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

**PRINCIPAL BENCH - COURT NO. II**

**Customs Appeal No. 51673 of 2021**
(Arising out of Order-in-Appeal No. D-II/Prev./NCH/246/2021-22 dated 10.06.2021 passed by the Commissioner of Customs(Appeals), New Delhi)

**Babu Ram** **Appellant**
S/o Shri Becham Ram, 5th Floor,
Somdatt Chamber-II, Bhikaji Cama Place,
New Delhi – 110 066

VERSUS

**Additional Commissioner,** **Respondent**
**Customs (Preventive), New Delhi**
New Customs House, Near IGI Airport,
New Delhi – 110 037

**and**

**Customs Appeal No. 51674 of 2021**
(Arising out of Order-in-Appeal No. D-II/Prev./NCH/544/2021-22 dated 30.06.2021 passed by the Commissioner of Customs(Appeals), New Delhi)

**Neeraj Aggarwal** **Appellant**
Prop. M/s Rajshree Jewellers, 5th Floor,
Somdatt Chamber-II, Bhikaji Cama Place,
New Delhi – 110 066

VERSUS

**Additional Commissioner,** **Respondent**
**Customs (Preventive), New Delhi**
New Customs House, Near IGI Airport,
New Delhi – 110 037

**APPEARANCE**:
Mr. Vineet Kumar Singh & Mr. R.K. Rawal, Advocates for the appellants.
Mr. Mahesh Bhardwaj, Authorised Representative for the respondent

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

**FINAL ORDER NO. 51154-51155/2023**

**DATE OF HEARING: 02.06.2023**
**DATE OF DECISION: 21-08-2023**

**ANIL CHOUDHARY:**

These Appeals are filed against Order of confiscation of 4Kg gold bars valued at Rs.1,19,98,963/- and imposition of penalty under Sec 112(i) on

(a) Mr. Neeraj Aggarwal – Rs.12,00,000/- & (b) Mr. Babu Ram – Rs.2,00,000/-.

2. The brief facts of the case are that the officers of DRI, Delhi Zonal unit (DZU in short) New Delhi intercepted the Appellant (Babu Ram) from seat No 36 of B9 Coach of Sealdah New Delhi Rajdhani Express at New Delhi Railway station on 31/01/2018, who identified himself as Babu Ram. The officers searched the bag of the said person and during the search, the officers found 4 gold bars on which 'Suisse 995' and 'Essayeur Founder' were mentioned. As per the department version, he was unable to produce any documents regarding its licit procurement. On further interrogation, Babu Ram informed the officers that the seized gold bars were imported and he received the same at Kolkata and going to deliver the said bars to Shri Anil of Karol Bagah, New Delhi. He further informed that the actual owner of such gold bars was Mr Neeraj Agrawal, proprietor M/s Raj Shree Jewellers, Mirzapur. The officers recorded the statement of Babu Ram on 01/02/2018 under Section 108 of the Customs Act 1962 and the officers arrested him under Section 104 of the Customs Act 1962.

3. Follow up search was conducted by the officers at the premises of Shri Neeraj Agarwal prop of M/s Raj Shree Jewellers at Basnahi Bazar Mirzapur U.P on 06/02/2018. During the search operation, the officers found delivery Challan Book, invoices, bank statement & copy of a letter issued by Neeraj Agarwal.

4. Thereafter, summons was issued to Mr Neeraj Agarwal, Shri Vinod Kumar & Mr Vijay Kumar, the other employees of Mr Neeraj Agarwal. It is pertinent to mention that no follow up investigation was done by the department from whom Babu Ram had procured the gold at Kolkata, as appears from the SCN. The ongoing investigation culminated by the issuance of SCN dt.19.7.2018, in which it was proposed to confiscate the seized gold absolutely and to impose penalty under various sections of Customs Act 1962, on both the appellants.

5. On going through the SCN it appears that the main allegation of the department is that the Appellant had not submitted any documents regarding the procurement of seized gold bars of foreign origin. But it is not alleged anywhere in the SCN, that the seized gold bars were smuggled. The SCN also did not speak about the origin of seized gold bars. In nutshell, the entire case of the department is based on the statement of appellant - Babu Ram, which was retracted by the appellant on very first opportunity.

