CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 60278 Of 2020

[Arising out of 02/CUS/ASR/PRV/2020 dated 03.07.2020 passed by the Commissioner of Customs, Amritsar]

Narayan Sharma : **Appellant (s)**
S/o Santosh Sharma, resident of 283,
Street No. 3, Ambedkar Nagar-2, Gaziabad, UP-201001

Vs

Commissioner of Customs, Amritsar : **Respondent (s)**
Central Revenue Building, The Mall, Amritsar

With

(2) Customs Appeal No. 60357 of 2020-Pardeep Saini
(3) Customs Appeal No. 60387 of 2020 – Sreet Saini
(4) Customs Appeal No. 60003 of 2021-Vaibhav Rai
(5) Customs Appeal No. 60004 of 2021-Rakesh Rai

[Arising out of Common impugned order No. 02/CUS/ASR/PRV/2020 dated 03.07.2020 passed by the Commissioner of Customs, Amritsar]

APPEARANCE:
Shri Naveen Bindal, Advocate for the Appellant
Shri Dilpreet Singh Gandhi, Advocate for the Appellant
Ms. Swati Chopra, DR for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

ORDER No. A/60464-60468/2023

Date of Hearing:07.06.2023

Date of Decision:05.10.2023

Per : S. S. GARG

These five (5) Appeals are directed against the common impugned order dated 03.07.2020 passed by the Commissioner of Customs, Amritsar whereby the Ld. Commissioner has passed the following order:-
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"(1) I order absolute confiscation of gold bar weighing 995.5 grams valued at Rs 32,98,350/-, seized under seizure memo dt. 22.03.2019, under section 111(d), 111(1), 111(1) and 111(m) of the Customs Act, 1962.

(2) I confirm duty of Rs 11,80,872 on gold valued at Rs 30,67,200/- under section 28 of the Customs Act, 1962 and order its recovery from Noticee 3, Sh. Narayan Sharma alongwith interest under section 28AA of the Act, ibid.

(3) I confirm duty of Rs 23,44,804/- on gold valued at Rs 60,90,400/- under section 28 of the Customs Act, 1962 and order its recovery from Noticee 4, Sh. Rishab Saini alongwith interest under section 28AA of the Act.

(4) I order absolute confiscation of the Indian currency of Rs 2.20 lacs detained from the premises of the Noticee 2, Sh. Pardeep Saini, on 23.03.2019 under Section 121 of the Customs Act, 1962.

(5) 1 Impose a penalty of Rs. 50,000/- (Rs. Fifty Thousand only) on Sh. Sahib Singh, Noticee 1, under Section 112 of the Customs Act, 1962;

(6) I impose a penalty of Rs. 15,00,000/- (Rs. Fifteen Lakhs only) on Sh. Pardeep Saini, Noticee 2, under Section 112 of the Customs Act, 1962;

(7) I impose a penalty of Rs. 1,00,000/- (Rs. One Lakh only) on Sh. Narayan Sharma, Noticee 3 under Section 112 of the Act read with section 114 of the Act.

(8) I impose a penalty of Rs.5,00,000/- (Rs Five Lakhs only) on Sh. Rishab Saini, Noticee 4, under Section 112 of the Customs Act, 1962.

(9) I impose a penalty of Rs.15,00,000/-(Rs Fifteen Lakhs only) on Sh. Rakesh Rai, Noticee 5, under Section 112 of the Customs Act, 1962.

(10) I impose a penalty of Rs.5,00,000/- (Rs Five Lakhs only) on Sh. Vaibhav Rai, Noticee 6, under Section 112 of the Customs Act, 1962.

(11) I order confiscation of Toyota Innova car bearing Registration No. PB02-BZ-7000 registered in the name of Smt. Sreet Saini, Noticee 7, seized under Section 110 of the Customs Act, 1962 under section 115(2) of the Customs Act, 1962. However I order

Noticee 7 may redeem the said vehicle on payment of redemption fine of Rs. 1,00,000/- (Rs. One Lakh only) under section 125 of the Customs Act, 1962

(12) I impose a penalty of Rs. 50,000/- (Rs. Fifty Thousand only) on Smt. Sreet Saini, Noticee 7, under Section 117 of the Act;

(13) I order confiscation of Bus with registration No. PB-02 CR 3991 seized under Section 110 of the Customs Act, 1962 from Noticee 8, (M/s InterGlobe Aviation Limited, SGRDJI Airport, Amritsar) under Section 115(2) of the Customs Act, 1962. However, I order that it may be redeemed on redemption fine of Rs. 50,000/- (Rs. Fifty Thousand only) under section 125 of the Customs Act, 1962.

