

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

APPEAL Nos. C/70305, 70521 & 70522/2018-CU[DB]

(Arising out of Order-in-Appeal No. 282-284-CUS/APPL/LKO/2017 dated 16/10/2017 passed by Commissionerate, GST & Central Excise (Appeals), Lucknow)

Shri Sanjeeb Kumar @ Pappu Kumar (in Appeal No. C/70305/2018),

Shri Ajay Kumar (in Appeal No. C/70521/2018) &

Shri Umesh Kumar (in Appeal No. C/70522/2018) **Appellant(s)**

Vs.

The Joint Commissioner, Customs

Commissionerate, Lucknow **Respondent(s)**

Appearance:

Shri Saurabh Kapoor (Advocate)

for Appellant(s)

Shri Pawan Kumar Singh (Superintendent) AR

for Respondent(s)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

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

Date of Hearing : 27/12/2018

Date of Decision : 27/12/2018

FINAL ORDER NOs **72932-72934 / 2018**

Per: Ashok Jindal

The appellants are in appeal against the impugned order wherein Gold recovered from the possession of the appellants have been confiscated absolutely and penalties on appellants have been imposed.

2. The facts of the case are that the appellants namely Shri Umesh Kumar and Shri Ajay Kumar were intercepted at

Lucknow, Railway Station who were travelling by Saptkranti Express on 22nd November, 2013 to Anand Vihar, Delhi. During the course of interception, four Gold Bars weighing 1kg each were recovered from their luggage. On the basis of the markings on the Gold Bars it was presumed that these Gold Bars are of third country origin and statements of both the appellants were recorded who have stated that Gold has been handed over by Shri Sanjeeb Kumar @ Pappu Kumar to them. On the basis of the statements recorded, another appellant Shri Sanjeeb Kumar @ Pappu Kumar was also interrogated. Thereafter, the statement of Shri Pappu was also recorded and the proceedings were initiated against the appellants for absolute confiscation of the Gold in question and to impose penalties on all the appellants. The matter was adjudicated, the Gold recovered from the possession of appellants namely Shir Umesh Kumar and Shri Ajay Kumar was absolutely confiscated and penalties to the tune Rs.10 lakhs each on Shri Umesh Kumar and Shri Ajay Kumar and a penalty of Rs.15 lakhs has been imposed on Shri Sanjeeb Kumar. Against the said order, the appellants are before us.

3. The learned counsel for the appellants submits that in terms of Section 123 of Customs Act, 1962 the onus is on the appellant to prove that the Gold in question is not smuggled one, although appellants have failed to prove that Gold is not smuggled one but the allegation of the Revenue that the Gold

is restricted item being third country origin has not been proved by the Revenue and no evidence has been brought on record by the Revenue that how the Gold is in question has come to India through Nepal. In that circumstances, Gold cannot be absolutely confiscated in the facts and circumstances of the case, therefore, Gold is required to be released to the appellants on payment of redemption find and penalty. He also relied on the decision of the Hon'ble Bombay High Court in the case of State of Maharashtra vs. Prithviraj Pokhraj Jain reported as 2000 (126) E.L.T. 180 (Bom.).

4. On the other hand learned AR appearing on behalf of the Revenue submits that in this case Shri Umesh Kumar in his statement has admitted that Gold is being smuggled from Nepal by Shri Sanjeeb Kumar, therefore, Revenue has established that Gold in question is smuggled one and if of third country origin. The appellants have failed to prove that the Gold in question is not smuggled one. In that circumstances, the Revenue has rightly absolute confiscated the Gold in question.

5. Heard the parties.

6. Considering the submissions made by both the sides, we find that the appellants have failed to prove the source of procurement of Gold, therefore, we hold that Gold is smuggled one but on the same time, Revenue is also failed to

prove that Gold is of third country origin and smuggled through Nepal. In fact, the Revenue has not adduced any evidence to that effect, whereas on the other side, Shri Sanjeeb Kumar, himself has categorically stated that he is not dealing with the purchase and sale of the Gold. Therefore, the Revenue has failed to prove that the Gold in question is of third country origin and have been imported/smuggled through Nepal. In that circumstances, the Gold in question cannot be held as restricted goods and they can be released on payment of redemption fine and penalty as the goods are smuggled in nature. We also gone through the case law relied upon by the learned Counsel for the appellants in the case of Prithviraj Pokhraj Jain (supra) wherein in Para 19 which is extracted below wherein the Hon'ble High Court observed as under –

“19. The burden was, therefore, on the prosecution to prove that the goods were smuggled. For this the prosecution relied upon the evidence of Hebbar who stated that he believed the goods to be smuggled, because watches and watch straps were of foreign origin, the import of which was heavily restricted and prohibited and they were found in huge quantity. The foreign origin of the watches is tried to be shown from the foreign markings on the watches. The question whether the foreign markings of goods can be treated as admissible in evidence was considered by Naik J. in Criminal Appeal No. 3 of 1966, decided on 22nd December, 1966. Among the property involved in that case were some gold slabs. The slabs bore the marking “Johnson Mathey 9990 London”. Naik J. observed in his judgment that the markings do not speak for

themselves and that evidence would be hearsay evidence. There was nothing to indicate that the markings were really done by Johnson Mathey in London. No presumption can arise in regard to the markings, unless there is evidence to show that those markings were made by a particular company in the ordinary course of business. A Division Bench of the Gujarat High Court has also taken a similar view in Asstt. Collector of Customs, Baroda, v. M. Ibrahim Pirjada, 1970 Criminal Law Journal, 1305. There, the Gujarat High Court has held that mere markings cannot be taken as proof of the fact of foreign origin of the goods as such markings and labels would be hearsay evidence. With respect, I agree with the above view.”

Relying on the said decision, without evidence, the benefit of presumption under Section 123 of the Customs Act, 1962 is not available to the Revenue. Therefore, we hold that the Gold in question is not restricted item but being smuggled one liable for confiscation and the same can be redeemed on payment of redemption fine. We also take note of the fact that the value of Gold is Rs.1,26,22,800/- and margin of profit in the trade of Gold is very less, therefore, considering the value of Gold and margin of profit, we hold that the redemption fine of Rs.5 lakhs is appropriate in the facts and circumstances of the case. Therefore, we impose redemption fine of Rs.5 lakhs on the Gold in question which can be redeemed on payment of the said redemption fine. Considering the fact, that appellants are involved in the activity of smuggling of Gold, therefore, penalty of Rs.1 lakh each is imposed on all the appellants.

7. In these terms, we dispose all the appeals filed by the appellants.

(Dictated and Pronounced in Court)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Sd/-
(Ashok Jindal)
Member (Judicial)

Ankit