6. The Appellant's Counsel assailed the entire proceedings on the following grounds:

6.1 The appellant (Neeraj Aggarwal) had purchased the gold in question from Shivi Agarwal (another jeweler-trader) through invoice No 98 dated 05/10/2018 and payment of the same was also made through the banking Channel . The said Invoice is duly reflected on the appellant's GST records. Mr Neeraj Agarwal the owner of seized gold, was sending the gold through Mr Babu Ram (the other appellant) to M/s K.K Gold of Coimbatore for making designer jewelry on job work basis, through challan no 5 dated 30/01/2018.

6.2 The Appellants submits that the alleged inscriptions 'Valcambi Suisse 1 kg. gold', 99.50% 'CHI essayeur foundeur' on another 3 bars, was the duplicate one because the purity of gold is not equal to 99.99% or 24 carat. From the SCN, it is clear that the department has not accepted the appellant(s) plea for re-testing of the gold from CRCL, to ascertain its purity. Undisputedly the seized gold if tested will reveal that it does not contain purity of 99.9%, and will prove that the gold is of Indian origin. It is a well-known fact that purity of the foreign origin gold is of 99.9%. Therefore, it is established beyond doubt that the seized gold bars were not of foreign origin because purity was not tested by the department through any government agency. The seized gold contains purity of 99.5% and the same itself indicates that it was of Indian origin. It was alleged in the SCN that the gold bars bear foreign markings, but the origin of the country has not been mentioned anywhere in the SCN and the purity of the gold has also not been checked through an approved agency. Thus how the department has concluded that the seized gold bars were of foreign origin, without verifying the purity of gold. The allegation that the seized gold was of foreign origin is not sustainable in the eyes of law.

6.3 Mere foreign marking on the gold does not by itself establish the smuggled nature of the goods. It can at best establish the foreign origin of the goods. He relies on the following judgments in support of his contention, namely:-

i) *Naved Ahmed Khan* v. *CC, Bangalore* [2005 (182) E.L.T. 494]
ii) *Jitendra Pawar* v. *CC, Raipur* [2003 (156) E.L.T. 622]
iii) *CC, (Prev) Kolkata* v. *Monoranjan Banik* [2004 (165) E.L.T. 237]

6.4 That the department has built up its case entirely on the ground that the seized gold contains marking which belongs to a foreign country , hence the seized gold was of foreign origin and smuggled, whereas mere markings cannot be taken as proof of the gold being of foreign origin, because markings and labels are only hearsay evidence. In this regard the appellant places reliance on STATE OF MAHARASHTRA Vs PRITHVIRAJ POKHRAJ JAIN 2000 (126) E.L.T. 180. In this case it was held that the markings do not speak for themselves, and that evidence would be hearsay evidence. The Department has chosen not to test check the sample of seized gold, to examine the purity of gold. The entire case has been built by the department based on such markings which is at best hearsay evidence. Admittedly it is the case of town seizure; hence, provisions of Section 123 of the Customs Act are not attracted.

6.5. That at the time of filing the bail application, the appellant had produced the (i) challan, (ii) invoice, (iii) stock book to establish the licit possession of the gold, at the first available opportunity before the Sessions Court. The ld. adjudicating authority as well as Commissioner Appeals conveniently ignored these documents. For this the appellant relies on the following judgments in support of his contention:

i) *Krishnakumar Dhandhania* [2007 (219) E.L.T. 736 (Tri.-Kol.)]

ii) *CC* v. *Golak Chandra Kamila* [2006 (205) E.L.T. 665]

iii) *S.K. Chains* v. *CC, Mumbai* [2001 (127) E.L.T. 415]

6.6. The only evidence that the department has against the appellant is the statement of Babu Ram which was given on 31/01/2018, wherein he had admitted that the goods under seizure are smuggled, otherwise there is no evidence available with the department to allege that seized gold was of foreign origin or smuggled gold. However, the co –appellant (Neeraj Aggarwal) immediately produced the evidence by way of challan & invoice, to show that he had procured the same from another trader on payment of GST. It is a well-settled proposition of law that confessional statements need independent corroboration. In the instant case, the voluntary character of the statements itself being in doubt, the same cannot be the basis of holding the guilt against the appellants because the purity of the gold is below 99.9 %. Thus the circumstantial evidence is not compatible with the alleged guilt of the accused. In this regard the appellant places reliance on **COMMISSIONER OF CUSTOMS (PREVENTIVE) Vs PUNI DHAPA LOKESWARA RAO 2009 (248) E.L.T. 141 (Cal.)**. The circumstantial evidence proves that the statement recorded under section 108 of the Customs Act 1962, was not voluntary.

