CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
ALLAHABAD BENCH
E-Hearing

Customs Appeal No. 70036/ 2020

(Arising out of Order-in-Appeals No. 508 & 509/Cus/APPL/LKO/2019 dated 30.09.2019 passed by the Commissioner (Appeals), Customs & GST Lucknow)

Shri Lokesh Kumar Choudhary.
Prop. M/s. Shri Ji Jewellers, AMC No. 417/13,
Shiv Bag, Naya Bazar Ajmer -305001

APPELLANT

VS.

Commissioner of Customs
3/194, Vishal Khand, Gomti Nagar
Lucknow.

RESPONDENT

WITH

Customs Appeal No. 70037/ 2020

(Arising out of Order-in-Appeals No. 508 & 509/Cus/APPL/LKO/2019 dated 30.09.2019 passed by the Commissioner (Appeals), Customs & GST Lucknow)

Shri Karan Soni.
716/30, Sarawagi Mohalla
Ghee Mandi, Ajmer -305001

APPELLANT

VS.

Commissioner of Customs
3/194, Vishal Khand, Gomti Nagar
Lucknow.

RESPONDENT

WITH

Customs Appeal No. 70750 / 2019
Customs/Stay/70509/2019

(Arising out of Order-in-Appeals No. 508 & 509/Cus/APPL/LKO/2019 dated 30.09.2019 passed by the Commissioner (Appeals), Customs & GST Lucknow)

Commissioner of Customs
3/194, Vishal Khand, Gomti Nagar
Lucknow
Appellant

Vs.

Lokesh Kumar Choudhary
Prop. M/s. Shri Ji Jewellers, AMC No. 417/13,
Shiv Bag, Naya Bazar Ajmer -305001
Respondent

Present for the Appellant : Shri Bipin Garg, Advocate
Present for the Respondent **:** Shri Santosh Kumar Agarwal, AR

DATE OF HEARING/DECISION : 07/12/2020

FINAL ORDER NO. 70269-70271 / 2020

PER ARCHANA WADHWA:

All the three appeals, two filed by the individuals and one by the Revenue, are being disposed of by a common order as they arise out of the same impugned order passed by the Commissioner (Appeals).

2. As per the facts on record, one Shri Karan Soni was intercepted by the Police officers of GRP (Government Railway Police) on 11.04.2018 at Platform No.05/06 at about 15.30 hrs. On checking of his bag, the same was found to be containing 07 pieces of gold bars. On being questioned, Shri Karan Soni revealed that he was bringing the said gold from Kolkata and taking the same to Ajmer. On a reasonable belief that the gold bars in question was of foreign origin and were smuggled in character, the same were handed over to the

Customs for further action. The Customs officers brought Shri Karan Soni to Varanasi for further action and as no documents regarding sale purchase/ transportation of the recovered gold were produced by Shri Karan Soni, and as per his statement dated 12.04.2018, the recovered gold was brought into India from Bangladesh, the same were seized by the officers under a panchnama. Shri Karan Soni in his statement before the officers deposed that he was working for one Shri Prateek Goyal, Proprietor of M/s. Sawaria Seth Jewellers Ghee Mandi, Naya Bazar, Ajmer and at his instructions the gold was brought from one Shri Pradeep of Kolkata for carrying the same to Ajmer. On being questioned as to why the gold bars were not carrying any marking of foreign origin, he stated that same were smuggled from Bangladesh in a clandestine manner and to hide the identity of its foreign origin, gold bars were melted and marks were removed.

3. The Customs officers also checked the mobile of Shri Karan Sone and found one bill No. 517 dated 09.04.2018 issued by Shri Ji Jewellers, Shiv Bagh, Naya Bazar, Ajmer in favour of M/s. Bhagwan Dash Sampatlal Jewellers, Sir Hariram Goenka Street, Kolkata. On being asked Shri Karan Soni stated that above bill No. 517 covering the gold bards accompanied the goods and was produced before the Police officer who torned the same.

4. In post seizure investigations, searchs were conducted at the shop and residence of Shri Prateek Goyal, owner of Shri Ji Jewellers and residence of Shri Karan Soni at Ajmer. However, nothing incriminating was found. Statement of Shri Lokesh Kumar

Choudhary, proprietor of Shri Ji Jewellers was recorded wherein he explained that gold was sent by him under the cover of invoice No. 517 dated 09.04.2018 for sale to Shri Bhagwan Dash Sampatlal of Kolkata. Shri Karan Soni went to their shop on 10.04.2018 but as the owner of the shop was not available and their employees refused to take delivery of the same, Shri Karan Soni was directed to come back with the gold in train Howrah Jaipur Express. It is at Mughalsarai station that Shri Karan Soni was intercepted and the gold was seized.

