

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE**

Appeals (s) Involved:

C/20859-20860/2017

*[Arising out of No. 26/2016 dated 20/01/2017 passed by
Commissioner of Customs, Bangalore-I (Appeal).]*

SRI Baburaya Narayan Nayak

S/o Late Narayan Nayak Flat No B 507
Shiva Parvathi Cooperative Housing Society Ltd.
(Near Satya Nagar Bus Stop)
Sai Baba Nagar Extension Borivali West
MUMBAI – 400 092.
MH

Appellant(s)

SRI K Vishwanath Bhakta

S/o Late Ramachandra Bhakta
Flat No.103, Sai Vittal Apartment Dongerakery
MANGALORE – 575 003.
KARNATAKA

Versus

**The Commissioner of Customs
Bangalore - Cus.**

C.R. BUILDING, QUEENS ROAD,
P.B.NO. 5400,
BANGALORE – 560 001.
KARNATAKA

Respondent(s)

Appearance:

Mr. T. P. Muthanna, Advocate

No.62-B, Modi Residency
Millers Road, Benson Town
Bangalore – 560 046.

M AND R CONSULT

NO 62B MODHI RESINDECY MILLERS ROAD
BENSON TOWN
BANGALORE
KARNATAKA
560046

For the Appellant

Mr. N. Jagadish, AR

For the Respondent

Date of Hearing: 10.01.2018

Date of Decision: 04.04.2018

CORAM:

HON'BLE SHRI S.S. GARG, JUDICIAL MEMBER

FINAL Order No. 20522 - 20523 / 2018

Per : S.S. GARG

Appellants have filed these two appeals against the common impugned order dated 20.1.2017 passed by the Commissioner (A) whereby the Commissioner (A) has rejected the appeal of the appellants and upheld the Order-in-Original. Since the Commissioner (A) has passed a common order as the facts are common in both the appeals, therefore, both the appeals are being disposed of by this common order.

2. For the sake of convenience, the facts of appeal No.C/20859/2017 are taken.

Briefly the facts of the case are that the DRI Mangalore received a written complaint that as a result of certain property deal, huge amount of Indian currency including fake Indian currency notes were secreted in the residential premises of Mr. Bhakta. The officials of DRI Mangalore searched the residence of Mr. Bhakta and recovered two gold bars of foreign origin totally

weighting 928.230 grams of 24 carat purity valued at Rs.25,52,632/-. In his statement recorded under Section 108 of Customs Act, 1962, Mr Bhakta *inter alia* stated that, the said gold belongs to his relative Mr. Nayak from Mumbai (Mr. Bhatka's daughter married to Mr. Nayak's son); Mr. Nayak had sold some immovable ancestral property at Chempai, Udupi District and thereafter, along with Mr. Bhakta, purchased gold bars for Rs.26 lakhs without licit documents from Shri Surendra Kamath, owner of Popular Jewellers, Car Street, Mangalore and kept the same with Mr. Bhakta for safe custody. In his statement, Mr. Nayak has concurred with the statement given by Mr. Bhakta and stated that the said gold has been kept by him with Mr. Bhakta. However, Shri Surendra Kamath in his statement, has stated that, the said gold was not supplied by him and he does not deal with foreign gold. The original authority, the Additional Commissioner of Customs, Mangalore culminated the proceedings vide OIO No.10/2016 ADC dated 11.4.2016 whereby the said gold has been absolutely confiscated and imposed a penalty of Rs.3,00,000/- each on Mr. Bhakta and Mr. Nayak under Section 112 of the Act, and the proposal of the penalty on Shri Surendra Kamath, owner of Popular Jewellers, Mangalore was dropped due to lack of evidences. Aggrieved by the Order-in-Original, both the

