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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. C/583 /2002 – SM [BR] **Date 27/12/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :

SHRI RAM CHHORDAM AGARWAL
S/O SHRI BHAGWAN DAS AGARWAL
R/O HOSPITAL ROAD, RASRA, P.S. RASRA, DISTT. BALLIA. [U.P.]

SHRI RAM CHHORDAM AGARWAL Appellant

Vs

C.C.E. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No. 932 / 2011-SM[BR]** dated 22.12.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III
Customs Appeal No. 583 of 2002 (SM)

[Arising out of the Order-in-Appeal No. 63-CUS/LKO/2002 dated Nil passed by The Commissioner (Appeals), Customs & Central Excise, Allahabad.]

For Approval and signature :
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

Shri Ran Chhordas Agarwal Appellant

Versus

CC, Lucknow Respondent

Appearance

Shri Bipin Garg, Advocate – for the appellant.

Ms.R. Jagdav, Authorized Representative (SDR) – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 18/11/2011.
DATE OF DECISION : 22/12/2011

Final Order No. 932/2011 SM (BR) Dated : 22/12/2011

Per. Rakesh Kumar :-

The facts leading to this appeal are, in brief, as under.

1.1 In the morning of 28/1/2000 at around 0600 hours, the officers of Customs Division, Varanasi, who on receipt of a specific information were keeping a watch at a particular place alongwith two independent Panchas on Khairaghat Belthara Road, Balia since the night of 27/1/2000, intercepted a Maruti Car No. UP-52B/803 which was coming towards Khaira Ghat. The car on being signalled by the officers stopped and the officers searched the same. The person sitting in the car – Shri Ran Chhordas Agarwal, the appellant in this case, stated that he was a businessman of Rasra, Ballia dealing in silver and was having some silver ornaments. However on thorough search of the car in presence of Panchas some cavities in the back seat of the car were found which were opened by the keys which were in the possession of the appellant. The cavities were found to be containing silver slabs, some silver jewellery and also cash. According to Department, the appellant on being asked, could not produce any document regarding legal possession of the silver slabs and silver jewellery. Since the place where the car was intercepted was a lonely place and not considered safe, the officers alongwith Panchas took the appellant and his car to the office of Customs Division, Varanasi, where a thorough search was made and inventory of the goods recovered from the car was prepared. In all 67 pieces of silver bullion weighing 114.902 kg.valued at Rs.5,68,887/-, silver ornaments weighing 3.875 kg. valued at Rs.22,111/- and Indian currency of Rs.63,000/- were recovered from the car which were placed under seizure under reasonable belief, that the silver and silver jewellery was of smuggled origin and Indian currency of Rs.63,000/- was sale proceeds of the smuggled silver. Statement of driver of the car, Shri Jai Prakash Yadav was recorded wherein he stated that since the last 4 months he used to go to Deoria along with Shri Agarwal 2 to 3 times in a month, that Shri Agarwal used to leave him at Deoria for 2 to 3 days, that he was not aware as to what he used to do during that period and that only after return of Agarwal he used to accompany him back to Rasra, Ballia. Statement of Shri Agarwal, the appellant, was recorded on 28/1/2000 under Section 108 of Customs Act, 1962, wherein he stated that he used to go to Nepal to bring silver to Deoria, that the silver brought by him to Deoria used to be melted and mixed with other metals to decrease its purity, that in Deoria, he used to stay at Nawalgarhia Dharmshala, Mohan Road and his driver used to stay at some other place, that the silver smuggled from Nepal used to be melted and its purity reduced at the premises of one Shri Santosh, that the silver brought from Nepal after reduction of its purity used to be sold by him in Varanasi to Shri Chunnu Babu, Shri Shiv Prasad and Shri Uttam, whose shops are located in Thatheri Bazar, Varanasi, that he has got no documents regarding the silver recovered from his car, and that the smuggled silver used to be sold by him in cash and Rs. 63,000/- recovered from car is the amount received from the sale of such silver. His further statement was recorded on 29/1/2000 wherein he his stated that his car No. UP-52B/803 which is a Maruti 800 car, had been purchased by him from

Shri Shiv Mangal Prasad, Tilak Road, Deoria and cavity was got constructed by him. Here it may also be mentioned that neither 67 silver slabs nor the jewellery was bearing any markings of foreign origin. It was having the marking likes BB, MP, SR, BK, ARP, PB, MG etc. and except for one slab whose purity was 98%, the purity of other pieces was 50% to 60%.

