CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21184 of 2015

(Arising out of Order-in-Original No. 09/2014 dated 07.01.2015 passed by the Commissioner of Customs (Preventive), Cochin.)

K V Kunhimohammed,
S/o. Mohammed,
Kunduvayil House,
RC Nagar, Ponmala Pst,
Malappuram District,
State of Kerala.

Appellant(s)

VERSUS

The Commissioner of Customs, (Preventive)
5th Floor, Catholic Centre, Broadway,
Kochi – 682 031.

Respondent(s)

With

Customs Appeal No. 21186 of 2015

(Arising out of Order-in-Original No. 09/2014 dated 07.01.2015 passed by the Commissioner of Customs (Preventive), Cochin.)

Khairudheen.V.,
S/o Abdurahiman (Late),
Vadakkan House,
Ponmala Post,
Malappuram District,
State of Kerala.

Appellant(s)

VERSUS

The Commissioner of Customs, (Preventive)
5th Floor, Catholic Centre, Broadway,
Kochi – 682 031.

Respondent(s)

And

Customs Appeal No. 21187 of 2015

(Arising out of Order-in-Original No. 09/2014 dated 07.01.2015 passed by the Commissioner of Customs (Preventive), Cochin.)

Jamsheer.P.T.
S/o. Mohammed.P.T,
Poonthiruthil House,
Ponmala Post,
Malappuram District,
State of Kerala.

Appellant(s)

VERSUS

The Commissioner of Customs, (Preventive)
5th Floor, Catholic Centre, Broadway,
Kochi – 682 031.

Respondent(s)

APPEARANCE:

Mr. Moideen.P.C, Advocate for the Appellants

Mr.K.A. Jathin, Asst. Commissioner (AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20311-20313 /2025

DATE OF HEARING: 19.09.2024
DATE OF DECISION: 17.03.2025

PER : DR. D.M. MISRA

These three appeals are filed against Order-in-Original No.09/2014 dated 07.01.2015 passed by the Commissioner of Customs (Preventive), Cochin.

2. Briefly stated the facts of the case are that on the basis of specific information, four persons viz. Shri Jamsheer P.T., Shri Abdu Samad P., Shri Khairudheen V. and Shri Mohammed Asharaf on board of Train No.12601 – Chennai – Mangalore Mail were intercepted at Ottapalam, Palakkad District, Kerala on 05.09.2013 in presence of independent witnesses and on search of the said persons, a total Indian currency of Rs.1.29 crores kept in knee cap and cloth waist band was recovered [i.e. Rs.33.00 lakhs in possession of Shri Jamsheer and Rs.32.00 lakhs each in possession of other three persons]. Besides currency, eight paper slips of which four were torn into two pieces each, with writings in Tamil, were found in their possession. The said Indian currency of Rs.1.29 crores was seized under Mahazar dated 05.09.2013 and also travel tickets for travelling from Arakonam, Chennai to Tirur, Kerala were seized. Statements of these four persons were recorded and

later they were arrested. On completion of investigation, it is alleged that the Indian currency seized from the four persons were the sale proceeds of the smuggled gold which was received by these four persons at the instance of one Shri K.V. Kunhimohammed; hence liable to be confiscated. Consequently, a show-cause notice was issued on 28.02.2014 proposing confiscation of seized currency amounting to Rs.1.29 crores under Section 121 of the Customs Act, 1962 and also penalty under Section 112 and 117 of the Customs Act on all four persons and Shri K.V. Kunhimohammed. On adjudication, the Indian currency totalling to Rs.1.29 crores directed to be confiscated under Section 121 of the Customs Act and penalty of Rs.2.00 lakhs imposed each on Shri Jamsheer P.T., Shri Abdu Samad P., Shri Khairudheen V. and Shri Mohammed Asharaf and Rs.20.00 lakhs on Shri K.V. Kunhimohammed under Section 112(b) of the Customs Act, 1962. Aggrieved by the said order, the present appeals are filed by the above three appellants.

