IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.76583 of 2018

(Arising out of Order-in-Appeal No.168-170/Pat/Cus/Appeal/2018 dated 14.02.2018 passed by Commissioner(Appeals) of Central GST & CX, Patna.)

Shri Ratan Kumar Shah
(S/o Late Singhasan Sah,
Jaiprakash Nagar, South Maheshwari,
Ward No.15, P.O. & P.S. Jogbani,
Distt-Araria, Patna.)

...Appellant

VERSUS

Commissioner of Customs, Patna

.....Respondent

(C.R. Building(Annex), 2nd Floor,
Bir Chand Patel Path, Patna.)

WITH

Customs Appeal No.76592 of 2018

(Arising out of Order-in-Appeal No.168-170/Pat/Cus/Appeal/2018 dated 14.02.2018 passed by Commissioner(Appeals) of Central GST & CX, Patna.)

Md. Minatullah Ansari
(S/o Late Haji Subhan Ansari,
Hajiganj Ward No.3, Haripur,
P.O. & P.S. Jogbani,
Distt. : Araria, Bihar.)

...Appellant

VERSUS

Commissioner of Customs, Patna

.....Respondent

(C.R. Building(Annex), 2nd Floor,
Bir Chand Patel Path, Patna.)

APPEARANCE

Shri N.K.Chowdhary, Advocate for the Appellant (s)
Shri A.K.Singh, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75396-75397/2020

DATE OF HEARING : 10 February 2020
DATE OF DECISION : 02 September 2020

P.K.CHOUDHARY :

The present appeals arising out of Order-in-Appeal No. 168-170/Pat/ Cus/Appeal/2018 dated 14-02-2018 passed by the Commissioner (Appeals) of Central GST & CX, Patna, confirming the Order of the Adjudicating Authority confiscating the gold, silver and currencies with the option to redeem the same on payment of redemption fine of Rs.12,24,048/- (Rupees Twelve Lakhs, Twenty four thousand and forty eight only) and imposition of penalty of Rs.4,00,000/- (Rupees four lakhs only) on the Appellant No.1 and penalty of Rs.2,00,000/- (Rupees two lakhs only) on the Appellant No.2 and also directing to pay the duty of Customs on the seized quantity of gold/silver on appeal by the Department.

2. The facts of the case in brief are that the Appellant No.1 Ratan Kumar Shah is the Proprietor of M/s. Ratan Jewelers, Jogbani - Arariya, Bihar, engaged in the business of gold and silver. During the course of his business, the Appellant No.1 had purchased 3(three) pieces of gold weighing 857.450 Gms. and silver weighing 4.182 Kgms. from Shri Balaji Impex of Rajasthan against Invoice No.SBI/15-16/3937 dated 24-07-2015 and Invoice No. SBI/15-16/3920 dated 24-07-2015 respectively. He purchased the said gold and silver on payment of cash. The appellant had accepted Rs.30,00,000/- (Rupees Thirty Lakhs only) against two Money Receipts being No.63 dated 21-07-2015 and 67 dated 26-07-2015 from Md. Minatullah Ansari (Appellant No.2) for selling of gold jewellery. On 04-08-2015, the Officers of the Department visited the shop premises of the Appellant No.1 and searched the premises and recovered three cut pieces of gold and silver coins and some quantity of silver. The Officers also recovered Indian Currency of Rs.9,78,000/- (Rupees Nine lakhs Seventy eight thousand only) and Nepali Currency of

