

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 53695 of 2018-SM

(Arising out of order-in-appeal No. CC(A) CUS/D-1/Air/247/ 2018 dated 31.08.2018 passed by the Commissioner (Appeals) New Customs House, Near IGI Airport, New Delhi).

Ajay Gupta

B-84, Gautam Nagar
New Delhi-110049.

Appellant

VERSUS

Commissioner of Customs

New Customs House,
Near IGI Airport, New Delhi.

Respondent

APPEARANCE:

Shri S. Sunil, Advocate for the appellant

Shri Y. Singh, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 51592/2021

**DATE OF HEARING: 09.04.2021
DATE OF DECISION: 23.06.2021**

ANIL CHOUDHARY:

This appeal is filed against order of absolute confiscation of gold jewellery weighing 547.5 gm. valued at Rs. 14,77,073/- seized from the possession of the appellant while he was in the transit area of the IGI Airport, T-3, New Delhi. Further, appellant was imposed a composite penalty of Rs. 3 lakhs under Section 112 and 114 AA of the Customs Act.

2. The brief facts are that the appellant (travelling from Bangkok to Kathmandu) had arrived at IGI Airport, T-3, New Delhi on

05.06.2016 from Bangkok by flight No. 9W0063 and was scheduled to take the next flight to Kathmandu after a few hours on 06.06.2016. He was intercepted by the officers of the Customs Intelligence Unit (CIU) in the transit area. The officers enquired whether he was carrying any dutiable goods to which the appellant answered in the negative. However, on being frisked by hand-held metal detector, a beep sound was heard near his body. On further enquiry the appellant informed that he was wearing a silver coated - gold chain and a gold kada. For further enquiry and investigation the appellant was offloaded by the officers and was brought to the customs arrival hall for his detailed examination and personal search. That the hand baggage of appellant was diverted for X-ray screening. Nothing objectionable was observed. Then the appellant was asked to pass through the door frame metal detector, after removal of all metallic items he was wearing including the silver coated gold chain and Kada, no beep was noticed. The appellant was again asked whether he wanted to declare any dutiable items to the Customs, to which the appellant once again replied in the negative. After that, the appellant was served upon a notice under section 102 of the Customs Act and his personal search was taken in presence of two witnesses. In the personal search nothing objectionable was noticed. To ascertain the genuineness and purity of the silver coated gold jewellery, jewellery appraiser was called by the Officers.

3. The jewellery appraiser vide his report dated 06.06.2016 ascertained that the jewellery were made of gold and was of 999

fineness, and collectively weighed 547.50 gm. and valued at Rs.14,77,073/-. It appeared to revenue that the appellant have failed to produce any documentary evidence or otherwise for unlawful possession/import of the gold jewellery. Further, the quantity appears to be commercial and it further appeared that appellant was attempting to illegally import, being a non-eligible passenger in terms of Notification No. 12/2012-Cus. Further, the money which was withdrawn through ATM in Dubai, seem to have been used for financing or purchase of the recovered gold jewellery. Accordingly, the jewellery was seized under Section 110 of the Customs Act.

4. The statement of appellant was recorded under Section 108 of the Customs Act on 06.06.2016 by the officers, wherein he deposed as under: –

- (i) He is in the business of supply of stationary items as general order supplier in the name of M/s Reliable Computer Media Corpn. He had started a side job in a travelling company.
- (ii) He ventured into travelling job on persuasion of his nephew Shri Vikas Mittal, owner of M/s Iris Vacations Pvt. Ltd.
- (iii) He had joined the travel job since last month i.e. May 2016.
- (iv) He got lumpsum salary based on his performance.
- (v) His job profile was to escort the tourist groups to foreign destinations and manage tour arrangements for the groups at foreign destination during their stay.
- (vi) With regard to the question as to the entries in the Passport showing visit to Dubai 13 times, Bangkok 2 times and Nepal 4 times, he deposed that he had started export of gold jewellery in November, 2015 to Dubai. So, he used to visit for market survey, selling the gold

jewellery and collecting the payment. He visited Dubai for survey and exploring the market on 4 to 5 occasions. In November 2015, he exported 2 kgs of gold jewellery through CHA - God Gift Cargo. His further visits 8-9 times after the export of jewellery was for selling and recovery of payment.

