper treatment, his wife also expired after some time.

13. The other appellant Shri Satish Kumar also contested the show cause notice by filing reply dated 10th June, 2014 wherein inter-alia he stated that he is the owner of M/s Goyal Jewellers situated at Hanuman Gali, Chowk, Bahraich is engaged in making of new ornaments from old ornaments and for this, they are registered, as required. That he is economically too weak to purchase 700gms of gold. That Shri Shakeel Ahmad Khan is an old and skilled artisan of gold and he works for almost all the traders or jewellery shops in Baharaich. Shri Khan usually delays the work of small traders like him. Whenever, he has work with Shri Khan, he contacts him on telephone for making or repairing of ornaments. He had given some ornaments to Shri Khan for repairing which were not delivered despite

several reminders and that is why he had scolded Shri Khan on phone. Due to this reason only, it appears Shri Khan has taken his name as owner of part of the gold recovered by the officers. Further, Shri S.A. Khan has retracted his statement later on wherein he stated that in order to save himself he had given a wrong statement to the officers. Further, during search of business as well as residential premises of the appellant– Shri Satish Kumar, nothing objectionable was recovered or found. Shri Satish Kumar has stated that the conversation between him and Shri S.A. Khan was for making and/or repairing of jewellery and not with respect to carrying or smuggling of gold.

14. The other appellant Shri Mridul Agarwal also contested the SCN by filing reply dated 10th June, 2014 vide which inter-alia he stated that his father Shri Krishna Kumar Agarwal owns and runs the shop and engaged in jewellery business under the name and style of M/s Krishna Kumar Sarraf. As his father is not keeping good health for the last few years, he sits in the shop and carries on the business of the jewellery shop. Both, his shop as well as business and residential premises were searched by the Customs Officers and nothing objectionable was found. He further stated that neither he imported gold from Nepal nor given any gold for delivery at Lucknow to Shri S.A.

Khan. He further stated that the appellant does not have the financial capacity to purchase 1000gms of gold. Further, he knows Shri S.A. Khan, as the jewellery artisan, as he does good work, for which he keeps engaging him for manufacture of new jewellery and also repair of old jewellery from him, from time to time. For this purpose, he often talks to Shri Khan on Telephone/Mobile Phone. Further, He submitted that he does not know why Shri Khan has taken his name, as owner of the part of the gold, so as to falsely implicate him. He has got no manner of concern with the gold recovered from Shri S.A. Khan. He further stated that during the time of search at his premises, he was not available, as had gone to Lucknow for medical checkup. The Officers of Customs had forcefully taken the statement of his father, according to their dictation. He further stated that no case of penalty under Section 112 is made out, against him.

15. The said SCN was adjudicated on contest vide Order-in-Original dated 05/08/2014 wherein the adjudicating authority, by rejecting the contentions of the appellants and relying on the allegations of the revenue based on the initial statement of Shri S.A. Khan, have held that Mr. S.A. Khan is an artisan and as such it is beyond his capacity to own/deal with 1.7 KG of gold, and further both the jewellers have stated that Shri Khan have taken their name

apparently out of anger, as they had scolded him, so as to implicate them falsely, which is not believable. Further, relying on the ruling of Hon'ble Supreme Court in the case of Commissioner of Customs, Madras Vs D. Bhoormull reported at 1983 (13) ELT 1546 (SC) the learned Commissioner has held that the 14 Pcs. (broken) of Gold bars totally weighing 1700.730gms valued at Rs.53,23,285/- is liable to confiscation and accordingly, confiscated in absolute terms under Section 111 (b) & (d) of the Customs Act, 1962. Further, Learned Commissioner was pleased to impose penalties under Section 112 of the Act, as follows:-

a. Shri Shakil Ahmad Khan - Rs.5Lakhs
b. Shri Mridul Agarwal - Rs.20Lakhs
c. Shri Satish Kumar - Rs.10Lakhs.

Being aggrieved, the appellants preferred appeal before this Tribunal.

