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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75454 of 2016
And
Customs Cross Objection No.75565 of 2016

(Arising out of Order-in-Original No.39/COMMR/CUS/SLG/15-16 dated 10.02.2016 passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

Shri Gopal Kumar Agarwal
(S/o – Shri Baijnath Agarwal, Old Sona Chandi Building, Naya Bazar, P.O. – Siliguri Bazar, Siliguri-734005.)

...Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Siliguri
.....Respondent
(C.R. Building, Haren Mukherjee Road, Hakimpara, Siliguri-734001.)

WITH

Customs Appeal No.75610 of 2016
And
Customs Cross Objection No.75478 of 2016

(Arising out of Order-in-Original No.39/COMMR/CUS/SLG/15-16 dated 10.02.2016 passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

Shri Pramod Agarwal
(S/o – Shri Baijnath Agarwal, Old Sona Chandi Building, Naya Bazar, P.O. – Siliguri Bazar, Siliguri-734004 & FD-321, Sector-III, Salt Lake, Kolkata-700106.)

...Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Siliguri
.....Respondent
(C.R. Building, Haren Mukherjee Road, Hakimpara, Siliguri-734001.)

APPEARANCE

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

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

FINAL ORDER NO. 75871-75872/2021

DATE OF HEARING : 24 August 2021
DATE OF DECISION : 20 December 2021

P.K. CHOUDHARY :

The facts of the case in brief are that the officers of DRI Siliguri Regional Unit intercepted one person by name Shri Gopal Kumar Agarwal at Khudirampally Market on 28.09.2014. The Officers found that the said person was carrying 8 pieces of 24 Caret Gold Bars in the pockets of his trousers. Shri Gopal Kumar Agarwal was brought to the DRI office situated at 32, T.N. Road, Pradhan Nagar, Siliguri. The gold pieces were found to be of foreign origin and were seized. The statement was recorded and Shri Gopal Kumar Agarwal was arrested and was released on bail. A Show Cause Notice dated 18.09.2015 was issued proposing confiscation of the seized gold and imposing penalty on the Appellant. The same was confirmed by the Order-in-Original No.39/COMMR/CUS/SLG/15-16 dated 10.02.2016. Penalty was also imposed on Shri Pramod Agarwal and Shri Balaji Jadhav. Shri Balaji Jadhav is not in Appeal before us. The two Appeals filed by Shri Gopal Kumar Agarwal and Shri Pramod Agarwal are being taken up for disposal by this common order.

2. The learned Counsel for the Appellant submits that the Appellant during normal course of business had purchased 2 pieces of gold bars from M/s. Jamuna Gold & Silver Pvt.Ltd. of Naya Bazar, Siliguri under their Invoice No.2014-15/Sept/003 dated 20.09.2014 against total advance payment of Rs.54,18,300/- vide Cheque No.330149 dated 19.09.2014 drawn on State Bank of India, Mangaldeep Branch, Siliguri. M/s.Jamuna Gold & Silver Pvt.Ltd., had delivered the said 2 gold bars to the Appellant only after encashment of the said Account Payee Cheque. At the time of delivery, the seller of the gold provided Assay Certificates of the gold bars issued by the makers of the foreign gold certifying the same to be of 99.5% purity. Photocopy of the Invoice together with

Bank Statement reflecting payment of invoice value and Assay Certificates of the maker of the foreign gold bars are enclosed in the Appeal Paper Book. Thereafter the Appellant had taken the said two gold bars to M/s. Shree Balaji Gold & Silver Refinery, Kalibari Road, Siliguri for melting and transformation of the said two gold bars into small pieces. Accordingly, M/s. Shree Balaji Gold & Silver Refinery had melted the said two gold bars and transformed the same into 8 small pieces of gold and handed over the same to the Appellant against melting charge of Rs.500/- only. It is the submission of the learned Counsel that the Appellant was compelled under coercion and duress to sign in a computer-typed statement in English. Initially the Appellant refused to sign such typed statement, but he was threatened with consequence of arrest.