- (vii) With regard to the question that why he was required to visit Dubai to sell the jewellery and recover payment, when at the time of export itself this should have been negotiated, he answered that as he was a new exporter, he used to visit many times to sell his jewellery and for collection of payment. All the payments were received through bank. He has in his possession related BRCs against the exports made.
- (viii) His purpose of visit to Bangkok on 05.06.16 was to manage hotels for tourists in Bangkok. He was supposed to talk to the hotels but due to language problem, he was not successful. He did not know anyone in Bangkok and it was only his second visit.
- (viii) With regard to the documents recovered from his hand bag such as forex card equivalent to Rs.13 lacs and ATM receipts showing withdrawal of such much money in Dubai, he answered that he had handed over the money to his friend Shri Jitender S. Raghav as an advance payment towards hotel expenses.
- (ix) With regard to the specific question, that from where did he purchase gold chain and kada, he answered ***he purchased gold chain and kada around four to five months back. He purchased the same on loan from Punjab National Bank. He took a loan of Rs.50 lacs, out of which he purchased kada and chain for Rs.19 lacs approx. The remaining amount was spent for purchased of gold from MMTC for making jewellery for export.*** (emphasis supplied).
- (x) With regard to the question that why did he make such a huge investment in kada and chain, when he suffering lossess, he answered that he had purchased and worn kada and chain on the body on his Astrologer's advice.
- (xi) With regard to the question as to where did he get the money to hand over to the friend when he had spent all

the amount on purchase of gold from MMTC and for kada and chain, he answered that he had spent the money from the money received after exporting the jewellery.

- (xii) With regard to the question as to whether he had any document at present in his possession, that he had purchased the kada and chain four months ago, he answered that he had no document **at present** to prove that kada and chain were purchased by him.

5. The appellant was asked to appear on 12.06.2016 for producing documents so as to satisfy the licit the possession of the gold jewellery seized. The appellant appeared on the said date and produced the following documents before the authorities:—

- i) Bank statement of the account of appellant with PAN No. showing the debit entry for purchase of gold on 27.04.2016, being purchase of gold bar 695.5 gm. for Rs.19,95,000/- vide Invoice No. 05 dated 12.04.2016 issued by M/s O. P. Jewellers Private Ltd, Chandni Chowk, Delhi.
- ii) Copy of documents being purchase orders for appellant's main business activity.
- iii) Copy of documents pertaining to export done by the appellant - of gold jewellery.

6. As it appeared to Revenue that the appellant was carrying gold jewellery by way of wearing on person as aforementioned, and further failed to provide details of licit possession of the seized gold jewellery, and it further appeared that the appellant was knowingly carrying gold jewellery with intention to evade customs duty and further the quantity appeared to be commercial, being carried for

monetary gain and thus the jewellery appeared to be liable for confiscation. Accordingly, show cause notice dated 29.11.2016 was issued requiring to show cause as to why the silver coated gold jewellery weighing 547.5 gm, valued at Rs. 14,77,073/-, should not be absolutely confiscated under Section 111(d), (i) (j) (l) (m) of the Customs Act. Further, penalty was proposed on the appellant under Section 112 and 114 AA of the Act.

7. The appellant contested the show cause notice by filing reply, denying the allegations levelled against him. Further, the adjudicator vide order dated 31.01.2018 ordered absolute confiscation of the jewellery in question under the proposed Sections 111 (i) (j) (l) & (m) of the Customs Act. Further, composite penalty was imposed under Section 112 and 114AA of the Customs Act.

8. Being aggrieved, the appellant preferred appeal before the learned Commissioner (Appeals) on amongst others the following grounds:-

"A. That the Id. Adjudicating Authority has passed the orders without appreciating the laws applicable and violation of principles of natural justice.