Rs.12,90,000/- (Rupees Twelve lakhs Ninety thousand only). The jewelleries were also there in the shop premises, which were not taken by the Officers. The Bills, Registers and other documents were kept in a bag and sealed by the Officers and kept in the custody of the Appellant No.1. Thereafter, the Appellant No.1 was taken to the Forbeshganj Custom Office and the Seizure List was prepared and goods were seized. The Appellant No.1 was also kept in the custody of the Customs Officers in the Customs Office for the period from 04-08-2015 to 07-08-2015. During this period on 04-08-2015, statement of the Appellant No.1 was recorded when he had given statements at the instance of the Officers that the gold bars were allegedly having marking “Rand Refinery Mark - 9950” and Officers were of the view that the said gold bars were of foreign origin and the Officers learnt from the Internet that the said markings of gold are the product of South Africa. The Appellant No.1 also had given the names of persons while in the custody from whom the gold and silver bars have been procured. The said persons viz. Amarnath Prasad and Bijoy Bombiya denied providing any gold or silver to the appellant and they did not know whether the appellant brought or sold gold and silver from Nepal. The purity of gold and silver was tested from the Mint and according to Assay Certificate dated 07-10-2015, three pieces of gold were having fineness 993.6, 992.8 and 992 respectively and fineness of silver was 999.6, 999.9 and 999.9 (for three samples) respectively. The Appellant No.1 subsequently submitted I.T. Returns to the Department as asked for. On 12-10-2015, the Appellant No.1 submitted a letter detailing everything in his letter about the source of gold and silver and the currencies recovered from his premises. In his said letter, he has clearly stated that he was conducting the business having VAT/TIN No.10441409025 and purchased the gold against Invoices dated 24-07-2015 from Shri Balaji Impex of Jaipur, Rajasthan. The Indian Currencies were the sale proceeds of his ornaments to different customers, the silver coins were accumulated by him since many years as good luck sign of Deepawali Festival each year and part of it was purchased from local seller for business purpose. Subsequently on 15-10-2015, the Appellant No.1 was summoned and he appeared before the investigating authority and submitted documents and gave clarifications that he could not show the documents on the day of the search since he got panicked and after all he is also a heart patient and stated that what was recorded from him on 04-08-2015 was incorrect. He was kept in the custody at Forbeshganj Customs Office from 04-08-2015 to 07-08-2015 and was facing threat of the Officers and on 07-08-2015; he was allowed to go home on furnishing Bail Bond. He clearly stated before the Officers that he had purchased the gold from Shri Balaji Impex, Jaipur, Rajasthan and an amount of Rs.30,00,000/- (Rupees Thirty lakhs only) was given to him by Md. Minatullah Ansari (Appellant No.2). The Nepali Currency was relating to business transaction in his shop and that it was common to accept Nepali Currency at Jogbani. He also explained the reason for contradicting his earlier statement. There is no rebuttal evidence in respect of the appellant's contention in his letter dated 12-10-2015 and statement dated 15-10-2015. The Department investigated the matter further from the supplier of gold and silver. Shri Ratan Lal Soni of Shri Balaji Impex, in his statement dated 23-11-2015 and 18-01-2016 has clearly stated that the said gold and silver was sold by them to the Appellant No.1. Shri Ratan Lal Soni also submitted the copies of invoices of purchasing the gold from different importers and even he stated in his statement dated 18-01-2016, that he was purchasing gold of different brands including "Rand Refinery Mark 9950" and in their purchase documents marking is not mentioned. While they sell the gold they also did not mention marking on the bills/invoices. He was shown the photo of the gold seized, which was not legible and he could not identify the marking. The said photo was also not made a part of this proceeding. He also submitted the ledger showing the transaction made on 24-07-2015 with the Appellant No.1 and the transaction took place on receiving payments from the appellant. Md. Minatullah Ansari (Appellant No.2) in his statement dated 20-11-2015 accepted the fact of advancing money to the extent of Rs.30,00,000/- (Rupees Thirty Lakhs only) to the Appellant No.1 and disclosed the source of money and stated that the said money was paid to the Appellant No.1 as advance against two Money Receipts and there is no rebuttal evidence against this submission.