3.1. At the outset, the learned advocate for the appellants has submitted that the Superintendent of Customs (Preventive Division), Calicut intercepted four persons viz. Shri Jamsheer P.T., Shri Abdu Samad P., Shri Khairudheen V. and Shri Mohammed Asharaf on 05.09.2013 from the train Chennai - Mangalore Mail No.12601 on board and recovered Indian currency amounting to Rs.1.29 crores concealed on their body on knee cap and waist band at Ottapalam. Also, eight paper slips written in Tamil along with train tickets were also recovered from the said passengers. He has submitted that though the four persons were apprehended when the train left Palakkad Junction, recovery was made at Ottapalam by the officer. The Mahazar documents and statements recorded under Section 108 of the Customs Act revealed that the amount seized from the possession of these four persons was given by one person at Chennai to hand over to one Shri K.V. Kunhimohammed stating that the same were the sale proceeds of the smuggled gold through the Chennai Airport and slips recovered indicate the weight of the gold. Consequently, Shri K.V. Kunhimohammed was also examined and statements were recorded who revealed that the cash recovered from the four persons was entrusted by him to purchase gold, who deals with gold on minimum margin and being an Income Tax payee, the amount seized belongs to him which raised by borrowing from various persons and the slips recovered from the possession of the four persons has no connection with him. Later search conducted in house in all residential premises of all three persons resulted in a 'nil' recovery. All these persons retracted their statements on 06.09.2013 stating that the statements were recorded under duress and force. Consequently on 13.09.2013 explaining the source of the cash under seizure, Shri K.V. Kunhimohammed, the appellant, sought release of the cash to him. However, the Department denied to release the cash.

3.2. Further, the learned advocate has submitted that the appellants had replied to the show-cause notice indicating the source of cash seized by the Department and filed separate request petitions to permit to cross-examining the witnesses. Assailing the impugned order, he has submitted that as per the statements recorded from the four persons, it is clear that they were not parties to the alleged smuggling of gold and they were persons entrusted the work to carry the cash only. The persons who entrusted the cash to these four persons at Chennai mentioned to them that the same was sale proceeds of the smuggled gold which cannot be relied upon as no such person would disclose that proceeds are of sale of smuggled gold. Further, he has submitted that the person who handed over the cash at Chennai could not be traced by the Department nor any details regarding the smuggling, passenger, quantity of gold, details of sale etc. brought out on record. They have submitted that all these four persons had retracted the statements on 06.09.2013; hence their statements recorded on 05.09.2013 cannot be basis for holding that the currency recovered from them are sale proceeds of smuggled gold. Further, he has submitted that the denial of cross-examination of the witnesses as requested by the appellants during the course of adjudication on flimsy grounds indicates that the order was passed in haste and hence, bad in law. He has submitted that non-accounting of the cash under seizure cannot be a ground to hold that it was sale proceeds of smuggled gold. In support, he referred the following decisions:-

i. Sarin and Sarin Vs. CCE Kanpur [2014(310) ELT 404 (Tri.Delhi)]
ii. Hem Raj Soni Vs. CC Jaipur [2014(308) ELT 600 (Tri. Delhi)]
iii. Wall Street Finance Limited Vs. CC [2007(209) ELT 427 (Tri. Mumbai)]
iv. CC(Preventive), Mumbai Vs. Sadashiv R Lele [2005(191) ELT 841 (Tri. Mumbai)]
v. Ram Avtar Gohel Vs. CC, Mumbai [2003(159) ELT 935 (Tri. Mumbai)]

3.3. Also, the learned advocate has submitted that onus to prove that the cash recovered is the sale proceeds of smuggled gold lies on the Revenue by adducing sufficient evidences which has not been discharged in the present case. To support this submission, he has relied upon the following judgments:-

i. Tulsi Das Agarwal Vs. CC, Kanpur [2004(158) ELT 725 (Tri. Delhi)]
ii. CC Vs. Jagadish Prashad Soni [2003(158) ELT 457 (Tri. Delhi)]
iii. Ram Avtar Gohel Vs. CC, New Delhi [2003(159) ELT 935 (Tri. Delhi)]