appellants filed appeals before the Commissioner (A) and the Commissioner (A) vide the common impugned order rejected their appeals and hence, the present appeals.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without considering the facts and the law in proper perspective. He further submitted that the Commissioner (A) has wrongly held that gold in question which was handed over to Shri K. Viswanath Bhakta, by the appellant meant for his son Shri Lakshminarayan, who is the Son-in-Law of Shri K. Viswanath Bhakta belong to the family and not purchased out of the sale proceeds of the property sold by the appellant. He further submitted that the appellant is an aged person and in the recent past has not travelled to foreign country and therefore, the question of smuggling does not arise. It is his further submission that the said gold biscuits belongs to Mr. Nayak's family which was purchased at Mumbai and was kept with Shri K. Viswanath Bhakta for safe custody. He further submitted that the DRI has initiated the action on the basis of a written complaint filed by the

son of the appellant, Mr. Nayak. But the DRI officers did not call the complainant for interrogation for the best reasons known to them. In support of his submissions, he relied upon the various decisions:

- *Gian Chand & Others vs. State of Punjab: LAWS (SC) 1961 11 18*
- *State of Maharashtra vs. Prithviraj Pokraj Jain: 2000 (126) ELT 180 (Bom.)*
- *Eswara Reddy vs. Commissioner of Customs, Hyderabad: 2006 (196) ELT 410.*
- *Naveed Ahemd Khan vs. Commissioner of Customs, Bangalore: 2005 (182) ELT 494*
- *Commissioner of Customs, Kolkata vs. Manoranjan Banik: 2004 (165)ELT 237 (Kolkata)*
- *Jitendra Pawar vs. Commissioner of Customs, Raipur: 2003 (156) ELT 622 (Delhi)*
- *S.K. Chains vs. Commissioner of Customs, Mumbai: 2001 (127) ELT 415 (Mumbai)*
- *Mahesh B. Mali vs. Commissioner of Central Excise, Pune: Appeal No.C/798/10-Customs, Excise and Service Tax Appellate Tribunal, Mumbai.*

5. On the other hand, the learned AR defended the impugned order and submitted that the Commissioner (A) has rightly confiscated the gold as the appellants have not been able to justify the possession of the said gold bearing markings 'RAND REFINERY 995.0' and '995.0 MELTER ASSAYER 0082414'. He further submitted that Shri B. Rathnakar of Rathan Jewellers,

Mangalore has certified in his report that the said gold bars were of foreign origin and were of 24 carat purity. The learned AR further submitted that both the appellants have made contradictory statements regarding the source of these gold bars. Initially, Mr. Bhakta in his statement under Section 108 of the Customs Act, 1962, has stated that the said gold was purchased from Mr. Surendra Kamath owner of Popular Jewellers, Mangalore; but in the grounds of appeal, it has been stated that the said gold was purchased at Mumbai. The Commissioner (A) has observed that whether these foreign origin gold bars were purchased at Mangalore or Mumbai, the fact remains that the same were procured without any licit documents and the appellants have failed to prove the fact as to whether the same were declared to customs and whether applicable customs duty was paid on them. In support of his submission, he also relied upon the following decisions:

- *Gomathinayagam vs. CC, Trichy: 2006 (201) ELT 365 (Tri.-Chennai)*
- *Roopchand Khemchand Oswal vs. CCE, Pune: 2007 (214) ELT 48 (Tri.-Mumbai)*
- *Subhash Jain vs. State: 2016 (333) ELT 51 (Del.)*
- *Shanti Lal Mehta vs. UOI & Ors.: ILR 1983 Delhi 374*