3. In this perspective, proceeding has been initiated by issuing a Show Cause Notice under Section 124 of the Customs Act, 1962 dated 28-01-16 alleging that the gold and silver were of foreign origin and the party receipts and invoices submitted belatedly were fabricated. The silver coins were also of foreign origin and currencies were the sale proceeds of the smuggled goods and hence, the gold and silver were liable to confiscation under Section 111(a) and 111(b) of the Customs Act, 1962. Currencies were liable for confiscation under Section 121 of the Customs Act, 1962. Proposals were also made for imposing penalty under Section 112(b) of the Customs Act, 1962. The penalty was proposed against Md. Minatullah Ansari under Section 112(a) of the Customs Act, 1962 on the allegation that he abetted the commission or omission of the act by the appellant. Penalty was also proposed against Shri Balaji Impex under Section 112(a) of the Customs Act, 1962 for his complicity in the matter of smuggling gold and silver. Penalty on the Appellant No.1, Md. Minatullah Ansari(Appellant No.2) and Shree Balaji Impex under Section 114AA of the Customs Act, 1962 have also been proposed on the ground that they had signed on the false documents and incorrect declarations.

4. The Appellant No.1 submitted the reply dated 25-02-2016 to the Show Cause Notice as would be appearing from internal page - 19 of the Order-in-Original, denying and disputing the allegations. It was vehemently contended that since the goods were recovered from the shop premises and the documents have been submitted in support of

the gold and silver, the seller of the gold also accepted the position, the burden under Section 123 of the Customs Act, 1962 has been discharged. The belated submissions of the documents cannot be the only ground for doubting the genuineness of the documents, more particularly when the seller and the buyer accepted the position. The supplier of the gold also explained that the same has been supplied by them since they were also procuring the said branded gold from the importers. The silver of such quantity cannot be seized since it is below 20 Kgs. and is covered by the Boards's Circular dated 11-06-90. The Indian Currencies and Nepali Currencies were the sale proceeds of the jewellery to different customers and there is no evidence of buyer of the smuggled goods and there is no transaction of sale of any smuggled goods. Section 121 of the Customs Act, 1962 does not apply. The Appellant No.1 also relied upon some decisions in support of his contentions.

5. Pending adjudication, the learned Joint Commissioner considering the documents submitted by the Appellant No.1 vide his letter dated 12-10-2015 and praying for provisional release of the goods, granted provisional release verifying the documents and genuineness of the ownership of the seized goods valued at Rs.40,80,158/- vide his Order dated 26-08-2016 subject to deposit of the Bond for the full value of the goods and 30% Security Deposit. The Appellant No.1 deposited Rs.12,24,048/- and executed the Bond and got the entire goods and currencies released provisionally.

6. The learned Adjudicating Authority in his Order did not accept the submissions of the appellant and the decisions cited, since the Appellant No.1 could not produce documents at the time of search of his premises. The statement of Amar Prasad and/or Bijoy Bombaiya has been relied upon though their names were stated by the Appellant No.1 while in the custody of the Customs in their Office from 04-08-

2015 to 07-08-2015. Their statements also did not led to infer about the goods recovered from the appellant's premises as to its Nepali origin. Marking on the packets does not mean that goods kept in the packet is of the marked origin. The Appellant No.1 also had given explanation in respect of silver coins. It was emphasized that the goods were covered by the documents and hence, the burden under Section 123 of the Customs Act, 1962 has duly been discharged. There is no evidence of currencies being the sale proceeds of smuggled goods. The learned Joint Commissioner doubted the documents without any legally tenable reason and ultimately passed the order of confiscation with the option to redeem the gold, silver and currencies valued at Rs.40,80,158/- on payment of Redemption Fine of Rs.12,24,048/-. Since the said amount was already paid at the time of getting the goods released provisionally, the said amount was appropriated. The learned Adjudicating Authority also imposed penalty of Rs.4,00,000/- (Rupees Four Lakhs only) on the Appellant No.1 under the provisions of Section 112(a), 112(b)(ii) and under Section 114AA of the Customs Act, 1962 and also imposed penalty on the Appellant No.2 to the extent of Rs.2,00,000/- (Rupees Two Lakhs only) under the said provisions.