3.4. Further, he has submitted that Indian currency is not an item specified under Section 123 of the Customs Act, 1962; hence the burden to prove is on the Revenue, which is not discharged in the present case. The smuggling nature of the gold, of which the currency seized claims to be the sale proceeds is not established; therefore currencies seized are liable to be released. He has relied upon the following judgments:-

i. Sarin and Sarin Vs. CCE Kanpur [2014(310) ELT 404 (Tri.Delhi)]
ii. Hem Raj Soni Vs. CC Jaipur [2014(308) ELT 600 (Tri. Delhi)]
iii. Wall Street Finance Limited Vs. CC [2007(209) ELT 427 (Tri. Mumbai)]
iv. Pradeep Mahajan Vs. CC, New Delhi [2004(175) ELT 441 (Tri. Delhi)]

4. *Per contra*, the learned AR for the Revenue has submitted that on the basis of prior information, all four passengers travelling in Train No. 12601- Chennai-Mangalore Mail were intercepted by the officers of the Customs Department, conducted search and recovered Indian currency totaling to Rs.1.29 crores concealed on the body of Shri Jamsheer P.T., Shri Abdu Samad P., Shri Khairudheen V. and Shri Mohammed Asharaf, in the presence of independent witnesses. Apart from currency, paper slips in Tamil which connected with the sales proceeds of illegally imported gold were also seized. Statements of these four persons were recorded under Section 108 of the Customs Act, 1962 on the same day i.e. 05.09.2013 wherein all of them were admitted that the seized currencies were the sale proceeds of smuggled gold and they were carrying the same to handover to Shri K.V. Kunhimohammed. They also described the entire modus operandi as how and where the currency was collected and explained the details in the slips showing the transaction of the gold. The slips recovered from Shri Khairudheen showed writing such as 1006X3025 = 30,43,150/- and similarly, other persons had paper slips with weight in grams multiplied by rate and the total amount. Further, he has submitted that Shri K.V. Kunhimohammed was not able to provide sufficient proof for the licit sources of the huge amount of cash seized and he has submitted details of withdrawal from his wife's account for a sum of Rs.24,27,000/- over a period of four years. If the gold trading business was of legal and licit nature, sending cash through carriers would have been avoided. Further, the statements of the carriers explained how they were

entrusted the cash, every details/contents in the slips, manner in which they were torn into half, the writing in Tamil, the rate of gold in grams shown indicating the transaction happened in relation to smuggled gold. The reply filed by the noticees could not explain how the slips written in Tamil were recovered along with cash seized, which is enough to link the smugglers and Shri K.V. Kunhimohammed as the Tamil is not the spoken language of either Shri K.V. Kunhimohammed or the carriers. Further, he has submitted that Shri K.V. Kunhimohammed did not reveal the name of the business contact in Chennai. He could have revealed the name of the persons with whom he has legal business connection to prove his innocence in the matter. In support of his submissions, he has referred to the following case laws:-

i. CC(Preventive) Vs. Rajendra Kumar Damani [2024(5) TMI 730 – Calcutta High Court]
ii. K.P Abdul Majeed Vs. CC, Cochin[2014(309) ELT 671 (Ker.)]
iii. Vinod Solanki Vs. UOI [2009(233) ELT 157 (SC)]
iv. Surjeet Singh Chhabra Vs. UOI [1997(89) ELT 646 (SC)]

5. Heard both sides and perused the records.

6. The limited question involved in the present case is whether the currency of Rs.1.29 crores seized from the four persons Shri Jamsheer P.T., Shri Abdu Samad P., Shri Khairudheen V. and Shri Mohammed Asharaf when they were on board Train No.12601 Chennai-Mangalore Mail, is sale proceeds of gold smuggled into India and hence, rightly confiscated under Section 121 of the Customs Act, 1962 by the adjudicating authority.

7. Undisputed facts of the case are that the above four passengers travelling in the Train No.12601 from Arakonam to Tirur were intercepted by the Department at Ottapalam and on a personal search of these persons, Indian currencies were recovered being concealed in their bodies. Though there is no

denial of the fact that the currency had been seized from these four persons but all along it is claimed that the Indian currencies are not sale proceeds of smuggled gold but were handed over to them by Shri K.V. Kunhimohammed for purchasing gold from Chennai and since the gold was not purchased, they were returning from Chennai with the said currency in their possession. Section 121 of CA,1962 reads as below:

> "**Section 121**. Confiscation of sale-proceeds of smuggled goods.—Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation."