B. That the appellant was a Transit Passenger coming from Bangkok and proceeding to Kathmandu. A transit passenger is not required to pass through the customs check post. So question of declaration of the personal baggage or ornaments worn over the body before the customs authorities in the transit airport does not arise.

C. In this case the gold was not imported into India, relies upon case law:-

- Empress Mills, Nagpur vs. Municipal committee, Wardha;

- K. R. Ahmed Shah vs. Additional Collector of Customs, Madras – 1981 (8) ELT 153;
- Shewbuxrai Onkarmal vs. Assistant Collector of Customs and Others -1981 (8) ELT 298 (Cal.)
- Trilochan Singh vs. UoI -1981 (8) ELT 667;

D. That the appellant was wearing the said gold kada and chain, and the said gold articles were not concealed.

E. The appellant has bought the gold from his own money and money taken as loan from Punjab National Bank.

F. Appellant is not a carrier, neither the gold was concealed, hence he is not a smuggler.

The Id. Advocate also requested to set aside the impugned order and orders be passed as may be deemed fit and proper in the interest of justice”.

9. The learned Commissioner (Appeals) relying on the findings in the impugned order in original, was pleased to dismiss the appeal.

10. Being aggrieved the appellant is before this Tribunal.

11. Learned Authorised Representative for the Revenue have raised the preliminary objection regarding maintainability of appeal before this Tribunal. It is urged that Section 129A of the Act prohibits the Tribunal in deciding the cases of baggage, in which case the jurisdiction lies with the Revision authority in the Department of Revenue, Ministry of Finance. Proviso to Section 129A restricts this Tribunal to decide the appeal in respect of any order passed by the Commissioner (Appeals), which relates to any goods imported or

exported as baggage.

12. The appellant opposing the contention of Revenue submits that first of all it is not a case of import or export of baggage, and secondly the appellant is neither an importer nor exporter, as he was a passenger in transit. Thus, there being no export or import under the facts and circumstances, there is no application of Baggage Rules under the Customs Act. Admittedly, the status of the appellant in the present case is a 'passenger in transit' who had arrived from Bangkok around midnight on 05.06.2016 and was scheduled to take his next flight after a few hours on 06.06.2016 for Kathmandu, his ticket being from 'Bangkok to Kathmandu'. The appellant had got down from the plane which had arrived from Bangkok only for the purpose of changing the flight and/or taking the flight for his destination, without entering India, and thus was not required to go through immigration or compliance with any customs formalities, as required by a passenger or person entering India. Admittedly, the appellant was intercepted by the Customs Officers in the transit area of the Airport, where the appellant was waiting for his next flight. He further urges that although the expression 'transit passenger' has not been defined in the Customs Act or under any provision of the Foreign Trade Regulation Act, however, in common parlance, transit passenger is someone who is required to change flight at an Airport that connects to the terminal Airport of the passenger journey.

13. For a detailed and expanded meaning of the term 'import and export' the appellant relies on the ruling of the Hon'ble Madras High Court in **K.R. Ahmad Shah vs. Additional Collector of Customs -1981 (8) ELT 153** wherein the Hon'ble High Court dealing with the meaning of the word 'import' or 'export' held that if transit would be considered to cover imported into or exported from, would make even the airborne goods passing through India liable to confiscation and other penalties provided under the Customs Act, as soon as the plane land or takes off from the Airport in India. Such an interpretation would only lead to inconvenience and confusion and at the same time would also result in inordinate delay and irreparable burden on the interstate trade and commerce. Therefore, it is well settled law that unless goods are brought into the country for the purpose of use, enjoyment, consumption or distribution are incorporated in and got mixed with the totality of the property in the country, they cannot be said to have been imported.