7. The appellants filed appeals before the learned Commissioner (Appeals) pointing out the grievance and the grounds that the Order of the learned Joint Commissioner is erroneous in view of the fact that the same has been passed wholly on the basis of surmises and conjecture. The documentary evidence will prevail over the oral evidences. The purity of gold does not show that they were of foreign origin. The supplier of the gold accepted in supplying the gold and silver and thus, the burden of Section 123 of the Customs Act, 1962 was discharged. From the print on the plastic packet cannot be a factor for inferring the origin of the goods in the packet. Packets are available in the market and silver was not of foreign origin. The coins

were also not of foreign origin. The currencies are not liable to confiscation. The decisions cited before the Adjudicating Authority are applicable to their case. The Appellant No.2 also made his position clear by contending in his appeal that he is a *bona fide* citizen of India and owns two tractors and earned from cultivation of Sugar cane, Corn, Rice and Vegetables. He admitted that he had given Rs.30,00,000/- (Rupees Thirty Lakhs only) to the Appellant No.1 as advance for making gold jewellery and ornaments. He has been entangled in this case on the allegation of abating illegal importation of gold and silver by the Appellant No.1. The investigation made by the Department failed to unearth any evidence to that effect. The statement given by him has not been rebutted by the Department. The elements of abatement are also totally absent in this case. The imposition of penalty in a composite manner is contrary to law. The documentary evidence would prevail over oral evidences also. The imposition of penalty on the Appellant No.2 is not maintainable.

8. The Department also filed appeal before the lower appellate authority since the learned Joint Commissioner did not ask for payment of duty. The appeals were decided by the Order-in-Appeal No.168-170/Pat/Cus/Appeal/2018 dated 14-02-2018 by which the learned Commissioner (Appeals) rejected the appeals of the appellants and allowed the appeal of the Department on the basis of his findings contained in Paragraph - 7 & 8 of his Order-in-Appeal dated 14-02-2018. Hence, the present appeals before the Tribunal.

9. The learned Advocate appearing on behalf of the Appellant No.1 and Appellant No.2 submitted that the finding of the learned Commissioner (Appeals) is based on assumption and presumption and not based on any valid and solid evidence. The argument advanced by the appellants had not been contradicted. The findings contained in Paragraph - 7 and 8 of the Order-in-Appeal are not sufficient for