16. The learned Counsel appearing for Shri Mridul Agarwal and Shri Satish Kumar, states that the penalty under Section 112 of the Act is not leviable on them. The statement of Shri Krishna Kumar Agarwal father of Shri Mridul Agarwal was recorded on 28/11/2013 wherein he had stated that his son had given some gold for carrying to Lucknow to Shri S.A. Khan, was subsequently retracted on

03/12/2013. That Section 112 of the Customs Act provides for imposition of penalty on a person–

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

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

Thus, no case of any alleged violation been made out, as provided herein above under Section 112, no penalty is imposable. Further, the imposition of penalty is also bad, as no particular clause of Section 112 have been specified in the order for imposing penalty. The plausible explanation given by the appellant and also categorical denial by them that they have no manner of concern with the seized Gold, the penalty imposed is fit to be set aside. There is no evidence on record to link these appellants with the seized Gold, save and except the retracted statement (s) of Shri S.A. Khan and Shri Krishan Kumar Agarwal father of Shri Mridul Agarwal. In the search, conducted by the Customs Officers at the shop and residential premises of these appellants, nothing incriminating was found. It is further contended that imposition of penalty in absence of independent corroborative evidence, is bad and fit to be set aside. He further prays that the order for imposition of penalty, being based on assumptions and presumptions, is fit to be set aside.

17. The Learned Counsel for the appellant Shri S.A. Khan states that it is a case of seizer of goods/gold within the country and not at the customs post or the Border of India and Nepal and/or seizer in the near vicinity of the Border. As such confiscation of Gold, on presumption of the same being smuggled from the Nepal into India in violation of Notification No.9/96–Cuss, is bad and not tenable. That revenue have not established smuggling of gold against the appellant. It is admitted case of the revenue that the appellant was carrying the gold from Bahraich to Lucknow. He further submits that in view of town seizer, the allegation of smuggling, is without any evidence and as such the order of confiscation is bad and fit to be set aside. He further states that he has got no manner of concern with the seized Gold and he has been falsely implicated by the Customs Officers after knowing that he is a jewellery artisan (Gold smith). Further, gold is not prohibited for import and the same can be imported openly upon payment of the prescribed duty. Gold is not notified goods

under Section 111 in the list of prohibited goods. He further states that the order of absolute confiscation is bad and should be allowed to be redeemed to him. The learned Counsel further states that there is no case of imposition of penalty under Section 112 of the Act made out. The only case made out against the appellant is that he has not been able to discharge the burden of proof, as required under Section 123 of the Customs Act, which provides that 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, primary relies on the person from whose position the goods were seized. Accordingly, he prays for setting aside the confiscation and penalty and release of the Gold to him.

18. Heard the learned A.R. for Revenue has relied on the impugned Order.

19. Having considered the rival contentions and after going through the record, we find that Gold is not a prohibited item and can be imported upon payment of duty. Further, it is a case of town seizer and the customs officers have seized the Gold on the suspicion of smuggling, without there being any actual evidence of smuggling. We find that the whole case of revenue is based on the retracted statement (s) of appellant S.A. Khan and father of the other appellant Shri Mridul Agarwal. We further find

that these persons are not examined in the adjudication proceedings and as such their statements are not admissible, as evidence under the provisions of Section 138B of Customs Act, which provides that- If an authority in any proceedings under the Act wants to rely upon the statement of any person (made during enquiry), such person is required to be examined as witness and if the adjudicating authority finds the evidence of the witness 'admissible', then such witness should be offered for cross examination and only thereafter the evidence is admissible. In absence of compliance with the provision of Section 138B of the Act, the statements are not admissible as evidence and accordingly, the case of revenue against the appellants does not stand. We further find that the appellants namely Shri Mridul Agarwal and Shri Satish Kumar have categorically denied their connection with the seized Gold and in absence of any corroborative evidence the imposition of penalty on them is bad and fit to be set aside.

20. We also set aside the penalty imposed on Shri S.A. Khan, as smuggling is not established. However, as the appellant Shri S.A. Khan have not discharged the burden of proof under Section 123 of the Act (the presumption of gold being smuggled), we uphold the confiscation but set aside the absolute confiscation by the learned Commissioner.

21. The confiscated Gold will be redeemable to Shri S.A. Khan on payment of duty and redemption fine of Rs.5,00,000/-. Thus, the appeal of Shri S.A. Khan is allowed in part and the appeals of Shri Mridul Agarwal and Shri Satish Kumar is allowed.

(Pronounced in Court on-22/05/2018)

(Anil G. Shakkarwar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

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