(14) I impose a penalty of Rs. 5,000/- (Rs Five Thousand only) on M/s InterGlobe Aviation Limited, Noticee 8, under Section 117 of the Act;"

2. Briefly the facts of the present case are that on 22.03.2019, based upon a specific input, Customs officers at SGRDJI Airport, Amritsar found suspicious object wrapped in yellow coloured cloth bag from the cavity near the driver seat in the bus bearing registration number PB-02 CR 3991 operated by M/s Inter Globe Aviation Limited (IndiGo Airlines) to ferry passengers from Aircraft to terminal building and vice versa, the suspicious object was found to be a gold bar with foreign marking "MTM 1 Kg GOLD 995 MELYER ASSAYER B020344" and Customs officers took the possession of the said gold bar.

- Panchnama dated 22.03.2019 was drawn on the spot and the gold was got certified by the Goldsmith M/s Khalsa Jewellers, Raja Sansi, Amritsar, who vide its certificate dated 23.03.2019 certified that the gold bar in question was of 99.5% purity Le. 24 Karat, having gross weight of 999.50 grams (foreign origin) and having market value of Rs. 32,98,350/-. The said Gold bar recovered from the said bus along with its packing material i.e. yellow coloured cloth bag with bus bearing registration number PB-02 CR 3991, were seized under recovery cum seizure memo dated 22.03.2019 under Section 110 of the Customs Act, 1962 (hereinafter referred to as 'the Act') on the reasonable belief that the same are liable to confiscation under Section 111, 115 & 118 of the Customs Act, 1962.

- As per the Department, the said bus was being driven by Shri Sahib Singh driver of the bus who is not the appellant before me and his statement was recorded under Section 108 of the Customs Act, 1962 on 22.03.2019 by Superintendent of Customs, Amritsar wherein he has admitted 1 Kilo Gram Gold was handed over to him by a passenger who came on board Indigo Flight 6E048 from Dubai; but the name is not known to him because on the earlier occasion also, the same person also handed over Gold to him on 04.03.2019. He also said on three previous occasions, Gold was handed over to Sh. Pardeep Saini by him. He further clarified that on previous two occasions, the Gold was brought by Shri Rishab Saini, son of Shri Pardeep Saini. Though the Rishab Saini has not filed appeal before the Tribunal but Sh. Pardeep Saini and his wife Smt. Sreet Saini have filed appeals before the Tribunal. He has also admitted the modus-operandi of whole smuggling of Gold and also admitted that he get Rs. 10,000/- for each transaction of gold.
- Similarly, the statements of other appellants were recorded under Section 108 of the Customs Act, 1962 wherein they have partly admitted the smuggling of gold.
- After completion of investigation, show cause notices were issued to the appellants, as per impugned order to call upon to show cause as to why:-

"19.3 Sh. Pardeep Saini was called upon to Show Cause as to why:-

(1) Penalty should not be imposed upon him for involvement in the smuggling of seized 999.5 grams of gold valued at Rs. 32,98,350/- on 22.03.2019 and in the smuggling of 3000 grams of gold valued at Rs. 9157600/- on previous multiple occasions i.e. on 15.02.2019, 04.03.2019 and 09.03.2019 under Section 112(a) & 112(b) of the Act.

(ii) Indian currency of Rs 2.20 lacs which was detained from the premises of the Noticee 2 on 23.03.2019 should not be absolutely confiscated under Section 121 of the Customs Act, 1962

19.4 Sh. Narayan Sharma was called upon to Show Cause as to why:-

(1) Gold bar weighing 999.5 grams valued at Rs. 32,98,350/- smuggled on 22.03.2019 and seized under Seizure Memo dated 22.03.2019, should not be absolutely confiscated under Section 111(d), 111(i), 111(I) and 111(m) of the Customs Act, 1962;

19.6 Shri Rakesh Rai, Noticee 5 was called upon to Show Cause as to why:-

(1) Gold bar weighing 999.5 grams valued at Rs. 32,98,350/- smuggled on 22.03.2019 and seized under Seizure Memo dated 22.03.2019, should not be absolutely confiscated under Section 111(d), 111(1), 111(I) and 111(m) of the Customs Act, 1962;

(ii) Penalty should not be imposed upon him for involvement in the smuggling of seized 999.5 grams of gold on 22.03.2019 and in the smuggling of 3000 grams of gold on previous multiple occasions i.e. on 15.02.2019, 04.03.2019 and 09.03.2019 under Section 112(a) & 112(b) of the Act.