1.2 The appellant was arrested under Section 104 of the Customs Act, 1962 at 9 p.m. on 29/1/2000. He was produced before Magistrate on 30/1/2000 and at that time he submitted a letter to the Magistrate complaining that he had been illegally detained by the Customs and had been subjected to duress and had been forced to give certain confessional statement which are not as per his say. However, he was remanded to judicial custody. He was ultimately released on bail by the Hon'ble Allahabad High Court on 4th May 2000.

1.3 The Investigating Officers conducted follow up investigation to cross check certain facts disclosed by the appellant in his statement dated 28/1/2000 and 29/1/2000. While the appellant's statement regarding purchase of the car from Shri Shiv Mangal Prasad, Tilak Road, Deoria was found to be correct, his statement that during his visit to Deoria, he used to stay at Nawalgarhia Dharamshala, Mohan Road was found to be incorrect as the Manager of Dharamshala on checking his records gave a letter that no person with the name Ranchor Das Agarwal had ever stayed in his Dharamshala. On inquiry it was found that there was no person named Santosh living near Sabzi Mandi in Deoria engaged in melting of silver. Since M/s Swastik Metals was a silver refiner in Deoria, the officers conducted inquiry with Shri Ramesh Kumar of M/s Swastik who in his statement dated 2/2/2000. stated that about a week back Shri Ranchor Das of Rasra had come to him for getting some silver refined, but due to non-settlement of rate, he did not give the silver for refining and except this, no business has been done with Shri Ranchor Das. Inquiry was also made with Shri Chunnu Babu, Shri Shiv Prasad and Shri Uttam and each of these three persons in their respective statement stated that they had not purchased any silver slabs from the appellant. While Shri Chunnu Babu whose actual name was Shri Prema Nand Verma, he did not know the appellant, Shri Uttam Rao Pawar stated that he was a dealer in silver ornaments and the appellant Shri Ranchhor Das used to buy silver ornaments from him and other than this, he had no dealings with him. Similarly Shri Shiv Prasad in his statement stated that while he knew the appellant Shri Ranchhor Das Agarwal and used to sell silver ornaments to him, he had never purchased any silver bullion from him.

1.4 Immediately after on his release from bail, the appellant submitted an affidavit to the Jurisdictional Assistant Commissioner, wherein he stated that he is a silver dealer of Rasra, that he used to purchase old silver ornaments and melted ornaments from various customers and shop keepers, that he used to get the melted silver jewellery refined through M/s Swastik Metal, Surti Hatta Road, Deoria, that the purchase of silver ornaments and silver bullion is accounted for in his books of accounts, that the seized silver was being carried by him to Deoria under transit challan No. 20, that he had gone to M/s Swastik Metal, Deoria, for refining of the silver, but since M/s Swastik Metal had quoted a rate for refining which was not acceptable to him, the silver was not given to M/s Swastik Metal for purification, that it is this silver bullion and ornaments which were being brought back by him from Deoria to Rasra and on the way his car was intercepted by the customs, that he has been illegally detained and tortured and that he had been forced give some certain statements which were not as per his say.

1.5 The department issued a show cause notice dated 8/7/2000 to the appellant, wherein relying upon his confessional statement dated 28/1/2000, it was proposed to confiscate the silver bullion and ornaments under seizure under Section 111 (d) of Customs Act, 1962, confiscate the Indian currency of Rs. 63,000/- under seizure under Section 121 of Customs Act, 1962 and also impose penalty on the appellant under Section 112 of Customs Act, 1962. Beside this, the show cause notice also proposed confiscation of the Maruti Car under Section 115 of Customs Act, 1962.

1.5 The show cause notice was adjudicated by the Additional Commissioner, vide order-in-original dated 28/9/2000 by which the silver bullion as well as silver ornaments under seizure were confiscated under Section 111 (d) of Customs Act, 1962, the Indian currency under seizure was confiscated under Section 121 of Customs Act, 1962 and the Maruti Car No. UP-52B/803 was confiscated under Section 115 (2) of Customs Act, 1962. All the confiscation were absolute confiscation without any option to redeem the goods on payment of redemption fine. A penalty of Rs. 50,000/- was also imposed on the appellant under Section 112 of Customs Act, 1962.