14. Reliance is also placed on the following ruling also namely:-

- Empress Mills, Nagpur vs. Municipal Committee, Wardha
AIR 1958 SC 341
- Trilochan Singh v. Union of India -1981 (8) ELT 667 (Delhi)

15. It is further urged that Section 2 (23) of the Act defines 'import' as meaning bringing into India from a place outside India. The use of the words 'into India' after the word 'import' is for a wider meaning which is also apparent from a plain reading of Section

111(d) which makes the distinction between goods which are imported or attempted to be imported or are brought within India - Customs water for the purpose of being imported. Reliance is also placed on the rulings in the following case:-

- Empress Mills, Nagpur vs. Municipal committee, Wardha; (supra)
- K. R. Ahmed Shah vs. Additional Collector of Customs, Madras – 1981 (8) ELT 153;
- Shewbuxrai Onkarmal vs. Assistant Collector of Customs and Others -1981 (8) ELT 298 (Cal.)
- Trilochan Singh vs. UoI -1981 (8) ELT 667;

16. In view of the position of law as clarified by the aforementioned judgements, I am satisfied that it is not a case of import into India from a place outside India as defined in Section 2 (23) of the Customs Act and thus there is no application of Baggage Rules under the Customs Act. Accordingly, the preliminary objection of Revenue is dismissed.

17. It is further urged by the appellant that the whole case of Revenue is misconceived and *ab initio* illegal. In absence of any allegation on the appellant trying to import the gold in question or in absence of any allegation that the appellant was caught while handing over the gold to any other person for being smuggled into India, etc. Admittedly, the appellant at the time of inspection was not found to be interlinked with any other person and upon interception was found to be a passenger in transit who was wearing the gold ornaments being chain and kada, totally weighing 550 gms. approx.

18. Admittedly, the appellant produced before the Court below the copy of purchase bill showing purchase of gold bar from M/s O. P. Jewellers, Delhi vide Invoice No. 5 dated 12.04.2016, 695.51 kg. for Rs. 19,95,000/- for which payment was made through Bank transaction which is reflected in the Account of the appellant maintained with P.N. Bank, Gurudwara Road Branch, Delhi wherein the same amount is found debited on 27.04.2016 which was paid to M/s O. P. Jewellers vide Cheque No. 386972. Admittedly, the weight of the two gold articles of jewellery have been found to be 547.5 gm. only which is less than the gold purchased. Thus, the conclusion of the Court below that there is no co-relation between the gold purchased by the appellant in April, 2016 and the jewellery seized from him on 06.06.2016 is bad both on facts and in the eyes of law. The Court below have misconceived by drawing adverse inference on the ground that the weight or quantity of jewellery seized from the appellant is less than the weight or quantity of gold purchased in April, 2016. Such adverse conclusion could have been valid if the weight of jewellery seized would have been more than the weight of gold purchased.

19. It is further urged that there is no iota of evidence to demonstrate that the appellant have purchased gold at Dubai and have attempted to smuggled the same into India, in absence of any such evidence save and except wild guess work by the Revenue.

20. It is further urged that admittedly a transit passenger is not required to pass through the customs barrier or check post. Further, he is not required to declare the contents of his baggage, while waiting in the transit area. Thus, there is no question of a transit passenger going or passing through green channel or red channel (customs barrier). Thus, the formality of immigration and customs clearance does not arise in the case of the transit passenger. In the absence of any legal requirement for complying with any customs formalities for a transit passenger, the question of declaration of the personal baggage or the ornaments worn on the body of the passenger before the Customs authority, does not arise. Further, there is no allegation that the appellant had attempted to enter India by attempting to cross the customs barrier. Further, it is urged that there is no prohibition under the law which restricts the international passenger who is travelling from Bangkok to Kathmandu via Delhi, barring him from wearing any gold ornaments or silver ornaments. All the custom procedures regarding declaration of baggage and dutiable goods arise only if a person wants to enter India at the Custom post or barrier. Thus, in the facts and circumstances the seizure and subsequent confiscation of the personal belongings of the appellant – transit passenger, is *ab initio void* and misconceived. All the allegations by the Revenue are wholly unsubstantiated and *ab initio void* under the facts and circumstances. The cogent reason given by the appellant before the Court below have not been found untrue and rejected by non speaking and cryptic

order. Accordingly, learned Counsel for the appellant prays for allowing the appeal with consequential benefits.