19.7 Sh. Vaibhav Rai, Noticee 6 was called upon to Show Cause as to why:-

(1) Penalty should not be imposed upon him for involvement in the smuggling of seized 999.5 grams of gold on 22.03.2019 and in the smuggling of 3000 grams of gold on previous multiple occasions l.e. on 15.02.2019, 04.03.2019 and 09.03.2019 under Section 112(a) & 112(b) of the Act.

19.8 Smt. Sreet Saini Noticee 7 was called upon to Show Cause to as to why:-

(i) Toyota Innova car bearing Registration No. PB02-B2-7000 used by Sh. Pardeep Saini to commute to and from the Airport and smuggle the gold out of Airport which was seized under Section 110 of the Customs Act, 1962 should not be absolutely confiscated under Section 115(2) of the Customs Act, 1962.

(ii) Penalty should not be imposed upon her under Section 117 of the Act;"

- Out of these five (5) appellants, Shri Rishab Saini did not choose to file the reply to the show cause notice which was issued to him whereas other appellants denied the allegations against them by stating that they have been falsely implicated in the present case and they have no role in the said smuggling of gold.

3. Heard both the parties and perused the records.

4. Ld. Counsel Shri Naveen Bindal appearing for the appellant Shri Narayan Sharma submitted that the demand of duty and penalty on the appellant Shri Narayan Sharma is only based upon his statement given under Section 108 of the Customs Act, 1962 but the said statement has not been read as a whole and relied upon in toto but read in piecemeal. He further submits that the appellant is hardly studied upto 10th class and also does not know English language whereas the customs officer has got his statement typed and the signature was obtained without explaining the same to him. He further submits that the demand of customs duty has been confirmed under Section 28 of the Customs Act, 1962 alongwith interest under Section 28AA whereas as per law before confirming the duty, a show cause notice is required to be served upon the person chargeable with duty. He further submits that as per Section 17 of the Customs Act, 1962 the importer shall assess the duty liability at the time of import and the proper officer shall verify the assessment or may re-assess the goods. He further submits that in the present case, the appellant Shri Narayan Sharma is not the importer and therefore, the duty under Section 28 cannot be confirmed and recovered from him who according to the Counsel was only a carrier and not the importer of the alleged goods. He further submits that the appellant Shri Narayan Sharma is working as a salesman with M/s Ganesh Book Depot and also worked as driver for them. He further submitted that the appellant went to Dubai with Shri Vaibhav Rai s/o Shri Rakesh Rai. He also submits that the Ld. Commissioner has given categorical findings in Para 36 and 39 of the impugned order that Shri Rakesh Rai was mastermind and chief organizer of the alleged smuggling of gold and

was also involved in arranging foreign currency. He further submitted that the Ld. Commissioner has given finding against Shri Vaibhav Rai by holding that he purchased 1Kg gold and gave it to Shri Narayan Sharma to hand over the same to Shri Sahib Singh, driver of the bus. He further submitted that Shri Rakesh Rai and Shri Vaibhav Rai had played major role in the entire smuggling of gold and were also the actual beneficiary of the whole smuggling. The foreign currency was also arranged by Shri Rakesh Rai and gold was purchased by Shri Vaibhav Rai in Dubai. Further, the appellant did not bring the gold outside the Airport. He further submits that the appellant was only a carrier who used to be paid Rs. 10,000/- for carrying the gold and handover the same to the driver of the Bus. He further submits that the penalty imposed on the appellant Shri Narayan Sharma is on a higher side.

5. Ld. Counsel Shri Dilpreet Singh Gandhi appearing for the Appellant Shri Rakesh Rai has submitted that the entire allegation against Shri Rakesh Rai is based upon the statement of Shri Narayan Sharma and despite request; cross examination of the said person was denied to him which is in violation of principle of natural justice. He also submits that if the statement of Shri Narayan Sharma is excluded then nothing remains against him and therefore, the cross examination of the said witness was essential before any penalty is imposed on him. He further submits that the allegations that he gave foreign currency USD 33,000 to Shri Narayan Sharma is not proved by any cogent evidence and cannot be believed.

5.1 Ld. Counsel cited some decisions wherein it has been held that the statement against assessee cannot be used without giving them opportunity of cross examination.

5.2 Ld. Counsel submitted on behalf of Shri Pardeep Saini that no recovery was affected from him and he has been falsely implicated only on the statement made by Shri Naryana Sharma under Section 108 of the Customs Act, 1962. He further submits that penalty could not be imposed on him because he had no *mens rea.* He also submits that no cross examination of Shri Narayan Sharma was granted to him and therefore his statement cannot be relied upon to impose penalty and further the penalty imposed on him is on higher side which is not justified.

