CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 60006 of 2021

[Arising out of Order-in-Appeal No. JNK-EXCUS-APP-83-20-21 dated 21.10.2020 passed by the Commissioner (Appeals) CGST, Jammu]

Rajesh Verma **......Appellant**
(House No. F-7/282, Kashmir Avenue,
Batala Road, Amritsar, Punjab -143001)

VERSUS

Commissioner of Customs, Amritsar **......Respondent**
(Preventive Customs House, C.R. Building,
The Mall, Amritsar, Punjab)

APPEARANCE:

Present for the Appellant: Mr. Sudhir Malhotra, Advocate

Present for the Respondent: Ms Swati Chopra, Authorized Representative

CORAM: **HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**

FINAL ORDER NO. 60569/2021

DATE OF HEARING: 18.03.2021
DATE OF DECISION: 25.03.2021

PER ASHOK JINDAL:

The appellant is in appeal against the impugned order wherein ten gold biscuits weighing 1160 grams valued at Rs. 30,57,320/- have been absolutely confiscated and penalty of Rs. 3,00,000/- has been imposed on the appellant under the provisions of the Customs Act, 1962.

2. The facts of the case are that the impugned ten gold biscuits of foreign origin were seized by Punjab Police, Amritsar during the

search of the residential premises of the appellant as well as Smt. Ramesh Verma, mother of appellant on 24.09.2007. The appellant contested the case before the Hon'ble Judicial Magistrate, 1st Class, Amritsar who vide order 13.06.2009 held that the police official is not an appropriate authority for seizer of the said gold and ordered that the S.S.P., Amritsar is at liberty to forward the copy of the order with necessary documents to the Commissioner of Customs, Amritsar or any other appropriate authority/agency as he deemed with who shall be liberty to initiate appropriate action against the accused in accordance with law. Thereafter, on 25.10.2011, Smt. Ramesh Verma, mother of the appellant, filed an application to the Court of Chief Judicial Magistrate, Amritsar stated that she was the registered owner of these ten gold biscuits recovered in the case registered by the police against Sh. Rajesh Verma, her son. She further enclosed the invoice showing the purchase of the said gold biscuits to substantiate the claim. She further requested that these ten gold biscuits lying in the custody of police station, civil lines, Amritsar be released to her. The said application was contested by the Customs Department. Thereafter, on 15.12.2017, the Revenue took the possession of the said gold from the police and the Panchnama was drawn. On panchnama, it is also mentioned that the said gold has been seized and thereafter on 07.03.2018, a show cause notice was issued for confiscation of the said gold and to initiate penal proceedings against the appellant. The matter was adjudicated. The gold valued at Rs. 30,57,320/- was absolutely confiscated and penalty of Rs. 3,00,000/- was also imposed on the appellant. Against the said order, the appellant is before me.

3.1 The ld. Counsel for the appellant submits that in the impugned order, it has been held that the appellant has failed to discharge the burden under Section 123 of the Customs Act, 1962 as the goods are notified goods, therefore, burden lies on the appellant to prove that the goods are not smuggled one. It is his submission that the gold was seized by the police without appropriate authority of law and the same has also been held by the Hon'ble Judicial Magistrate, Amritsar vide its order dated 13.06.2009 and it is a settled law that Section 123 of the Act is not attracted where goods were seized by the police and later handed to the Customs Officials. To support of his contention, he relied on the following case laws:

(i) Commissioner of Customs Vs. D. K. Singh - 2006 (199) ELT 202 (MP)

(ii) E. Eswara Reddy Vs. C.C. - 2006 (196) ELT 410 (Tribunal)

(iii) Ram Lubhaya Vs. C.C.- 2002 (147) ELT 807 (Tribunal)

(iv) Ghewar Chand Vs. C.C. - 1999 (111) ELT 379 (Tribunal)

3.2 He further submits that the authority below has failed to appreciate the fact that the appellant has discharged the onus required under section 123 of Customs Act, 1962 by producing the invoice No. 254 dt. 03.03.1999 and 266 dt. 16.03.1999 and certificate thereto of M/s Rakesh Jewellers, Jalandhar. Sh. Naresh Malhotra partner of M/s Rakesh Jewellers joined the investigation and in his statement dt. 27.12.2017 recorded under section 108 of

Customs Act has deposed the invoice No. 254 dt. 03.03.1999 and 266 dt. 16.03.1999 and also deposed that certificate thereto have been issued by them. But the Revenue failed to bring on records to justify that the impugned gold was smuggled one. The authority below has wrongly rejected the plea of purchase of the gold biscuits by Smt. Ramesh Verma on the ground that she had not made any such claim before the Punjab Police when her son was under trial.