5. On the above basis, show cause notice dated 04 October, 2018 was issued, inter-alia to the appellants proposing confiscation of the gold as also for imposition of penalty. The Original Adjudicating Authority concluded that the gold in question was of foreign origin and smuggled into the country. Accordingly, he absolutely confiscated the gold and imposed penalties upon both the appellants. However, no penalty was imposed upon Shri Prateek Goyal, the alleged master mind on the ground that Revenue’s entire case was based upon the statement of Shri Karan Soni, which cannot be considered to be a legal evidence. The said order of the Original Adjudicated Authority was challenged before the Commissioner (Appeals) who upheld the same but converted the absolute confiscation of the gold into an option to Shri Lokesh Kumar Choudhary to redeem the same on payment of redemption fine of Rs.45,00,000/- (Rupees Fortyfive lakh only). The said order stand challenged by the appellants. The Revenue also filed an appeal against the said order on the ground that conversion of absolute confiscation into an option for redemption of gold is not legal and hence same should be set aside.

6. I have heard Shri Bipin Garg, learned counsel appearing for the appellant and Shri Santosh Kumar, Authorised representative appearing for the Revenue.

7. On going through the impugned orders and after appreciating the arguments advanced by both the sides, I find that the gold in question stand seized and confiscated by the Revenue on the ground that the same was of foreign origin and was smuggled into the country. On being questioned, learned Authorised Representative, appearing for the Revenue fairly agreed that there are no marking of foreign origin found on the gold bars. However, he submits that Shri Karan Soni in his initial statement has revealed that the gold in question was actually of foreign origin and was smuggled from Bangladesh but the marking of foreign origin stand removed. However, it is seen that there is no further revelation by Shri Karan Soni as to who has smuggled the gold and who had removed the foreign origin marking and in which manner the same was removed. The entire case of the Revenue is based upon the initial statement of Shri Karan Soni which was also retracted by him on the next day itself, when he was produced before the Judicial Magistrate. As such, Revenue's entire case of the gold being of foreign origin is based upon the retracted statement of Shri Karan Soni. It is well settled law that for upholding the charge of smuggling, the goods have to be first established to be of foreign origin. It is required to be done by concrete and positive evidence. The retracted statement of deponent without any further corroboration from independent source, cannot be considered to be legal proof for holding the gold to be of foreign origin. It is further seen that the observation of the Adjudicating

Authority that mere no marking and purity of gold cannot be taken as a proof of fact that gold was not of foreign origin, cannot be appreciated inasmuch as the onus to show that the gold was of foreign origin lies upon the Revenue. The Adjudicating Authority has also not disputed the fact that Shri Karan Soni retracted from his statement before CJM, Varanasi immediately on the next date. However, he has not given any weightage to the said retraction only on the ground that Shri Karan Soni never bothered or never felt the need to bring to the notice of the immediate Superior of the investigating officer. As such, he observed that the case is not based merely on statement of the appellant but is corroborated in intimate details by the statement of Shri Karan Soni from whose possession the gold was seized. Apart from observing as above, the Adjudicating Authority has not referred to any of the evidence corroborating the said statement. It is merely an observation simplicitor without any reference on record.

8. Apart from the above, it is also seen that the Adjudicating Authority exonerated Shri Prateek Goyal on observation that "entire alleged offence against Shri Prateek Goyal is solely based on the statement of Shri Karan Soni. There is no collateral or any other acceptable piece of evidence……." Surprisingly, the said statement of Shri Karan Soni has been found insufficient by the Adjudicating Authority for imposing penalty upon Shri Prateek Goyal but the same very statement stand relied upon by him for imposing penalties upon the appellants. This is self-contradictory observations and findings of the Adjudicating Authority. It may not be out of place to mention that non-imposition of penalty upon Shri Prateek Goyal was never

challenged by the Revenue and has attained finality. If that be so, by adopting the same reasoning for non-imposition of penalty on Shri Prateek Goyal, imposition of penalties upon the present two appellants are also required to be set aside inasmuch as apart from the retracted statement of Shri Karan Soni, there is no further or additional evidence against the present appellants.

9. Apart from the fact that gold in question was not carrying any marking of foreign origin, it is also seen that there is virtually no evidence of smuggled nature of said gold in question, except for the retracted statement of Shri Karan Soni. Gold can be imported on payment of duty and is not prohibited item. Even if it is assumed that for a second, that gold in question was of foreign origin, same could have been imported on payment of duty. Shri Karan Soni, in his statement has no where revealed as to how the gold in question was smuggled and by whom. In these circumstances, to conclude against the appellants is neither justified nor warranted.