5.3 Similarly, the ld. Counsel has submitted on behalf of Shri Vaibhav Rai that he has been falsely implicated and his statement was recorded under coercion and pressure and cannot be relied upon for imposing penalty.

5.4 Ld. Counsel appearing on behalf of Smt. Sreet Saini submits that she has no role in the entire smuggling of gold and the Toyota Innova Car bearing Registration No. PB02-BZ-7000 which is allegedly used in the said smuggling was registered in her name.

5.5 Besides, the Indian currency of Rs. 2,20,000/- was also recovered from the residential premises of Shri Pardeep Saini and Smt. Sreet Saini on the basis of search conducted on 23.03.2019.

6. On the other hand, the Ld. DR reiterated the findings in the impugned order and filed the written submissions controverting the grounds of which the appellants have filed these present appeals. He further submitted that the Ld. Commissioner has considered all the

statements made by the appellants and has given detailed findings regarding the alleged smuggling of gold by the appellants. He further submitted that the confessional statement of the appellants clearly indicates the role played by Shri Sahib Singh and Shri Pardeep Saini in all the transactions on various occasions.

7. After considering the submissions of both the parties and perusal of material on record, as far as the appeal of Shri Narayan Sharma is concerned, I find that in his confessional statement, he has admitted that he was a carrier of the gold which was recovered from the cavity near the driver seat in the Bus bearing No. PB-02-CR 3991 operated by M/s Inter Globe Aviation Limited (Indigo Airlines). Further, I find that Shri Narayan Sharma has stated in his confessional statement that he is working as salesman with M/s Ganesh Book Depot and went to Dubai along with Shri Vaibhav Rai son of Shri Rakesh Rai and brought the gold which was handed over to Shri Sahib Singh driver of the bus. Further, I find that in his statement, he admitted that Shri Rakesh Rai and Shri Vaibhav Rai played major role in the entire smuggling of gold and both were the actual beneficiary of the smuggling of gold and he was only getting Rs. 10,000/- as a carrier for carrying the gold and handing over the same to the driver of the bus.

7.1 Further, I find that the demand of customs duty has been wrongly confirmed under Section 28 of the Customs Act along with interest under Section 28AA because no show cause notice which is required to be served upon the person chargeable with duty was issued to Shri Narayan Sharma. Therefore, I hold that the demand of duty of Rs. 11,80,872/- alongwith interest under Section 28AA of the

Customs Act is not sustainable in law and therefore, I set-aside the same but keeping in view his role in the entire smuggling activity, penalty of Rs. 1,00,000/- which has been imposed by the Ld. Commissioner of Customs under Section 112 of the Customs Act readwith Section 114 of the Customs Act is upheld.

7.2 Further, in the case of Appellant Shri Pardeep Saini, I find that he was serving as Assistant Manager (Fire Service) Airport Authority of India. No recovery has been directly affected from his possession but he is one of the man accused involving in the smuggling of the gold seized on 22.03.2019.

7.3 Further, I find that Shri Sahib Singh who was driver of the Bus has categorically stated in his statement that gold weighing 1Kg each was delivered to him on three previous occasions also and the same was handed over to Shri Pardeep Saini who has also admitted in his statement, he received Rs. 25,000/- for each transaction of gold.

7.4 Further, I find that the Ld. Commissioner, Customs has relied upon the judgement of the Hon'ble Supreme Court in the case of Naresh J. Sukhawani vs. Union of India [1996 (83) E.L.T. 258 (S.C.)] wherein it has been held that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and such statement of co- accused can be used as a substantive evidence.

7.5 Further, It has been held by the Hon'ble Supreme Court in the case of K.I. Pavunny v. Assistant Collr. (HQ), C. Ex. Collectorate, Cochin [1997 (90) E.LT. 241 (S.C.)], the confessional statement under Section 108 of Customs Act, 1962, if found to be voluntary, can form the sole basis of conviction and that the burden is on the accused to prove that the statement was obtained by threat, duress or promise.