upholding confiscation since the goods were covered by documents and currencies not proved to be the sale proceeds of the smuggled goods. He further submitted that in the instant case, the statement of the Appellant No.1 while being in the custody of the Customs Authority in the Customs Office during 04-08-2015 to 07-08-2015 is not admissible. The said statement was also retracted by the appellant in his statement before the Customs Authority on 15-10-2015. There is no evidence of rebuttal to the contentions raised by the Appellant No.1 vide his letter dated 12-10-2015 and in his statement dated 15-10-2015 before the Customs Officials. The learned Advocate further submitted that the Appellant No.1 had produced documents showing licit purchase of gold and silver from Shri Balaji Impex. Shri Balaji Impex also produced purchase documents. The Department did not proceed to investigate the said purchase documents at Jaipur. Shri Balaji Impex accepted the selling of gold and silver to the Appellant No.1 against the invoices on receiving payments against cash reflecting in the ledger. Md. Minatullah Ansari (Appellant No.2) also accepted having paid the money to the Appellant No.1 as an advance against Money Receipt. There is no rebuttal evidence to that effect. On producing the procured documents, the Appellant No.1 had discharged the burden under Section 123 of the Customs Act, 1962. The existence of the document when not disputed, mere non-production of documents at the time of seizure cannot led to infer about genuineness of the same, more particularly when the reasons have been explained by the Appellant No.1 in his statement dated 15-10-2015 before the Customs Authority. learned Advocate also contended that when the buyer and seller admitted the transaction, the genuineness of the documents cannot be doubted. The silver was also not liable to be confiscated in view of Board's Circular referred and it was also below 20 Kgs. The learned Advocate relied upon the Tribunal's decisions in the case of - Samir Kumar Roy - 2001 (135) ELT 1036 (Tri. - Kol), Ganesh Prasad - 2005 (195) ELT 1103 (Tri. - Kol.) and Ramchandra - 1992 (60) ELT 277 (Tri.), which have not been appreciated by the Authorities below. The practice of mentioning mark in the Invoice is not maintained in the business, only quantity and value are mentioned. The Sales Tax Registration Number is also mentioned in the Invoice and Money Receipt. The said transaction cannot be doubted wholly on the basis of unsubstantiated speculation to contend illegal importation of goods. learned Advocate further submitted that undisputedly the gold was seized from the shop premises and not from any Port or Airport while being smuggled. Undisputedly, the documents were also produced. On being satisfied, the goods were released. The documentary evidence prevails over the oral evidence. The burden of Section 123 of the Customs Act, 1962 has been discharged. The purity of gold also does not show that the same were of foreign origin. Marking on the packet on which the goods were kept does not confer origin to the goods in the packet. There is also no evidence about the currencies were the sale proceeds of the smuggled goods. There is no whisper about buyer and seller and other elements for invoking Section 121 of the Customs Act, 1962. Finally, he submitted that confiscation under these circumstances is not maintainable in law. The question of payment of redemption fine and/or duty on the gold/silver does not arise. The amount appropriated should be refunded. The imposition of penalty cannot be made since confiscation is not proper. The penalty is also composite in nature which otherwise also is not permissible. The penalty imposed on the Appellant No.2 is not supported by any legally tenable finding. The penalty on Appellant No.2 is thus not maintainable. The learned Advocate relied upon the following decisions in his Written Submissions dated 10-02-2020.

SL. No.	CITATIONS	GISTS
1	Mridul Agarwal -Vs- Comm. of Customs, Lucknow 2018 (362) ELT 847 (Tri.-All)	The statement of the appellant is not acceptable and admissible since the Adjudicating Authority did not examine the appellant and found to be acceptable in terms of Section 138B of Customs Act, 1962 - Statement not admissible as evidence.
2	Union of India - Vs - Imtiaz Iqbal Pothiwala	The claim of assessee is backed by production of Bill and Statement of seller and thus the onus has been discharged. There is also no confession by the appellant that the goods were smuggled