1.6 On appeal being filed before the Commissioner (Appeals) against the Additional Commissioner's order, he vide order-in-appeal dated 3/9/02 dismissed the appeal. In course of proceedings before the Commissioner (Appeals), the Commissioner (Appeals) on the request of the appellant, got the seized silver bullion examined and after observing that the pieces of the silver shows the marks of the various melters, gave a finding that the same had been put by the appellant on the silver slabs after decreasing the purity of the smuggled bullion from the Nepal. He also gave a finding that silver bullion being notified under Section 123 of Customs Act, 1962, the burden of proof that the same is of not of smuggled origin, is on appellant and he has not been able to discharge his burden of proof.

1.7 The appellant filed an appeal before the Tribunal against the Commissioner (Appeals)'s order. The Tribunal vide final order No. A-1188/04-NB dated 13/8/04 set aside the Commissioner (Appeals)'s order and allowed the appeal. The Tribunal in this order gave a finding that merely on the basis of retracted statement of the appellant, it could not be held that the silver and silver jewellery was of smuggled origin, smuggled from Nepal.

1.8 Against this order of the Tribunal, the department filed a reference appeal under Section 130 of Customs Act, 1962, wherein the following two questions of law arising out of the Tribunal's order were raised for decision of the Hon'ble High Court :

> **"(1) "whether in view of the finding recorded by the Commissioner (Appeals) as well as material on record, the burden with regard to innocence shall shift on the shoulder of the respondent (appellant in this case), in view of provision of Section 123 of Customs Act, 1962 ;**

(2) whether the finding recorded by the Appellate Court is perverse and not sustainable under the law."

1.8.1 Hon'ble Allahabad High Court decided this reference appeal vide order dated 28/7/10, wherein the points raised by the department were answered as under:-

(1) the burden to prove the innocence was on the shoulder of Shri Ranchor Das Agarwal, the appellant in this case ;

(2) the finding recorded by the Tribunal is perverse being based on extraneous material."

The Revenue's appeal was, therefore, allowed and the matter was remanded to the Tribunal for deciding the appeal afresh keeping in view the observations made in this order.

1.8.2 In this regard, para 25, 26, 27 and 28 of the Hon'ble High Court's order are reproduced below :-

"25. The provision contained in Section 123 of the Act is quite clear and unambiguous. The tribunal should have considered the question with regard to burden of proof strictly in accordance to letter and spirit of Section 123 of the Act instead of taking into

account the extraneous materials which has got no bearing with the offence committed under the Act. Power conferred by the statute must be exercised within the four corner of law uninfluenced by the government actions, policy decisions or alike things.

26. Tribunal should not have shifted the burden on the revenue (appellant) keeping in view the provisions contained in Section 123 of the Act.

27. In view of above, question is answered as under –

1. Burden to prove innocence was not on the shoulder of appellant rather it was on the respondent.
2. Finding recorded by the tribunal is perverse being based on extraneous material.

28. In view of above, appeal is allowed. Tribunal's order is set aside. The matter is remanded back to the tribunal to decide the appeal afresh keeping in view the observation made hereinabove expeditiously and preferably within a period of three months from the date of service of certified copy of this order."

1.9 Accordingly, this matter was heard afresh for denovo decisions in accordance with the direction of the Hon'ble High Court.