3.3 He further submits that the seizure by the Punjab police has been held illegal and as such not making claim before an authority which does not have jurisdiction on the subject matter cannot be held adverse to the appellant. In fact, in very first statement before the Customs, who have jurisdiction, such claim was made.

3.4 He further submits that the authority below has erred in denying ownership of the gold on the ground that photocopy of invoice issued by M/s Rakesh Jewellers was produced. Further, it was not bearing the description that the gold is of foreign origin. It is a submission that Sh. Naresh Malhotra, Partner of M/s Rakesh Jewellers during the investigation tendered in his statement dt. 27.12.2017 and deposed that gold against invoices in question was sold by them to Smt. Ramesh Verma but the said fact has not been considered.

3.5 He further submits that the Hon'ble Apex Court in the case of *Hanif Khan vs Central Bureau of Narcotics - 2019-TIOL-387-SC-NDPS* held that even in cases reverse burden of proof, foundational facts so as to attract the rigours of such provisions have to be established by the prosecution. He also relied on the decision of the Hon'ble Apex

Court in the case of *Gian Chand Vs State of Punjab - 1983 (13) ELT 1365 (SC)*.

3.6 With regard to confiscation, he submits that the Revenue is relying upon panchnama dated 15.12.2017 where in hand written remark is that "the above said gold seized by Punjab police vide F.I.R. No. 379 dated 24.09.2007 have now been seized under the Customs Act, 1962." There is nothing in these hand written remarks which may suggest the proper officer has formed 'reason to believe' for seizure of the impugned goods. Therefore, the same is in violation of CBEC Instruction No. 1/2017 dt. 08.02.2017.

3.7 He further submits that the confiscation of the goods is illegal as the goods have been seized from the residential premises is not imported goods in terms of the Section 2(25) of the Act.

3.8 He further submits that without prejudice to above, the absolute confiscation of the gold is not correct as gold is not prohibited goods and was allowed to import under Notification No. 171/1994 dated 30.09.1994. To support this, he relied on the following decisions:

(i) Yakub Ibrahim Yusuf Vs. Commissioner of Customs - 2011 (263) ELT 685 (Tribunal)

(ii) Commissioner of Central Excise & Service Tax Vs. Mohd. Halim Mohd. Shamim Khan - 2018 (359) ELT 265 (Tribunal)

(iii) Commissioner of Customs (Preventive) Vs. India Sales International - 2009 (241) ELT 182 (Cal).

3.9 He further submits that the show cause notice issued to the appellant is highly time barred as the police raided the residential premises and the impugned goods were seized on 24.09.2007. Thereafter on 13.06.2009, the Hon'ble Judicial Magistrate has held that the police officer is not a proper officer to seize the goods and after that on 25.10.2011, Smt. Ramesh Verma moved an application to release of the said gold to her being the registered owner of the said gold. In that application, the Revenue has contested the claim filed by Smt. Ramesh Verma, therefore, it was in the knowledge of the Revenue about the seizure of the gold by Punjab police itself at the time of contesting of the application filed by Smt. Ramesh Verma on 25.10.2011. In these circumstances, a show cause notice issued on 07.03.2018 after seven years of the knowledge of the Department is barred by limitation as held by the Hon'ble Punjab & Haryana High Court in the case of *Famina Knit Fabs Vs Union of India - 2020 (371) ELT 97 (P&H).*

3.10 He further submits that penalty on the appellant cannot be imposed as there was neither any mensrea nor malafide and there is nothing substantive brought on record that appellant unlawfully acquired possession of impugned goods; therefore, the impugned order is to be set aside.

4.1 On the other hand, the ld. A.R. submits that these gold biscuits were seized by the Customs on 15.12.2017 and the show cause notice was issued on 07.03.2018 under Section 124 of the Customs Act, 1962, therefore, the confiscation of the goods is not time barred.

4.2 She further submits that the claim of ownership filed by Smt. Ramesh Verma is an afterthought and did not appear to be factual and genuine.

4.3 She further submits that Sh. Naresh Malhotra, partner of M/s Rakesh Jewellers on 27.10.2017 in his statement *inter-alia* stated as under:

- that the invoices and certificate issued on 23.09.2010 did not correlate with the foreign markings as South Africa or Switzerland and that no identity could be established with this certificate as to which invoice covered foreign marking as South Africa or Switzerland. So the invoice and certificate issued by him did not appear to be correlating with the seized 10 gold biscuits.