6.7. To substantiate that the seized gold was purchased through licit way, the appellant had submitted copy of the (i) challan, (ii) invoice, (iii) stock ledger & (iv) bank statement. Thus the appellant has discharged the burden of proof under Section 123 of the Customs Act. Now the onus shifted on the department to establish that the gold seized from the appellant was smuggled into India.

6.8. That the Department did not bother to inquire about the seller of the gold bullion; none of the documents which were produced by the Appellants have been discredited by the department. Since the purchase invoice is available on the GST portal, there was no need to make a detailed inquiry from the seller of the gold. From day one, department proceeded on unwarranted assumptions, presumptions, surmises and conjectures and the entire proceedings lacks legal sustainability. In this regard the appellant relies on following Rulings:

a. *Sitaram Sao* v. *State of Jharkhand* - 2007 (12) SCC 630.
b. *Mridul Agarwal* v. *Commissioner of Customs, Lucknow*, 2018 (362) E.L.T. 847 (Tri. - All.)
c. *Shantilal Mehta* v. *UOI and Others*, 1983 (14) E.L.T. 1715 (Del.).
d. *CCC (P)* v. *Prabhash Kumar Jalan,* CESTAT, Kolkata Bench, Final Order No. 75500/2021, dated 27-8-2021.
e. *Shri Sarvendra Kumar Mishra* v. *Commissioner of Customs Vide* Final Order Nos. 70198-70199/2021, dated 6-9-2021.
f. *Nand Kishore Modi* v. *Commissioner of Customs (Preventive), West Bengal*, 2015 (325) E.L.T. 781.
g. *Rajesh Pawar* v. *UOI*, 2014 (309) E.L.T. 600 (Cal.).
h. *Commissioner of Customs (Prev.) Kolkata* v. *Ashok Kumar Agarwal*, 2017 (348) E.L.T. 555 (Tri. - Kolkata)

6.9. Department has failed to discharge the obligation cast upon it. It is the case of the Department that the gold is smuggled. The Department has completely failed to go into the root of the matter as to how the goods were smuggled in nature, nor is the allegation based on any evidence to this effect, whereas the appellant - Mr Neeraj Agarwal from the very first day contended that the said gold was sent to M/s K.K Gold Coimbatore through Challan No 05 dated 30/01/2018. The appellant further informed that the said gold was purchased through Invoice No 95 dated 05/01/2018. In such circumstances, by no stretch of the imagination can the goods be termed as smuggled. The appellant has submitted sufficient documentary evidence in support of the licit acquisition of seized gold and discharged the burden under Section 123 of Customs Act, 1962. Therefore, the impugned order needs to be set aside. The appellant had submitted the copy of Challan along with the letter addressed to the M/s K.K Gold Coimbatore, regarding the transfer of gold for jewelry making, at the time of filing the bail application this fact was mentioned in the bail order itself, thus it cannot be termed as an afterthought.

6.10. That the entire case has been made by the department based on the confessional statement of Babu Ram, which was recorded under duress by the DRI officers. Such statement was retracted by the appellant Babu Ram on the very first opportunity. Therefore such confessional statement does not have any evidentiary values in the eyes of law, when the documentary evidence is contradictory to such statement, which proves that the statement was recorded under duress. It is established law that the confessional statement does not have any evidentiary value unless there is cogent evidence. In this regard the appellant is placing reliance on Hon'ble Gujrat High court Ruling in the matter of **Saakeen Alloys Pvt Ltd 2014(308) ELT655.**

6.11. As per the statement of Mr. Babu Ram, the appellant has received the gold bars at Mirzapur from Mr. Neeraj Agarwal (the other appellant) in the instant matter. In such circumstances, the onus is on Revenue to lead evidence as to the smuggled nature of the gold. Admittedly, it is the case of town seizure, as Mr. Babu Ram have been intercepted by the DRI officers at New Delhi Railway Station, while he was on board the train. Further, there is no basis and it has been vaguely stated by Mr. Babu Ram, that according to his knowledge gold bars are brought from Bangladesh and thereafter, they are traded in Mirzapur by method of erasing or removing the foreign markings.