2. Heard both the sides.

2.1 Shri Bipin Garg, Advocate, the learned Counsel for the appellant, pleaded that the place where the silver was seized in the morning of 28/1/2000 is far away from Indo-Nepal border, that neither silver nor silver ornaments bear any marks of foreign origin on the basis of which any reasonable belief could be exercised by a Customs office regarding their smuggled origin, that the appellant is a silver dealer in Rasra engaged in sale and purchase of silver as well as silver ornaments, that the silver bullion as well as silver ornaments under seizure had been purchased by the appellant from various persons, that as is clear from the verification in this regard done in course of proceedings before the Commissioner (Appeals), the bullion pieces bear the marks of various melters and also the percentage of purity, that the purity of silver bullion is from 50% to 60%, that the silver under seizure which had been purchased by the appellant from various persons, was accounted for in his books of accounts and was transported under a challan, that the silver had been taken by the appellant to M/s Swastik Refinery, Deoria for refining, that since the rate quoted by M/s Swastik was not acceptable, the appellant did not give the silver to M/s Swastik for refining, that it is this silver which was being brought by him to Rasra when the same was being seized by the Customs, that Shri Ramesh Kumar of M/s Swastik Metal, Deoria in his statement dated 2/2/2000 recorded by the Customs Officers has stated that about one week back Shri Ramchhor Das had come to him for refining of silver but due to non-settlement of rate, he did not give the work to him, that this statement of Shri Ramesh Kumar confirms the plea of the appellant that he had gone to Deoria with 67 pieces of bullion and jewellery for getting the same refined through M/s Swastik Metals, but due to non-settlement of rate, he did not give the silver to M/s Swastik Metal for refining, that not only the purchase of the silver under seizure is reflected in his books of accounts, the same was also reflected in his sales tax return which is clear from the assessment order dated 7/11/02 of the Commercial Tax Officer, that the Customs Authorities have disregarded the evidence submitted by the appellant regarding legal acquisition of the silver under seizure and also the fact that the same had been taken to M/s Swastik Metal for refining and due to non-settlement of rate, the same was not refined, that since the price of silver bullion or ornaments is dependent upon purity of the silver, no person after receiving 98 or 99% pure silver will get the same melted so as to reduced its purity and in that process incur extra expenditure, that there was no incentive for smuggling of silver from Nepal during January 2000, as is clear from the newspapers of Nepal, from which it is clear that the price of silver in Nepal at that time was higher than its price in India, that the only evidence relied upon by the department in support of its allegation that the silver under seizure is of smuggled origin, is the statement dated 28/1/2000 of the appellant, that a part of his statement regarding stay of the appellant at Nawalgarhia Dharmshala, Mohan Road in Deoria in course of his visit to Nepal and sale of smuggled silver after dilution to Shri Shiv Prasad, Shri Chunnu Babu and Shri Uttam has been found to be incorrect, that even this statement was retracted by the appellant at the first available opportunity – on 30th January 2000 when the appellant was produced before the Magistrate, that the Magistrate had also recorded the statement of Shri Sunil Kumar, Inspector on 24/4/2000 and Shri Sunil Kumar in his statement has stated that the appellant was in the Customs custody from 28/1/2000 to 29/1/2000 till 9 p.m., that he had been detained during this period and he had not been allowed to go anywhere, that this statement of Shri Sunil Kumar given before the judicial Magistrate is a clear evidence of the appellant's illegal detention and the same lends credence to the appellant's allegation that he has been illegally detained and pressurized to give confessional statement, which was not as per his say, and that when the statement dated 28/1/2000 is the only evidence relied upon by the department in support of allegation regarding smuggled origin of the silver under seizure and the correctness of this statement itself is doubtful and in fact part of the this statement have been found to be incorrect and when neither there are any markings indicating foreign origin on the silver nor there is any other evidence in this regard, there is absolutely no justification for confiscation of the silver and Indian currency, the confiscation of the car from which the same was seized and the imposition of penalty on the appellant. He also pleaded that the appellant by filing an affidavit on 5/5/2000 immediately after his release produced evidence regarding the legal origin of the silver under seizure had discharged his burden of proof and with that, the burden of proof would shift to the Department, but no inquiry has been conducted by the department to prove that the appellant's claim regarding legal origin of the silver under seizure was incorrect. He also cited the judgment of Hon'ble Kolkata High Court in the case of **CC (Preventive) vs. Puni Dhapa Lokeswara Rao** reported in **2009 (246) E.L.T. 141 (Cal.)**, wherein it was held that confessional statement needs independent corroboration and when voluntary character of the statement itself is in doubt, the same cannot be the basis for holding the guilt against the person giving such statement. In this case the Hon'ble High Court while observing that the department is not required to prove its case with mathematical precision but is required to establish only preponderance of probability, held that the department has failed to establish the preponderance of probability as the circumstantial evidence is not compatible with the guilt of the accused. He cited the judgment of Hon'ble Allahabad High Court in the case of **CC vs.**

Shambhu Nath reported in **2009 (239) E.L.T. 427 (All.)**, wherein it was held that when the silver slabs recovered from the secret cavities of the vehicle were having purity varying from 50% to 99% and were not having any marking of foreign origin and except for certain confessional statements which were retracted there was no other evidence regarding smuggled origin of the similar, the same could not be confiscated. Another judgment cited by him was in the case of **Lalchand D. Kothari vs. CC (P), Mumbai** reported in **2001 (136) E.L.T. 525 (Tri. – Mumbai)**, wherein it was held that even when the gold under seizure were having foreign marks, the same is not to be regarded as smuggled gold without any further evidence and the confiscation based on admission of the noticees which were retracted is not sustainable.