3. Vide letter dated 30.09.2014 the Appellant submitted that the statement dated 28.09.2014 recorded from him was not voluntary and was obtained under coercion and threat. He narrated the facts of his purchase of two gold bars from M/s. Jamuna Gold & Silver Pvt.Ltd. and subsequent melting of the same and transformation into 8 cut pieces from M/s.Shree Balaji Gold & Silver Refinery. It was also pointed out by the Appellant that no Challan Book of M/s.Bullion Traders was recovered from the Appellant and it was the DRI Authorities, who provided such Challan Book in the seizure. In response to subsequent summons in the month of March 2015, the Appellant made representation dated 04.03.2015 before the investigating authority stating that in view of his earlier experience. He was not inclined to appear before the investigating authority further and requested the investigating authority to record his statement at this residence or office in presence of his Advocate upon prior notice. However, nothing was heard from the investigating authority thereafter. Subsequently, in the course of investigation, the investigating authority interrogated Shri Pramod Kumar Agarwal, Director of M/s. Jamuna Gold & Silver Pvt.Ltd. and Shri Balaji Jadhav, Proprietor of M/s. Shree Balaji Gold & Silver Refinery and they respectively acknowledged and admitted the fact of

selling of 2 gold bars and transformation of the same into 8 pieces of gold respectively to and for the Appellant. The Appellant was issued with a Show Cause Notice under Section 124 of the Customs Act, 1962 alleging, *inter alia*, that the seized 8 pieces of gold were illegally imported into India and thus, liable for confiscation under Section 111(b) & (d) of the Customs Act, 1962 along with imposition of penalty under Section 112(b) of the Customs Act, 1962. He also received relied upon documents from the Department. The Appellant was not given any notice regarding the assay of the seized gold at the Customs Laboratory. The Customs Authority never asked the Appellant to remain present during the assay as purportedly conducted at the Customs Laboratory and the Appellant became aware of such assay from the Show Cause Notice. However, the Appellant vide his letter dated 28.12.2015 submitted his reply to the Show Cause Notice denying the allegations leveled against him. He reiterated the prayer for an independent Assay Report of the seized gold from Government Mint, Alipore, Kolkata and strongly disputed the test report dated 12.01.2015 of the Chemical Laboratory, Customs House, Kolkata. The Appellant contended, *inter alia*, as follows:-

a) The statement dated 28.09.2014 was not his voluntary statement and was a computer-typed statement according to the dictation and wish of DRI authorities;

b) No Challan Book of M/s. Bullion Traders was recovered from his possession;

c) Opportunity of cross-examination of the search witnesses to be given;

d) Opportunity of cross-examination of Shri Prahlad Rai Agarwal and Shri Pradip Sarkar to be given;

e) The samples of the seized gold further be sent to the Government Mint, Alipore, Kolkata for re-verification of purity of the seized gold;

f) Neither the seller of the gold bar nor the moulder of the same had denied the fact narrated by the Appellant;

g) Since the facts of purchase of 2 gold bars by the Appellant and after melting transformation of the same into 8 cut pieces of gold are not in dispute and the documents produced by the Appellant are found to be correct, question of confiscation of the gold does not arise as the Appellant was in licit possession of the said gold;

The learned Counsel for the Appellant also relied upon several judgements in support of his contentions.

4. The learned Authorized Representative for the Respondent submits that the gold bars were seized on the reasonable belief that these were smuggled into India hence liable for confiscation under the Customs Act; the said belief was founded on the basis of purity of the gold bars and absence of any evidence/explanation of their licit possession by the Appellant. The learned Authorized Representative further submits that gold being a notified item under Section 123 of the Customs Act, in case of seizure of any notified item in the reasonable belief that these were smuggled into India, the burden of proving is on the possessor/owner of the item that the item was not smuggled one. The learned Authorized Representative justified the impugned order and requested that the Appeals may be dismissed being devoid of any merits.

5. Heard both sides through video conferencing and perused the Appeal records.

6. The learned Counsel for the Appellant submits that in the instant case the Appellant was apprehended at Khudirampally Market, Siliguri and was taken to the DRI Office. 8 pieces of gold were seized from him. He alleges that the procedure for personal search as per Customs Act, 1962 was not followed and no Panchnama was prepared. Though Panch witnesses signed on the Seizure Memo, their particulars like age, name, address etc. was not noted. The sanctity of search and seizure is vitiated as proper procedure was not followed; Moreover, as the cross-examination of the Panch witnesses was not accorded, a serious doubt

is cast on the reliability of the entire proceedings. The learned Authorized Representative in turn submits that the Appellant had not taken these pleas before the Adjudicating authority and taking this at the appellate stage, hence, inadmissible. We find that these are not the facts in the case, but the basic legal issues involved in the case. Even though it is departmental proceedings, the Appellant's right to take legal issues cannot be taken away. However, we also find that the appreciation of the case would not solely hinge on these issues disregarding the merits of the case. The number of issues, which requires consideration of the Bench are :-

(i) Whether the Revenue established the existence of reasons to belief that the impugned gold was smuggled;

(ii) Whether the impugned gold is liable to be categorized as of foreign origin.