- further, he failed to prove that out of two invoices issued by him was related with the South Africa mark biscuit and Switzerland mark biscuit because he had not written any description and purity on the invoices.

- that the payment received against these invoices was through cash and no documentary evidence had been with him to prove the genuineness of the said transaction.

- that no such certificate in other case had been issued by him till date.

- that as on date he did not had original supplier copy of these invoices on the basis of which this certificate was issued by him.

4.4 She further submits that no bank statements were produced by Smt. Ramesh Verma to support her claim. Further, she submits that Smt. Ramesh Verma has not made claim of ownership during the course of search by Punjab police and no bill/invoice/sale challan or any receipt was produced in support of her claim. She also submits that apart from the statement of Sh. Naresh Malhotra, there are other materials or circumstances evidencing to justify the confiscation of the gold biscuits as the photocopies of the invoices produced by Sh. Rajesh Verma or Smt. Ramesh Verma were not in existence at the time of seizure of the gold of foreign origin by Punjab police in 2007. The original copies were not produced and no other documentary evidence produced showing that the transaction is genuine. She relied on the following case laws:

(i) Sudip Saha vs. CC, Shillong – 2019 (369) ELT 1039 (Tri. Kol.)

(ii) Naresh J Sukhwani vs. UOI – 1996 ELT 258

(iii) Malabar Diamond Gallery P. Ltd. vs. ADG, DRI, Chennai – 2016 (341) ELT 65 (Mad.)

5. Heard the parties and considered the submissions.

6. On careful consideration of the submissions made by both the sides, the first issue arises <u>whether the impugned gold seized by Punjab police and later on handed over to Customs Officers, the provisions of Section 123 of the Customs Act, 1962 are applicable or not?</u> in the light of the various judicial pronouncements namely *Commissioner of Customs Vs. D. K. Singh* (supra), wherein the Hon'ble Madhya Pradesh High Court held as under:

> *"**11.** ……, there can be no scintilla of doubt that the seizure made under the Code of Criminal Procedure or any other law or inspection of goods, transfer thereafter or handing over the same to the Customs Authority would not*

> *amount to seizure under the Act and therefore the presumption under Section 123 would not get attracted."*

The same view by taken by this Tribunal in the case of *E. Eswara Reddy Vs. C.C.* (supra) wherein this Tribunal has observed as under:

> ***"7 .****We have gone through the records of the case carefully. The Tribunals in a large number of cases have held that Section 123 is not applicable when the offending goods are seized by the police and handed over to the Customs. If the above ratio is followed in the present case, there is no justification for holding that the goods are liable for confiscation because the Revenue has not discharged its burden. The appellants have stated that the gold under seizure was actually purchased by Smt. G. Sumitra Devi, mother of L. Vijaya Lakshmi from one Shri P. Krishnan who had bought it when he came to India from Singapore on 14-9-96 and from Shri M. Nagaraj, who had bought it from MMTC Ltd. Secundrabad on 9-4-96. The baggage receipt and the original invoice were produced. A part of the gold purchased by G. Sumitra Devi was kept in bank lockers at Kurnool and Hyderabad for safe custody by Smt. L. Vijaya Lakshmi, daughter of Smt. Sumitra Devi with the consent of Shri L. Eswar Reddy, Son-in-law of G. Sumitra Devi and husband of Smt. L. Vijaya Lakshmi. The rest of the gold under seizure was gifted by Smt. Sumitra Devi to her daughter-in-law Smt. G. Sudha Madhuri, wife of Shri G. Pratap Reddy (son of Smt. G. Sumitra Devi) who in turn kept in the bank locker of Smt. L. Vijaya Lakshmi. The Adjudicating Authority has not accepted the above version. According to the Adjudicating Authority, the defence of the notice is totally fabricated. In our view, since the initial burden to prove that the goods are smuggled is on the Department's, the department has a responsibility to come out with positive evidence and establish the source of*

procurement of the gold, especially when the explanation of the appellants is not accepted. The department has failed to discharge its owners under Section 123 of the Customs Act. Therefore, on this point alone the order-in-original cannot be sustained. The other pleas of the appellants have not been considered. Hence, we allow the appeal with consequential relief."