2.2 Mrs. R. Jagdav, the learned SDR defended the impugned order by reiterating the findings of the Commissioner (Appeals) and pleaded that the appellant in his statement dated 28/1/2000 had clearly stated that the silver slabs seized from him had been smuggled by him from Nepal and subsequently their purity was reduced so as to conceal their smuggled origin, that though the appellant on 30th

January 2000 retracted his statement by giving a letter to the Judicial Magistrate alleging illegal detention and torture, he did not lodge any complaint in this regard and there is no order of the Magistrate on his complaint letter, that in view of this, his allegation that his statement is not voluntary and has been obtained under duress has to be rejected, that the statements of Shri Shiv Prasad, Shri Chunnu Babu and Shri Uttam of Thatheri Bazar, Varanasi do not support the case of the appellant, that mentioning of challan in the affidavit is only an afterthought, as at the time of seizure there was no such challan, that at the time of seizure no explanation about the source of the silver had been given by the appellant and all the explanations were given much later, and that the books of accounts were not produced during the investigation and hence his plea that the purchase of the silver being reflected in his books of accounts cannot be accepted. She, therefore, pleaded that there is no infirmity in the impugned order.

3. I have carefully considered the submissions from both the sides and perused the records.

4. From the records, it is clear that the car from which the silver had been recovered, had been intercepted on the basis an information received by the Jurisdictional Customs officers. On inquiry with the appellant on 28/1/2000 the appellant in his statement on that date recorded under Section 108 of Customs Act, 1962 had stated that the silver under seizure was of smuggled origin, that the same had been smuggled by him from Nepal and after bringing the same into India, the same was melted and some other metals were added so as to reduce its purity in order conceal its smuggled origin and that this silver used to be sold by him to certain dealers in Varanasi. In these circumstances, that the customs officers under reasonable belief that the silver recovered from the car is of silver origin and cash of Rs. 63,000/- is the sale proceed of smuggled silver, placed the same under seizure. Under Section 123 (1) of Customs Act, 1962, where any goods to which this section applies are seized under this Act in the reasonable belief that the same are of smuggled origin, the burden of proving that they are not of smuggled origin shall be on the person from whose possession the same were seized. There is no dispute that the silver bullion is notified

under this Section and as such the provisions of this Section are applicable to silver bullion. It is for this reason only that Hon'ble Allahabad High Court in its judgment dated 28/7/2010 has held that the burden to prove that the silver was not of smuggled origin is on the appellant and it is the appellant who has to lead the evidence in this regard. Thus, the matter has been remanded for denovo decision on the basis that the burden of proving that the silver under seizure is not of smuggled origin is on the appellant and it is he who had to produce the evidence in this regard.

5. Though under the provisions of Section 123 (1) of Customs Act, 1962 where any goods notified under this Section are seized from a person on reasonable belief that the same are of smuggled origin, the burden of proving that they are not of smuggled origin,is on the person from whose possession the same have been seized and thus this Section provides for presumption regarding the smuggled nature of the goods notified in this Section seized from a person, this presumption is a re-buttable presumption and once the person produces some evidence indicating their legal import, the burden would shift to the department.

6. In this case on going through the records, I find that from the morning of 28/1/2000 till the night of 29/1/2000 when he was arrested, the appellant was in the custody of customs officers and thereafter he was handed over to police and next day was produced before the Magistrate, who remanded him to judicial custody where he remained till 4th May 2000. Though in course of inquiry with him on 28/1/2000 by the customs he had given a statement under Section 108 of Customs Act, 1962, on that day admitting that the silver bullion and jewellery under seizure had been smuggled from Nepal, this statement was retracted when he was produced before the Magistrate on 30th January 2000. Not only this, even part of his statement where he has stated that in Deoria, he used to stay at Nawalgarhia Dharamshala, Mohan Road, and that silver brought from Nepal after dilution was being sold to three silver dealers in Varanasi - Shri Shiv Prasad, Shri Chunnu Babu and Shri Uttam has been found to be incorrect; as the Manager of Nawalgarhia Dharamshala has stated that there is no record that the appellant ever stayed in his Dharamshala and similarly Shri Shiv Prasad, Shri Chunu Babu and Shri Uttam have denied