6.12. Learned Counsel also states that in spite of immediate retraction at the very first opportunity, the Adjudicating Authority/ Court below failed to examine Mr. Babu Ram in the adjudication proceedings. Thus, in view of the violation of the provisions of Sec 138B also no reliance can be placed on the retracted statement of Mr. Babu Ram. Reliance is placed on the following Rulings:

i) Jindal Drugs Pvt Ltd vs UOI [2016 (340 ELT 67 (P & H)]
ii) Andaman Timber Industries [2015 (324) ELT 641 (SC)]

6.13. He has also urges that the whole proceedings are initiated as SCN has been issued and served after more than six months from the date of seizure. Admittedly, date of seizure is 31.1.2018. The SCN is purportedly issued on 19.7.2018 but the same was never served upon the Appellants. Learned Counsel refers to the Affidavit dated 22.5.2023 sworn by the Appellant - Mr. Neeraj Aggarwal (owner of the goods in question), who has stated on oath that he received a letter dated 22.10.2018 from the office of Additional Commissioner of Customs (Preventive), New Customs House, New Delhi, informing the date fixed for PH on 20.11.2018. Immediately Mr. Neeraj Aggarwal sent a letter dated 31.10.2018 informing the Adjudicating Authority that no SCN has been served or received and requested the Authority to provide him copy of SCN along with the relied upon documents.

6.14. In response, the Adjudicating Authority provided copy of SCN along with RUDs vide letter dated 28.11.2018. From the perusal of the SCN it appears that the said SCN was not signed by the issuing authority and further no date of issuance is mentioned. Accordingly, SCN has not been served within the stipulated period as required under Sec 124(a) of the Act. Further, Sec 110(2) provides that wherein goods are seized under Sub-Sec (1) and no notice in respect thereof is given under Sec 124(a) within six months of the date of seizure of the goods, the goods shall be returned to the person from whose possession they were seized. Accordingly, learned Counsel prayed for allowing the Appeal with consequential benefits.

7. Learned AR for Revenue, Mr. Mahesh Bhardwaj, relies on the Impugned Order.

8. Heard the parties in detail and perused the records.

9. Vide Order Sheet dated 4.5.2023, this Tribunal had recorded that there is dispute regarding the issue and service of SCN. According to the Appellants, they never received the SCN purportedly issued on or about 19.7.2018. The Appellants have claimed that SCN was served to them only when they approached the Department, after receiving notice for PH and

thereafter, served upon them on 28.11.2018, which is beyond the period of six months from the date of seizure. This Tribunal directed the Revenue to produce the original record and evidence dispatched along with proof of service of SCN.

10. The Appellant had filed Affidavit in support of the contention regarding non-service of SCN prior to 28.11.2018. Learned AR in response, informed that he has written to the concerned Adjudicating Authority, and the DRI/DZU on 11.5.2023 itself. However, the compliance was awaited. Accordingly, some more time was prayed and by way of last opportunity, time was allowed and the date of further Hearing was fixed on 02.06.2023. On 2.6.2023, learned AR stated that he has not received any reply or instructions in the matter. Accordingly, the Appeal was heard and Order was reserved. Even after conclusion of the Hearing till date, there is no submission on behalf of the Revenue as regards the service of SCN within the stipulated time.

11. I further find from the facts and circumstances and the evidence led by the Appellant (owner of goods) that he has discharged the onus under Sec 123 of the Act by leading sufficient documentary evidence like (i) copy of challan, (ii) copy of tax invoice, (iii) copy of stock ledger and (iv) copy of bank statement. The Bank statement further certifies that the payment has been made for the purchase of the gold in question through banking channel. Further the tax invoice reflects that GST has been deposited on the transaction. I, hold that the Appellant has discharged the onus under Sec 123 of the Act. I further find that allegations of Revenue are based on assumptions and presumptions as the evidence led by the Appellants have not been found to be incorrect or false.

12. I, therefore, find that the whole proceedings are vitiated as the SCN has not been issued and served within six months as required under Sec 124(a) read with Sec 110(2) of the Act.

13. In view of the aforementioned findings and observations, I allow the Appeals and set aside the Impugned Orders. I direct the Revenue to return the seized/confiscated goods forthwith to the Appellant - Mr. Neeraj

Aggarwal. In case the goods have been auctioned/sold then the Appellant is entitled to the sale proceeds with interest from the date the amount was realized by the Department, till the date of disbursement, with interest as per Rules.

(Order pronounced in the open Court on 21-08-2023)

**(ANIL CHOUDHARY)**
**MEMBER (JUDICIAL)**

Veda