6. After considering the submissions of both the parties and perusal of the material on record and the various decisions

relied upon by both the parties, I find that it is a fact that the DRI recovered two gold bars of foreign origin totally weighing 928.230 grams of 24 carat purity valued at Rs.25,52,632/-. Further, I also find that in the statements recorded under Section 108 of the Customs Act, Mr. Bhakta has said that the gold belongs to his relative Mr. Nayak from Mumbai and that Mr. Nayak had sold some immovable ancestral property at Udupi District and he, along with Mr. Bhakta had purchased the gold bars for Rs.26 lakhs from one Mr. Surendra Kamath, owner of Popular Jewellers from Mangalore. Further, I also find that when the statement of Mr. Nayak was recorded by DRI he has said that the gold belongs to their family and was purchased from Mumbai and is only kept for safe custody with Mr. Bhakta. But it is a fact that no document has been produced by both the appellants to prove that the said gold were procured with licit documents and that proper customs duty was paid on it. Further, it is also not disputed that the said gold bars were of foreign origin and bearing markings 'RAND REFINERY 995.0' and '995.0 MELTER ASSAYER 0082414'. Therefore, since the appellants have failed to justify the licit procurement of the gold bars, consequently, the seized gold cannot be considered as a *bona fide* baggage. Further, I find that the Commissioner (A) has also relied upon the

decision of *Uttamchand Sawal Chand Jain vs. UOI: 2013 (42) ELT 11*, where it is held that the Baggage Declaration Form is not filled in respect of the goods on which customs duty is payable or which are not permitted for import, which means goods are smuggled goods. The decisions relied upon by the appellants are not applicable in the facts and circumstances of the present case and are distinguishable. Further, I find that in the case of *Roopchand Khemchand Oswal vs. CCE, Customs reported in 2007 (214) ELT 48 (Tri.-Mumbai)*, the Tribunal has held in para 6 as under:

“6. Considered the submissions made by Ld. DR and perused the records. It is undisputed that 31 silver bars weighing 9.497 kgs. were recovered from the possession of current appellant. The current appellant was not able to produce any documentary evidence regarding the licit possession of the silver bars either during the investigation or even before the Tribunal. The grounds of appeal, as reproduced earlier, would indicate that the appellant was not in possession of documentary evidence which would imply that he had procured these silver bars legitimately. Further it is seen from the record that the appellant was cross examined by the Advocate of Shri Mustafa Mulla and it is on record that at that time also the appellant was unable to indicate how he came into possession of the said silver bars in question. Further, I find that the Advocate of the appellant had sought cross-examination of many people before the lower authorities, which was granted and despite this, no evidence is brought on record by the appellant before the adjudicating authority nor before me, to press home the point, that the appellant had licit possession of the silver bars. The only ground of the appellant is that these silver bars were having serial number affixed by indigenous refinery and no foreign marking were found on the silver bars is unsubstantiated by any evidence, that these very silver bars (as seized) were refined by the said indigenous refinery. In the absence of any such evidence the burden of proof under Section 123 of the Customs Act, 1962 has clearly not been discharged by the appellant, from whose possession silver bars were recovered. The appellant's ground of appeal that it was for the department to prove that the silver recovered was imported or smuggled in misconceived in the absence of any evidence of licit

possession. Once silver has been included in the notification issued under Section 123 of the Customs Act, 1962, it was for the appellant to adduce evidence regarding the licit possession of the said silver bars. In the absence of such evidence, it will be futile effort of the appellant to shift the burden on the department. Accordingly, the order of the adjudicating authority for absolute confiscation is correct and is to be upheld. Since the appellant has not produced any evidence regarding the licit possession of the silver bars and absolute confiscation is upheld, the penalty imposed on the appellant is also correct and is according to the law.”

6.1 Considering all the facts and circumstances, I am of the view that there is no infirmity in the impugned order so far as absolute confiscation of the two gold bar biscuits of foreign origin are concerned. The original authority has imposed a penalty of Rs.3 lakh each on both the appellants under the provisions of Section 112 of the Customs Act, 1962 for abetting in the smuggling of gold which has been upheld by the Commissioner (A) also. Considering the facts and circumstances of the case, in my opinion, the penalty imposed is on higher side. Therefore, I reduce the penalty to Rs.50,000/- (Rupees Fifty Thousand Only) on each of the appellant. Except to this modification, both the appeals are dismissed.

(Order was pronounced in open court on **04.04.2018.**)

S.S. GARG
JUDICIAL MEMBER