Further, in the case of *Ram Lubhaya Vs. C.C.* (supra), this Tribunal has held as under:

"6. *Admittedly, the gold biscuits were seized from the possession of the appellant by the Railway Police at the time of checking at Panipat Railway Station. It is only thereafter that the Customs Authorities approached the Police for handing over those biscuits to them for investigation. The Customs Officers got the order for the transfer of the gold biscuits to them from the Chief Judicial Magistrate on 17-1-2000. Therefore, no presumption that the gold biscuits were smuggled one, could be legally drawn under Section 123 of the Customs Act. It was for the Customs Authorities to prove by positive evidence that the biscuits had been smuggled into India illegally without payment of Customs duty. In this view, we are fortified by the ratio of the law laid down by the Apex Court in the case of M/s. Gian Chand & Ors. supra, relied upon by the learned Counsel. In that case, seizure of the gold was made by the Police and later on the same was transferred to the Customs Authorities under Section 180 of Sea Customs Act and the Apex Court observed as under :-*

> *"If the goods seized by the police and delivered to the Customs authorities under Section 180 of the Sea Customs Act, 1878, it is not seizure by the Customs within the meaning of Section 178A of the Sea Customs Act, 1878 (corresponding to Section 123 of the Customs Act, 1962). Therefore, the benefit of the provisions of Section 178A of the Sea Customs Act*

(corresponding to Section 123 of the Customs Act, 1962) could not be availed of to throw the burden of proving that the gold was not smuggled on the accused."

Further, in the case of *Ghewar Chand Vs. C.C.* (supra), again this Tribunal has held as under:

*"**11.** I have carefully gone through the records of the case as well as the rival submissions. I find that the law with respect to the applicability of Section 123 of the Customs Act is a well-settled one and is to the effect that when the initial seizure of any item covered by Section 123 of the Customs Act is by a Mazhar drawn by Police Officers, then the said Section would not be applicable to this case. The Department has not been able to cite any case law to the contrary and therefore applying the ratio of the Hon'ble Apex Court decision in the case of Gyanchand v. State of Punjab, I find that since in this case the Customs Officers had effected a seizure from the possession of the Police Officers as a sequel to the Court Order, therefore it is clear that the initial seizure was done by the Police Officers. As Police Officers are not Customs Officers, therefore the burden of proof under Section 123 of the Customs Act is not on the appellants and instead the burden shifts to the Department. The Department has not been able to lead any evidence to show that the 9 Gold biscuits were of smuggled origin. The entire case of the Department rests only on the grounds that the Baggage receipt was produced a month later by Shri Ghewarchand. Therefore the sum and substance of the evidence on record is that the appellant Shri Ghewarchand has submitted a reasonable explanation backed by the Baggage receipt. It is also not disputed that the quantity of gold of 9 biscuits is more than the quantity of gold contained in the Baggage Receipt. The Department*

has not been able to prove that this Baggage Receipt does not cover the seized gold because :

The Baggage receipt has on verification been found to be (a) genuinely issued by Madras Customs; and,

The Department has not been able to locate the holder of the b) said receipt, AbduI Razak. Since the burden was on the Department to do so, the Department cannot now simply brush away the said receipt on the group that it was produced later. I have perused the Order-in-Original as well as the Order-in-Appeal impugned very carefully. Apart from the grounds that the Baggage receipt was not accompanying the goods during transit and that a copy thereof was produced after a month of seizure, there is no other evidence on record in these orders to show that the said Baggage receipt clearly did not cover these goods or that the goods were otherwise of smuggled origin. Since I have already held that Section 123 cannot be invoked against the appellants in this case, and since no other evidence has been led by the Department, therefore it is clearly concluded that the benefit of doubt clearly goes to the appellants. I find that Shri Ghewarchand is the only person who has claimed ownership of the gold. The statement of Satyanandam that the gold was paid for by money given by Shri Ghewarchand has not been disputed by anyone. Therefore the claim of Shri Ghewarchand also cannot be brushed away under law.

***12.** In view of the aforesaid analysis, the Orders-in-Appeal impugned are set aside and both the appeals succeed with consequential relief. If the gold absolutely confiscated has already been disposed of by the Department, then the consequential relief granted herein shall be to the effect that the Sales proceeds thereof would be made available to Shri Ghewarchand."*

7. As all the judicial pronouncements stated that the impugned gold seized during the course of investigation by the police authorities, later on handed over to the Customs Authorities, the provision of Section 123 of the Act does not apply and burden lies on the Customs Officers to prove that the goods in question are of smuggled in nature.