21. Learned Authorised Representative appearing for the Revenue relies on the impugned order and reiterated the allegations in the show cause notice which are as follows:-

- (a) The appellant, while travelling from Bangkok to Delhi to Nepal has attempted to smuggle the gold clandestinely as he was aware that he was carrying imported gold in commercial quantity, which attracts customs duty.
- (b) The appellant with an intention to evade customs duty has not declared the seized goods before the customs authorities. He has attempted to clear the smuggled goods.
- (c) The appellant is not eligible for exemption from payment of customs duty in terms of Notification No. 12/2012. Condition No.35 specifies that who is an 'eligible passenger' in terms of Notification No. 12/2012. As per the said definition, the appellant appears to be an ineligible passenger.
- (d) The appellant failed to provide details of licit possession of seized goods despite being given a chance in this regard.
- (e) The appellant has imported seized goods in contravention of Section 77 and 79 of the Act read with Baggage Rules 1998, Para 2.1-2.20 of [FTP 2009-14](#). Seized goods are accordingly liable for confiscation under Section 111(d), 111(i), 111(j), 111(l) and 111(m) of the Act.
- (f) The appellant knowingly carried the gold imported with an intention to evade customs duty.
- (g) The appellant has imported goods of commercial nature in personal baggage, which is not allowed.
- (h) The appellant has imported goods in baggage which are not bonafide household goods and personal effects and thus would qualify as passenger baggage to avail of exemption in terms of R.3(1)(h) of Foreign Trade(Exemption from application of rules in certain cases) Rules,1993 and would constitute prohibited goods in terms of provisions of FTP Act, 1992.
- (i) Since the goods imported by the appellant is in commercial quantity for monetary gain and not for personal use and they do not appear to be bonafide household goods and personal

effects, they cannot be treated as passenger baggage to extend exemption in terms of Rule 3(1)(h) of F.T. (Exemption from application of Rules in certain cases), 1993 and has, therefore, to be treated as personal goods in terms of Section 2(33) of the Act.

- (j) Seized goods have been imported by the appellant in contravention of guidelines issued for imported gold and gold bars.
- (k) By the acts of omission and commission in relation to seized goods with intention to evade customs duty, the appellant has rendered the seized goods liable for confiscate.
- (l) In terms of Section 123 of Act, gold is notified goods under the Act and onus of proof that the goods are not prohibited lies on the person from whom gold has been recovered, but the appellant has failed discharge that onus.

22. Having considered the rival contentions, I hold that the appellant was a passenger in transit from Bangkok to Kathmandu. The appellant was admittedly found in the transit lounge at IGI Airport, T-3, Delhi, meant for international passengers, where they can wait for the purpose of changing flight without entering into India, as such they are not required to go through any formality of immigration as well as under the provision of Customs Law. I also find that it is admitted fact that the appellant was waiting for his next flight in the transit lounge of Terminal No. 3 of IGI Airport, Delhi, and he was not intermixing with any other person or trying to deliver any goods or any packet or jewellery for the purpose of smuggling. I further find that the appellant have not violated any of the provisions under the Customs Act, 1962 read with the Foreign Trade Policy. I further find that the whole case of Revenue is misconceived and has no legs to stand. I also find that the source of gold jewellery he was wearing is cogently explained, which has not been found to be untrue.

23. In view of the facts and circumstances, I allow this appeal and set aside the impugned order. The penalty imposed is also set aside.

24. The concerned officers of the customs is directed to return the seized gold jewellery to the appellant forthwith within a period of (30) thirty days from the receipt or service of a copy of this order.

(Pronounced on 23.06.2021).

(Anil Choudhary)
Member (Judicial)

Pant