purchased any silver bullion from the appellant. I also find that as per the record of the Court of the Special CJM, Varanasi, Shri Sunil Kumar, Inspector, one of the seizing officer, has stated before the Hon'ble Magistrate that the appellant was in the customs custody from 28/1/2000 to 29/1/2000 night, that he had been detained for inquiry and during that period he were not allowed to go anywhere. This statement of seizing officer lends credence to the appellant's allegation that he had been illegally detained and, therefore, in view of judgment of Hon'ble Supreme Court in the case of **Vinod Solanki vs. Union of India** reported in **2009 (233) E.L.T. 157 (S.C.)**, the correctness of his confession would become doubtful, as the same would be hit by the provisions of Section 24 of the Indian Evidence Act. As held by the Apex Court in the above-mentioned judgment, for application of Section 24 of the Indian Evidence Act, the allegation of coercion, duress, or inducement having been used in recording of a confessional statement, need not be proved beyond any doubt, the evidence and the circumstances from which it appears that the threat, coercion, or inducement had been used for obtaining the confession, is enough for application of this Section. In view of this, the statement dated 28/1/2000 of the appellant by itself cannot be treated as a reliable evidence in support of the department's allegation of smuggled origin of the silver, more so when there are absolutely no markings indicating foreign origin on the seized goods. In this background when the appellant immediately after his release on bail submitted an affidavit on 5th May 2000 claiming that the silver under seizure had been purchased by him from various persons and that the same was being taken by him to M/s Swastik Metal, Varanasi for refining and on account of non-settlement about the rate for refining, the silver was not given to M/s Swastik for refining and it is this silver which was being taken back by him to Rasra, these claims of the appellant should have been verified. I find that absolutely no inquiry has been conducted by the Department in this regard. On the contrary, the statement dated 2/2/2000 of Shri Ramesh Kumar of M/s Swastik Metal confirms the appellant's plea that the appellant had visited his premises in connection with refining of silver, but due to non-settlement of rate, the silver was not given for refining and it is this silver which was being brought back from Deoria. The pieces of silver bullion bear marks of various melters and in this regard, inquiry had been conducted in course of proceedings before the Commissioner (Appeals) who has stated that those marks are of various melters. Inquiry should have been conducted with those melters for ascertaining as to whether any silver bullion of Nepal origin had been brought by the appellant to them. But instead of doing this, the Commissioner (Appeals) has simply given a finding that the marks of various melters have been put by the appellant on the silver bullion brought from Nepal after decreasing its purity. When the appellant's plea that the silver and the silver ornaments under seizure purchased from various persons had been taken by him to M/s Swastik Metal, Varanasi for refining and only because of disagreement about rate for refining, the silver was not given for refining, has been corroborated by the statement of Shri Ramesh Kumar of M/s Swastik Metal, the Department's allegation that the silver under seizure was the one which had been smuggled from Nepal and after being brought into India had been melted and mixed with other metals to reduce its purity, would be difficult to believe, as if this is so, there would have been no reason for the appellant to take the same to M/s Swastik Metal for refining. In view of this, I hold that once the appellant, immediately after release on his on bail produced evidence in support of legal origin of the silver under seizure, the burden of proof would shift to the department and the department has not been able to produce any evidence that the appellant's plea regarding legal origin of the silver is incorrect. I also take note of the fact that in absence of any foreign markings on the silver, the only evidence in support of the department's allegation against the appellant is his confessional statement dated 28/1/2000, which, as discussed above, is unreliable, more so when the Appellant's statement regarding stay at Nawalgarhia Dharamshala in Deoria during his visit to that place is not corroborated by the Manager of that Dharmshala and the part of his confessional statement regarding sale of smuggled silver after melting and dilution to three dealer in Varanasi has not been corroborated by those dealers. Only on the basis of such a confessional statement of the appellant, the confiscation of the silver, currency and the vehicle under seizure and imposition of penalty on the appellant is not sustainable.

7. In view of the above discussion, the impugned order is set aside. The appeal is allowed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

PK