10. Further, admittedly the gold in question was seized by the Police Officer, in which case the presumption under section 123 of the Customs Act, 1962 is not available to the Customs Authorities. The Hon'ble Mumbai High Court in the case **State of Maharashtra vs. Prithviraj Pokhraj Jain** reported in **[2000 (126) ELT 180 (Bom)]** has held that in the absence of presumption under section 123 of the Customs Act, 1962, on the initial seizure of the goods by the Police, the burden to proof that the goods are smuggled lies entirely on the prosecution. It is further held that in the absence of any direct evidence on record, conclusively proving that the goods

were smuggled, the prosecution's case fails. It was also observed that when the goods are not totally prohibited from importation and can be imported, the seizure of the same on the ground that they were smuggled cannot be upheld. It may not be out of place to observe that in that case, the seized watches were having foreign marking on them whereas in the present case, there was no foreign marking on the gold bars.

11. Apart from the above, it is also seen that the seized gold was covered by invoice No. 517 dated 09.04.2018 issued by Shri Lokesh Kumar Choudhary, proprietor of Shri Ji Jewellers. As per Shri Karan Soni, the said invoice was produced before the GRP Police Officer but was torn by them. The said invoice was subsequently recovered by the Customs Officers from the mobile carried by Shri Karan Soni. The Revenue has nowhere alleged that the said invoice is a fake invoice, Infact, Shri Ji Jewellers who were registered under the GST, also charged GST of Rs.6,36,510/- on the invoice and deposited the same with the Revenue. These facts are not disputed by the Department. If that be so, I really fail to understand as to how the gold in question can be said to be a gold of foreign origin and smuggled, which was being brought by Shri Karan Soni from Kolkata. The said invoice clearly establishes, beyond doubt that the gold was sent by Shri Lokesh Kumar Choudhary from Ajmer to Kolkata for further delivery, but the same could not be delivered as the owner of shop was not available and Shri Karan Soni was advised to bring back the same to Ajmer. The production of invoice which was infact, found in the mobile phone of Shri Karan Soni itself, leads credence to the appellants' stand that the gold is part of the stock of Shri Ji

Jewellers and was sent by Shri Lokesh Kumar Choudhary for sale of the same duly covered by the invoice in question.

12. It is also surprising that even though the Revenue is believing and relying upon the initial statement of Shri Karan Soni, detailing the name and address of the persons at Kolkata from whom the gold in question was received by him, they have not bothered to make any investigation at their end. There is no explanation coming from the Revenue for the said lapse on their part. Once Shri Soni discloses the names of the alleged supplier of the goods, it was the duty of the Department to approach them and to investigate at their end so as to collect the evidence and to corroborate the statement of Shri Karan Soni. Such non-action on the part of the Revenue, creates doubt against them and compels one to conclude that such an effort might have been done by Revenue and found to be untrue, thus making the statement unworthy of reliance.

13. Having held that the gold in question cannot be concluded to be of foreign origin and smuggled, I intend to refer to some of the leading judgements on the said issue. Reference can be made to Tribunal's decision in the case of **Nitya Gopal Biwas vs. Commissioner of Customs (Prev) Kolkata** reported in **[2016 (344) ELT 209 (Tri-Kolkata)]** laying down that when the appellants had produced legal documents of the licit acquisition of the foreign origin gold, he can be said to have discharged the burden and the Department cannot be said to have established the smuggled nature of the seized foreign origin gold. In the present case, I observe,

even at the cost of repetition, that the gold in question was not marked with foreign marking.

14. In the case of **Nand Kishore Sumani vs CCE** reported in **[2016 (333) ELT 448 (Tri-Kolkata)]** the issue of the gold bars not having foreign marking and no evidence of defacing of foreign origin mark was discussed. Hon'ble Calcutta High Court in the case of **Commissioner of Customs,Excise and Service Tax, Siliguri vs. Nand Kishore Somani** reported in **[2016 (337) ELT 10 (Cal)]** observed that foreign origin cannot be established based upon the certificate from a jeweller certifying that the purity of the gold is more than 99.50%. To the same effect is another decision of the Calcutta High Court reported as **Madhukar Sonaba Bhagat vs. Commissioner of Customs (Prev), West Bengal [2019 (368) ELT 990 (Tri-Kolkata)].** In the case of **Ram Naresh Chaurasiya vs. Commissioner of Customs (Prev), Patna** reported in **[2019 (365) ELT 940 (Tri-Kolkata)],** it was held that there being no foreign marking and no investigations made by the department producing evidence of smuggled nature of the two gold bars, the presumption under section 123 of Customs Act, 1962 is not invocable. Infact the list is unending and it is almost established law that Revenue is required to prove its case by sufficient and positive evidence and not on the basis of assumption and presumption.

15. In view of the foregoing, I set aside the impugned order and allow both the appeals filed by Shri Lokesh Kumar Choudhary and Shri Karan Soni with consequential relief to them. Inasmuch as the

individual's appeals are allowed, the Revenue's appeal has become infructuous. The same is accordingly, rejected.

16. All three appeals are disposed of in the above manner.

Sd/-

(Archana Wadhwa)
Member(Judicial)

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