	2019 365) ELT 167 (Bom.)	[**Para- 8 & 9**]
3	Samir Kumar Roy 2001 (135) ELT 1036 (Tri-Kol.)	Purchase of gold by the appellant in India in support of statement of seller - All the documents were verified - Statement of seller of gold is sufficient to legal acquisition of gold, the burden under Section 123 of the Customs Act, 1962 is discharged [**Para -8 &9**]
4	Ganesh Prosad 2005 (191) ELT 1103 (Tri - Kol.)	The Silver is not of foreign origin and the quantity was much less than that of the quantity mentioned in the Board Circular dated 11-06-1990 and does not come under the purview of Section 123 of the Customs Act, 1962. **[Para-3]**
5	Gopal Prasad -Vs- Commr. of C.Ex,Cus,& ST, Patna 2018 (362) ELT 309 (Tri.-Kol.)	No material available on record to show that retail invoices placed by the appellant are false and fabricated - the investigation officers not verified the information contained in retail invoices - records and documents of seller required to be verified which has not been done in this case.
6	S.K. Chains 2001 (127) ELT 415 (Tri-Mum.)	Transaction between the appellant and the supplier was not proved to be fake - The appellant produced the documents showing the legal acquisition of gold and thus the burden of Section 123 of the Customs Act, 1962 has been discharged. [**Para - 5 to 10**]
7	Madhukar Sonaba Bhagat 2019 (368) ELT 990 (Tri.-Kol.)	Gold seized from the appellants Shop Premises of the City - documents produced to show how the appellant came in possession of Gold and on investigation, the same was not proved to be not genuine - confiscation and penalty set aside. [**Para - 11]**
8	Nand Kishore Somani 2016 (333) ELT 448 (Tri. - Kol.)	Under subsequent liberalization of Import Policy, licit import of even foreign marked gold allowed in India - as proper purchase of seized gold furnished by the appellant and seller also confirmed to have supplied the same - onus of the legal position of said gold is discharged - confiscation not proper - appeal allowed. [**Para - 7 & 7.1**]
9	Comm. of Cus. Ex & ST, Siliguri - Vs - Nand Kishore Somani 2016 (337) ELT 10 (Cal.)	Hon'ble High Court, Calcutta dismissed the appeal of the Department.
10	Nand Kishore Modi 2015 (325) ELT 781 (Tri. - Kol)	The gold was seized from the business premises and not from the Customs Area or from persons coming from across international border into India - the appellant able to discharge licit acquisition of gold by production of dealer's purchase documents with Bank - confiscation and penalty set aside. **[Para - 4, 4.1 & 5]**
11	Ghissihibhai Pravinkumar -Vs- Comm. of Customs, Mumbai 2001 (137) ELT 1311 (Tri.-Mum)	To be the sale proceeds of smuggled goods - there must be a sale by a person who knows or had reason to believe that the goods are smuggled - seizure of gold from the appellant not sufficient.
12	Tulsi Das Agarwal -Vs- Comm. of Customs, Kanpur 2003 (158) ELT 725 (Tri.-Del.)	Appellant submitted documents in support of licit acquisition of gold - burden discharged - Indian Currency cannot be regarded as sale proceeds of smuggled goods even if lawful acquisition is not proved - provision of Section 123 has no application in connection of Indian Currency. [**Para - 5.1, 8 & 9**]
13	Yamuna Prasad Sah -Vs-	Silver is not liable to confiscation - seizure of Indian and Nepalese Currencies - No violation of

	Comm. of Customs, Patna 2006 (206) ELT 469 (Tri. - Kol.)	Foreign Exchange Regulation by the appellant - Department failed to prove that the currency in question was sale proceeds of smuggled goods.

10. Shri A.K. Singh, learned Authorized Representative on behalf of Revenue reiterated the findings of the learned Commissioner (Appeals). He further submitted that the Appellant No.1 could not submit the purchase documents at the time of search. He placed reliance on the statements dated 18-01-2016 of Shri Ratan Lal Soni of Shri Balaji Impex to point out that the invoices were not containing any mark and the goods seized were not the same goods as sold by Shri Ratan Lal Soni to the Appellant No.1. The document of purchase of gold supplied to the investigating officers by Shri Ratan Lal Soni of Shri Balaji Impex also was not containing brand name “Rand Refinery 995”. He did not offer any comment as to any investigation made in respect of the purchase documents submitted by Shri Ratan Lal Soni and the records maintained by Shri Ratan Lal Soni showing purchase and sale of gold and silver.

11. Heard both sides and perused the appeal records.

12. I find that on 04-08-2015, the Officers of the Department searched the premises of Sri Ratan Kumar Shah (Appellant No.1) and recovered three cut pieces of gold and some quantity of silver and silver coins along with Indian Currency and Nepali Currency, which has been reflected in the Seizure List prepared in the Customs Office at Forbeshganj. The Seizure List shows the total value of the gold, silver and currencies, which comes to Rs.40,80,158/- (Rupees Forty Lakhs Eighty Thousand One Hundred and fifty eight only). The Officers did not take the jewellery from the shop premises of the Appellant No.1. I also find that the Appellant No.1 was kept in the custody of the