7.6 Further, I find that it is relevant to reproduce the relevant finding of the Ld. Commissioner in the impugned order regarding the role played by some of the appellants which is quoted in Para 26 herein as under:-

> "26 Noticee 1 in his statement dt. 22.03.19 has admitted that one kilogram gold bar was handed over to him by a passenger who came on board IndiGo flight 6E048 from Dubai and that he did not know the identity of that passenger but could identify him. He has categorically stated that Shri Pardeep Saini, (Noticee 2) was to collect this gold bar from him to whom he had delivered gold weighing 1 kilogram collected from the same passenger on previous occasions also. He identified that a cavity in the passenger bus was used on all these occasions to conceal gold.
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> Noticee 2, in his statement dt. 22.03.2019 has admitted that this one kilogram gold was to be delivered to him by Noticee1 inside the Airport; that on previous three occasions gold had been handed over to him; that he identified Shri Narayan Sharma (Noticee 3) as the person who collected gold from him, who he elaborated was the passenger who had brought the gold bars on 22.03.2019 and it was to Noticee 3 that he would have handed over this gold bar.
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> Noticee 3, in his statement dt.25.03.2019, has stated that on 17.03.19, he landed in Dubai and was carrying 33,000 US Dollars, given to him by Sh Rakesh Rai (Noticee 5) and Noticee 2. After getting these US Dollars converted into Arab Emirates Dirham (AED), he purchased 1 kg gold bar that he brought to Amritsar on 22.03.19. He has admitted that as instructed by Noticee 2 and 5, he identified the person by a pre-decided identification signal and handed over that gold bar of

one kilogram to the driver of the first bus of IndiGo Airlines that came to ferry passengers. Thereafter he stated that he left for Delhi.

I find that Sh Rakesh Rai (Noticee 5), in his statement dt. 27.08.19 & 28.08.19 has either denied what was imputed to him by other Noticees or given evasive and doubtful replies. It is clear that he joined the investigations being done by the Customs Staff as per orders passed by the Hon'ble High Court at Chandigarh.

On going through the above statements tendered by Noticee 1, 2, 3, and 5 under section 108 of the Act, it is clear that they knew each other and that a complex maze of network was built to act together. I find that Noticee 1, 2,3 and 5 in their statements made before the Customs Officer under Section 108 of the Customs Act have clearly confessed about their guilt of indulging in smuggling activity. I find that the Noticees have never alleged that those statements were obtained under duress or coercion and also that they have never retracted from those statements at any point of time thereafter. I have gone through the statements of the Noticees wherein they have clearly admitted the manner in which they were associated with the smuggling activity."

7.7 Further, I find that as far as the role played by Shri Rakesh Rai and Shri Vaibhav Rai is concerned, they were also actively involved in the entire smuggling of gold and it has also come in evidence that Shri Rakesh Rai has given the foreign currency of USD 33,000 to Shri Narayan Sharma who was a carrier of the gold.

7.8 Further, I find that the entire case is based on facts and statements of the appellants coupled with documentary evidence about purchase of gold in Dubai and how its purchase/smuggling was facilitated by the appellants and the role played by each one of them has been discussed in detail in order-in-original.

7.9 Further, after considering the entire facts and evidence, I am of the view that the penalties imposed on Shri Pardeep Saini and Shri Rakesh Rai amounting to Rs. 15,00,000/- each is on the higher side which I reduce to Rs. 5,00,000/- in each case.

7.10 In view of the categorical evidence against the appellants and their role played in the entire smuggling of gold without declaring the same to the Customs department under Section 77 of the Customs Act, 1962 is well established and therefore, I pass the following order:-

(i) I uphold the order of absolute confiscation of gold bar weighing 995.5 grams valued at Rs 32,98,350/-, seized under seizure memo dt. 22.03.2019, under section 111(d), 111(1), 111(1) and 111(m) of the Customs Act, 1962.

(ii) I dropped the demand of duty of Rs 11,80,872 under section 28 of the Customs Act, 1962 and order its recovery from Sh. Narayan Sharma.

(iii) I uphold the order of the Ld. Commissioner regarding absolute confiscation of Indian currency of Rs 2.20 lacs of Sh. Pardeep Saini, on 23.03.2019 under Section 121 of the Customs Act, 1962.

(iv) 1 reduce the penalty on Sh. Pardeep Saini from Rs. 15,00,000/- to 5,00,000/- under Section 112 of the Customs Act, 1962;

(v) I uphold the penalty of Rs. 1,00,000/- on Sh. Narayan Sharma, under Section 112 of the Act read with section 114 of the Act.

(vi) 1 reduce the penalty from Rs. 15,00,000/- to 5,00,000/- on Shri Rakesh Rai, under Section 112 of the Customs Act, 1962;

(vii) I uphold the penalty of Rs.5,00,000/- on Sh. Vaibhav Rai, under Section 112 of the Customs Act, 1962.

(viii) I uphold the penalty of Rs. 50,000/- on Smt. Sreet Saini, under Section 117 of the Act.

8. In result, all the appeals are accordingly disposed off in the above terms.

(Pronounced on 05.10.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

G.Y.