(iii) Whether the Customs have followed procedure vis-à-vis search and seizure of the gold.

7. Coming to the issue at Sl.No.(i), we find that in terms of Show Cause Notice in Para 1, it is seen that on being notified by the informer, the officers intercepted the Appellant at Khudirampally Market, Siliguri. Whereas second paragraph of the Show Cause Notice records that on reaching the DRI Office on 28.09.2014, the Appellant was searched in person and during the process, 8 pieces of rectangular shaped bars of Yellow Metal, believed to be gold, were recovered. A plain reading of the Show Cause Notice itself raises doubt about the place where the Appellant was found to carry gold. The Department appeared to have entertained reason to believe that the impugned gold was of foreign origin based on the fact that the Appellant could not show any documents, Department also believed that as gold was notified under Section 123 of the Customs Act, 1962, and therefore, the burden of proof that the same are not smuggled is with the Appellant and not with the Department. It also appears that the Department has not conducted any further worthwhile enquiry. The allegation against the Appellant was that he initially stated that he had purchased gold

ornaments weighing 2.14 Kg. from one Shri Pradip Sarkar on the previous day i.e. 27.09.2014. Vide letter dated 30.09.20214 addressed to the Deputy Director, DRI, Siliguri, the Appellant submitted that he is in the trade of gold bullion and is proprietor of M/s.Gopal Jewellers located at Sona Chandi Building, Naya Bazar, Silguri. He purchased 2 Kgs. Of gold bars from M/s. Jamuna Gold and Silver Pvt.Ltd., Naya Bazar, Siliguri. Total price of the goods was Rs.54,18,300/-. He paid the amount through Cheque vide A/c. Payee Cheque No.330149 dated 19.09.2014 drawn on State Bank of India, Mangaldeep Branch, Siliguri. He further alleges that he was tortured and coerced by DRI officers to sign a statement typed in English without knowing the contents. He further submitted that the Challan Book of Bullion Traders was produced before him by the DRI officers. He further submitted that he had taken the said two gold bars to M/s. Shree Balaji Gold & Silver Refinery, Kalibari Road, Siliguri for melting and transformation of the said two gold bars into small pieces. Accordingly, M/s. Shree Balaji Gold & Silver Refinery had melted the said two gold bars and transformed the same into 8 small pieces of gold and handed over the same to the Appellant against melting charge of Rs.500/-.

8. We observe that Department has failed to prove in the first place that there were valid grounds for presumption at the time of seizure that the seized 8 pieces of gold was of foreign origin and smuggled into India. Evidently the seized 8 pieces of gold did not bear any foreign markings. No evidence could be adduced by the Department in its subsequent investigation that the seized gold was of foreign origin and smuggled into the country. We find that the Appellant has submitted all the relevant documents including GST purchase invoice etc. covering the gold which have been admittedly examined by the Department revealing no discrepancies.

9. In the case of Shantilal Mehta Vs. Union of India & Others [1983 (14) E.L.T. 1715 (S.C.)], it was held by the Hon'ble Supreme Court that "reasonable belief is a pre-requisite condition of the power of seizure that the Statute confers on the Officer. The reasonable belief as

required by Section 110 refers to the point of time that the goods in question are seized not to a stage subsequent to the act of seizure." In the said case the Hon'ble Supreme Court also held that in order to attract the provision of Section 123, it is essential that the goods must be smuggled goods. The term 'smuggled' means goods of foreign origin and imported from abroad. There must be something suggesting their foreign origin and their recent importation from abroad. It cannot, from unaccounted goods, be inferred that they are smuggled goods or they may be stolen goods. Admittedly, it is a case of town seizure and as such onus was on the Customs officers to establish the allegation of smuggling which have not been done. As such, the impugned order is fit to be set aside with consequential benefits. Further, it is also observed that there was no independent Panch witnesses on the spot of seizure, drawl of Fard etc.. We find that the Hon'ble Patna High Court in the case of Commissioner of C.Ex, Cus. & S.T., Patna Vs. Go;al Prasad [2020 (371) E.L.T. 243 (Pat.)] held that -