Customs Authority in the Customs Office for the period from 04-08-2015 to 07-08-2015 and he was allowed to leave the Customs House on 07-08-2015 on furnishing Bail Bond. This is a case of seizure from the shop premises/a case of town seizure by Customs Officials and not from any Port or Airport while being smuggled. Since the appellant was ill, he could not take steps for release of the seized goods. Appellant No.1 made representation along with all documents for purchase of the said gold and silver before the Customs Authorities on 12-10-2015 and thereafter he was summoned by the Department and in response to summons, the Appellant No.1 appeared before the Customs Authorities on 15-10-2015 and explained his panic state of affairs and ill health for not submitting the documents on the day of the search. He also explained the source of money for making payment to the seller of gold in cash and also extended his explanation in respect of currencies in his possession. He also made clear that his earlier statements in the custody of Customs are incorrect. On subsequent investigation at the sellers end at Jaipur, Rajasthan, the seller Shri Ratan Lal Soni of Shri Balaji Impex clearly accepted the transaction of selling gold and silver against two invoices mentioned above. He also submitted documents of purchase of gold from different importers. He also submitted the ledger showing purchase and sale of gold and silver. He had given statement on 23-11-2015 and 18-01-2016 accepting the transaction with the Appellant No.1 and receiving of payment. He also stated that in the course of purchasing and selling of gold, the sellers did not mention markings/country of origin/brand name in the invoice. He purchased gold of different brands but the sellers did not mention any brand in the invoice. While selling the gold by Shri Soni, he also did not mention brand name in the invoice. There is no evidence also to show that the goods were actually having any foreign markings. The Essay Certificate dated 07-10-2015 do not also suggest the gold were of foreign origin since the purity was in the range of 992.8 to 993.6. The imported gold generally is having purity of 999 per mille. It is very difficult to hold that the gold were smuggled one. I also find that the statement was taken from Md. Minatullah Ansari (Appellant No.2), who in his statement accepted paying Rs.30,00,000/- (Rupees Thirty Lakhs only) as an advance towards purchase of gold ornaments. I do not find any rebuttal evidence on the statements of Appellant No.1 and Shri Ratan Lal Soni of Shri Balaji Impex and also Md. Minatullah Ansari (Appellant No.2). Their statements were also supported by documentary evidence. Before adjudication, the documents and statements were verified by the Department and the entire goods and currencies were provisionally released on being satisfied about genuineness of the documents and ownership of the goods. The Adjudicating Authority confiscated the goods wholly on the basis of assumption and presumption inferring some circumstantial evidence ignoring documentary evidence. He also did not consider the absence of evidence as to the sale proceeds of smuggled goods and confiscated the Indian and Nepali currencies in spite of having explanation for the same. Doubt expressed in respect of the documents was also not based on legally tenable observations. The confiscation of the goods was ordered with the option to redeem the same on payment of redemption fine to the extent of Rs.12,24,048/- (Rupees Twelve Lakhs Twenty four thousand and forty eight only) deposited as security at the time of provisional release. The said amount was ordered for appropriation and penalty of Rs.4,00,000/- (Rupees Four Lakhs only) on Appellant No.1 and Rs.2,00,000/- (Rupees Two Lakhs only) on Appellant No.2 was also imposed under various Sections of the Customs Act, 1962. The confiscation has been made without having evidence of confiscation. The goods were supported by documents. The supplier of goods has accepted the selling of the goods. The silver kept in a packet containing foreign marking does not confer foreign origin on the goods in the packet or bag. There is no evidence that the currencies were the sale proceeds of the smuggled goods. There is no evidence of abatement for imposing penalty on Md. Minatullah Ansari, Appellant No.2. The penalties are also composite in nature and not tenable in the eye of law. learned Commissioner (Appeals) in his Order confirmed the findings of the learned Joint Commissioner through his observation contained in Paragraph - 7 & 8 of his Order-in-Appeal. I find the said findings are wholly based on assumption and presumption and ignoring the importance of the documentary evidence and un-rebutted evidence and statements of the Appellant No.1 and Appellant No.2 and the seller of the goods. It is a settled law that documentary evidence prevail over the oral evidence. In this case, oral evidence and documentary evidence both supports the genuineness of transaction and question of illegal importation of the gold and silver does not arise. Facts and circumstances also do not suggest to accept such finding. Reliance on the statement of Amarnath Prasad and Shri Bambaiya are irrelevant in the presence of documentary evidence. Their names were taken by the Appellant No.1 on 04-08-2015 when he was in the custody of the Customs Authorities. The Appellant No.1 also retracted his statement dated 04-08-2015 before the Customs Authorities under summons by giving statement on 15-10-2015. I find that the documents submitted by the Appellant No.1 appear to be genuine and on submission of the documents he has discharged the burden under Section 123 of the Customs Act, 1962. There is no evidence on record to show that the seller Shri Ratan Lal Soni of Shri Balaji Impex was an active collaborator in this transaction, rather Department did not proceed to investigate in respect of the purchase documents submitted by Shri Ratan Lal Soni during investigation showing purchase of imported gold from different importers. Since the Appellant No.1 had discharged the burden, the confiscation cannot be held to be legal and proper. The decisions cited by the appellants in the case of - Imtiaz Iqbal Pothiwala - 2019 (365) ELT 167 (Bom.), Samir Kumar Roy - 2001 (135) ELT 1036 (Tri. - Kol.), Ganesh Prasad - 2005 (191) ELT 1103 (Tri. - Kol.), Gopal Prasad - 2018 (362) ELT 309 (Tri. - Kol.), S.K. Chains - 2001 (171) ELT 415 (Tri. - Mum.), Madhukar Sonaba Bhagat - 2019 (368) ELT 990 (Tri. -Kol.), Nand Kishore Somani - 2016 (333) ELT 448 (Tri. -