8. The learned Commissioner in the impugned order though acknowledged at para 34 of the order that the investigation has not been able to produce evidences regarding smuggling of gold or linking the seized currency directly to smuggled gold; however making a generalized remark held that smuggling of goods including the gold is primarily an offence that takes place at the border / frontier and it is almost impossible to distinguish or identify smuggled goods from licitly imported ones, once they move into the domestic tariff area. Further he observed that the currency must have been the sale proceeds of smuggled gold. Further, referring to the principle laid down by the Hon'ble Supreme Court in D. Bhoormull's case that preponderance of probability be given emphasis and the case is not required to be proved through mathematical precision, he had observed that Shri K.V. Kunhimohammed has neither been able to provide the sources of amount of cash seized nor able to provide evidence about handling gold imported legally into the country and the slips recovered from the four persons from whom cash was seized written in Tamil, not a spoken language of either Shri K.V. Kunhimohammed or the carriers, indicated a link between the cash transaction in gold, all together provide a high level of probability that the seized cash indeed represents sale proceeds of gold into the country through Chennai airport.

9. In our view, the said finding of the learned Commissioner is devoid of merit inasmuch as no evidence has been placed on record by the Revenue in discharging the onus which squarely rests on the department to establish that there has been smuggling of gold into the country and the recovered/seized currency of Rs.1.29 crores from the possession of these four passengers were sale proceeds of the smuggled gold. Needless to mention that burden lies heavily on the Revenue to establish that the currency seized was the sale proceeds of the smuggled gold. Similar view has been expressed by the Tribunal in the cases of Wall Street Finance Ltd. Vs. CC [2007(209) ELT 427 (Tri.) and CC (Preventive), Mumbai Vs. Sadashiv R. Lele [2005(191) ELT 841 (Tri. Mum.)]. The case records reveal that the Revenue even could not able to trace or bring on record the statements of the person who handed over the currency to these four persons at Chennai, as mentioned in the notice.

10. Further, we find that the statements furnished by the four persons on 05.09.2013 were retracted on the next day i.e. on 06.09.2013. Therefore, in the said circumstances, it is necessary to establish through the corroborative and independent evidence about the smuggling of the gold and the currency seized from the four persons is the sale proceeds of the smuggled gold. The loose slips recovered from the four persons indicating the quantity of gold and the rate itself do not reveal that the seized currency has got any connection with proceeds of the smuggled gold. No doubt, it leads to some doubt/suspicion in the circumstances when recovery of huge cash concealed by the said four persons was made, but that itself is not sufficient. Therefore, it is difficult to accept the conclusion of the learned Commissioner following principle of preponderance of probability, that the currency seized form these four persons are sale proceeds of the smuggled gold and liable for confiscation under Section 121 of Custom Act, 1962.

11. Further, it is noticed from the records that all along, the four persons viz. Shri Jamsheer P.T., Shri Abdu Samad P., Shri Khairudheen V. and Shri Mohammed Asharaf and Shri K.V. Kunhimohammed had claimed that the Indian currency seized from these four persons belongs to Mr. K.V. Kunhimohammed and during the pending of adjudication, Mr. K.V. Kunhimohammed on 13.09.2013 requested for its release of the seized currency to him. Therefore, since no other claimant has come forward as the owner of the said currency and the persons from whose possession the currency was seized did not dispute about the ownership of the currency, Mr. K.V. Kunhimohammed is undisputedly the owner of the currency. As observed above, since the currency seized from the four persons could not be proved to be the sale proceeds of the smuggled gold, the same are required to be released to the owner i.e. Shri K.V. Kunhimohammed. Consequently, penalty imposed on all the appellants cannot be sustained.

12. In the result, the impugned order is set aside and the appeals are allowed, with consequential relief, as per law.

(Order pronounced in Open Court on 17.03.2025)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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