> *"The Tribunal has given a categorical finding that the respondent No. 1 herein had produced retail invoices of M/s. Bhawana International in order to substantiate his claim that he had purchased two pieces of gold bars from Chandni Chowk, Delhi on 14-4-2014 and on his instructions his brother Chandreshwar Prasad Sah (respondent No. 3) had handed over the gold pieces to Sujeet Kumar (respondent No. 2) for carrying it to Patna to hand it over to Mahavir Prasad to make gold ornaments in exchange of the said gold. It has also given a finding of fact that the proprietor of M/s. Bhawana International was shown only photograph of the seized gold when he denied that the said gold bars were not sold to respondent No. 1. The retail invoices of M/s. Bhawana International submitted by the respondent No. 1 containing VAT TIN and PAN were never shown to its proprietor. It is not the case of the appellant that the bill and retail invoices are false and fabricated."*

Further, the Tribunal in the case of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Majjaba Khaleefa reported in 2019 (366) E.LT. 337 (Tri.-Del.), has held thus:-

> *"It is seen that there is no foreign marking on the jewellery. Revenue has not placed any proof to substantiate that the jewellery was smuggled into India other than the statement of the passenger. In the facts and circumstances of the case, I find no reason to interfere with the findings of the impugned order which is sustained for the reason mentioned therein. In the result, Revenue appeal is rejected."*

10. Learned Advocate further submits that according to the Department, burden of proof is on the Appellant under Section 123 of the Customs Act, 1962, which has been discharged; but burden of proof could be shifted again on the Appellant, only when Customs officers have proper evidence to allege that the gold relates to foreign origin, the place where seizure took place is not Customs area. It is not open for the Department to draw consequences from a general statement to particularize about the impugned goods. As admittedly the gold, having no foreign markings, the onus would be on the Department to prove the smuggled nature of the goods. The onus was not discharged. The invoice produced by the Appellant has not been found to be untrue or false by the Revenue. We find that the Tribunal in the case of Mridul Agarwal Vs. Commissioner of Customs, Lucknow reported in 2018 (362) E.L.T. 847 (Tri.All.) held that :-

> ***"19.*** *Having considered the rival contentions and after going through the record, we find that Gold is not a prohibited item and can be imported upon payment of duty. Further, it is a case of town seizer and the customs officers have seized the Gold on the suspicion of smuggling, without there being any actual evidence of smuggling. We find that the whole case of revenue is based on the retracted statement(s) of appellant S.A. Khan and father of the other appellant Shri Mridul Agarwal. We further find that these persons are not*

examined in the adjudication proceedings and as such their statements are not admissible, as evidence under the provisions of Section 138B of Customs Act, which provides that - if an authority in any proceedings under the Act wants to rely upon the statement of any person (made during enquiry), such person is required to be examined as witness and if the adjudicating authority finds the evidence of the witness 'admissible', then such witness should be offered for cross-examination and only thereafter the evidence is admissible. In absence of compliance with the provision of Section 138B of the Act, the statements are not admissible as evidence and accordingly, the case of revenue against the appellants does not stand. We further find that the appellants namely Shri Mridul Agarwal and Shri Satish Kumar have categorically denied their connection with the seized Gold and in absence of any corroborative evidence the imposition of penalty on them is bad and fit to be set aside."

11. In the light of the above decisions of the Hon'ble Supreme Court and the Tribunal, we may, at the cost of repetition, say that there were no ground for reasonable belief at the time of seizure that the gold pieces were of foreign origin and smuggled. Subsequent investigation has also not established that the gold pieces were smuggled and therefore the provision of the Section 123 of the Customs Act, 1962 is not invocable. However, we find that the Appellant had submitted all relevant documents in support of his domestic licit acquisition supported by GST purchase invoice, bank statement etc..

12. Having regard to the facts of the case and the evidences on record, we find that the confiscated gold was not of foreign origin and smuggled into India. We also find that there is no justification for imposition of penalty on the Appellants under Section 112(b) of the Customs Act, 1962.

Accordingly, we pass order in terms of the above with the direction to release the 8 (eight) pieces of gold bar weighing 1.9997

Kgs. to the Appellant being the right owner of the goods. The Appeals filed by the Appellants are thus allowed with consequential relief, as per law. Cross Objections also get disposed of.

(Order pronounced in the open court on 20 December 2021.)

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

Sd/
(RAJU)
MEMBER (TECHNICAL)

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