Kol.) and Nand Kishore Modi - 2015 (325) ELT 781 (Tri. - Kol.) are squarely applicable to the facts of the present case on the proposition that the transaction between the appellant and the supplier was accepted by the buyer and seller, verified by the Department and the documents submitted in support of the licit acquisition amounting to discharge of the burden under Section 123 of the Customs Act, 1962. There is also no confession by the Appellant No.1 that the goods were smuggled. The Hon'ble High Courts and the Tribunal have set aside the confiscation of gold, silver and penalty in similar circumstances. Regarding non-maintainability of confiscation of currencies, the appellants relied upon the decisions in the case of - Ghissihibhai Pravinkumar - 2001 (137) ELT 1311 (Tri. - Mum.), Tulsi Das Agarwal - 2003 (158) ELT 725 (Tri. - Del.), Yamuna Prasad Sah - 2006 (206) ELT 469 (Trio. - Kol.), which support the case of the appellants and confiscation of currencies cannot be maintained. The submissions of the Authorized Representative cannot be accepted in view of the production of documents showing licit procurement of gold and silver and the statement of Shri Ratan Lal Soni of Shri Balaji Impex dated 18-01-2016 which fully clarified the situation. The situation has also been clarified by the Appellant No.1 in his statement dated 15-10-2015. There is no rebuttal evidence against those statements. The submissions of A.R. do not support the stand of the learned Commissioner (Appeals). Without going into the proper determination of redemption fine, I am inclined to hold that redemption fine is not required to be paid since the confiscation under Section 111(a) and (b) of the Customs Act, 1962 in respect of gold and silver has been held to be not maintainable as also confiscation of Indian Currency and Nepali Currency are held to be not maintainable under Section 121 of the Customs Act, 1962, in the absence of evidence that the said currencies are the sale proceeds of the smuggled goods. Since, I find confiscation is not maintainable, the imposition of penalty is also not maintainable apart from being not maintainable for imposing composite penalty. The imposition of penalty on Appellant No.2 is also not maintainable in the absence of any evidence of abetment in illegal importation of gold/silver since illegal importation has not been established in this case. Since the confiscation is not maintainable, the question of payment of Customs duty on the gold/silver also does not arise.

13. In view of the above I set aside the impugned Order. Both the appeals of Appellant No.1 and Appellant No.2 are allowed with consequential relief as per law.

(Order pronounced in the open court on 02 September 2020.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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