8. Admittedly, in the case in hand, the gold initially seized by Punjab police in 2007 and thereafter, it was handed over to Customs authorities by Punjab police itself. In these circumstances, burden lies on the Revenue to prove that the goods in question are of smuggled in nature, which the Revenue failed to do so. In these circumstances, as the Revenue failed to discharge their onus, therefore, the impugned order and seizure of the goods by the authorities below is bad in law.

9. Further I find that Smt. Ramesh Verma moved an application before the Chief Judicial Magistrate, Amritsar on 25.10.2011 with regard to the ownership of the gold by producing the invoices in question and certificate from the seller of the said gold to her. In these circumstances also, the onus lies on the Revenue to prove that the goods in question are of smuggled in nature, which the Revenue has failed to discharge their onus with proper evidence. In the impugned order, it is held on the basis of assumption & presumption that the gold is of smuggled in nature which cannot be appreciated. Further, the gold in question is not prohibited goods in terms of Section 2(33) of the Act, in these circumstances, the absolute

confiscation of the gold is against the legal provisions as held by this Tribunal in the case of *Yakub Ibrahim Yusuf Vs. Commissioner of Customs* (supra). The same view was taken by this Tribunal in the case of *Commissioner of Central Excise & Service Tax Vs. Mohd. Halim Mohd. Shamim Khan* (supra), wherein this Tribunal has observed as under:

> ***"3.*** *As per Section 125 of the Customs Act, 1962 which has been reproduced herein as under :-*
>
> ***Option to pay fine in lieu of confiscation. -*** *Whenever confiscation of any goods is authorised by this Act, the (1) officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*
>
> *Provided that, without prejudice to the provisions of the proviso to sub-section (2) of Section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.*
>
> *Where any fine in lieu of confiscation of goods is imposed under (2) sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.*
>
> ***4.*** *Only prohibited goods cannot be released on payment of redemption fine. Admittedly, the gold in question is not*

prohibited goods under the Customs Act or any other law in force.

5. *In that circumstance, the goods in question cannot be absolutely confiscated in terms of Section 125 of the Customs Act, 1962. Therefore, I do not find any infirmity in the impugned order. The same is upheld. The appeal filed by the Revenue is dismissed."*

In view of this, I hold that the gold in question cannot be absolutely confiscated which shows the high handedness of authorities below by absolute confiscation of the goods.

10. Further, I find that when the proceedings were going before the Chief Judicial Magistrate, Amritsar in 2011 itself with regard to ownership of the impugned gold by Smt. Ramesh Verma and thereafter the gold was seized on 15.02.2017, in these circumstances, I hold that the proceedings initiated against the appellant are highly time barred as held by the Hon'ble High Court of Punjab & Haryana in the case of *Famina Knit Fabs vs. UOI* (supra), wherein the Hon'ble High Court observed as under:

*"**10**. ……. From the perusal of judgments cited by both sides, it is quite evident that every action including show cause notice must be issued within reasonable period where no limitation is prescribed. Taking cue from Section 28 of Act, 1962 which prescribes maximum 5 years period to issue show cause notice even in case of fraud, wilful misstatement and afore-cited plethora of judgments, we find that in every case 3 years period may not be reasonable (as otherwise held by Gujarat High Court in Pratibha Syntex case (supra), however notice issued after the expiry of 5 years cannot stand in the eyes of law. It*

would be apt to notice here that goods were exported during 2007-2012 after due verification by Customs officers and DRI searched premises on 27-12-2012 whereas impugned show cause notice came to be issued on 9-2-2018 means after the expiry of 5 years even from the date of search."

Therefore, I hold that the impugned show cause notice is barred by limitation.

11. Further, the case laws relied upon by the ld. A.R. have not relevant to the issues raised by the ld. Counsel for the appellant, therefore, they are not required much consideration. After due consideration of the said judgments, it has been held as under:

> As initially the seizure of the gold done by Punjab police and thereafter handed over to the Customs Officials, therefore, the provisions of Section 123 of the Customs Act, 1962 are not applicable to the facts of this case and onus lies on the Revenue to prove the gold in question is smuggled in nature, which the Revenue failed to do so. Further, I hold that the show cause notice is barred by limitation.

12. In view of the above, I set aside the impugned order and allow the appeal with consequential relief.

(Order pronounced in the court on 25.03.2021)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

RA_Saifi