

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Customs Appeal No.76102 of 2019

(On behalf of Appellant)

(Arising out of Order-in-Original No.27/Cus/CC(P)/WB/2018-19 dated 31.01.2019 passed by Commissioner of Customs (Prev.), Kolkata)

Shri Gobinda Das

Paschim Hridaypur, Nabadal Road, P.O. Hridaypur, P.S. Barasat, Kolkata-700107

Appellant

VERSUS

Commissioner of Customs (Prev.), Kolkata

15/1, Strand Road, Kolkata-700001

Respondent

APPEARANCE :

Shri N.K.Chowdhury, Advocate for the Appellant

Shri M.P.Toppo, Authorized Representative for the Respondent

CORAM:

HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO...76169/2023

DATE OF HEARING : 17.05.2023

DATE OF PRONOUNCEMENT : 24.07.2023

Per Ashok Jindal :

By way of this appeal, the appellant has challenged the imposition of penalty of Rs.4,88,18,000/- under Section 112 (b) of the Customs Act, 1962.

2. The facts of the case are that on intelligence, a team of DRI Officers intercepted two persons namely, Shri Shyam Sarkar and Shri Asit Roy at about 2.00 PM on 22.05.2017. On their search, 140 pcs. of gold biscuits of foreign origin weighing 16326.800 grms. were recovered. They could not produce any licit document in support of the possession of the same and on repeated questioning, they finally

admitted that they were carrying 140 gold biscuits tied to their waist , which were smuggled into India from Bangladesh. Consequently, they were arrested on 23.04.2017.

2.1 Further, an intelligence was gathered that at 32. Nalini Seth Road, Kolkata 700007, there was actually three shops under the control of Shri Bapi Das and Shri Gobinda Das (the appellant) brother of Shri Bapi Das, both of whom are in the same business of smuggling of gold. One at third floor having the shop No.305 and the other at 5th floor having two rooms at Room Nos.505 & 509. The said shops were attempted to search on 24.04.2017 and it was found that both the shop cum office premises at 5th Floor were under lock and key. On local enquiry, it was found that the rooms were not open since 22.04.2017. Thereafter, room nos.505 & 509 were sealed and intimation was given to local Police Station i.e. Posta Police Station.

2.2 Summon was also issued to Shri Bapi Das. In room No.305, one Shri Bikash Sarkar, staff of that shop cum office premises named M/s G.D.Gold House, honoured the search authorization and allowed the DRI officers to search. Additional three employees of M/s G.D.Gold House were also found to be present in the shop namely, Shri Nathuram Saha, Shri Haralal Das & Shri Rakesh Saha. Shri Bikash Sarkar revealed that the owners of the shop cum office premises were Shri Gobinda Das (the Appellant) and his brother, Shri Bapi Das. The employees were asked to contact Shri Gobinda Das over phone and asked him to come to the office cum shop premises immediately but Shri Gobinda Das informed that he was very ill and it will not be

possible for him to come at that time. Then shop was searched. During the course of search, one cloth bag was found in the possession of Shri Nathuram Saha containing Rs.19,46,200/- in different denomination and Rs.19,87,500/- on different denomination were recovered in the possession of Shri Rakesh Saha. From a drawer in the office, some loose documents , cash memo/Invoice bill and Indian Rupees amount to Rs,3,78,580/- were also recovered. None of the four persons present in the premises during search and could produce any legal documents in support of possessing such huge amount of currency notes. No cash book or ledger for the cash was found in the office. The employees admitted that the cash found in the shop are sale proceeds of gold. As the employees could not produce any documents in support of possessing such huge amount of cash or produce any account for presence of the cash in the shop cum office premises, the total cash amount of Rs.43,12,280/- was seized by the DRI Officers on the reasonable belief that the said cash is the sale proceeds of gold. Thereafter, the statements were recorded from all the persons present in the shop no.305.

2.3 Summon was issued to the appellant, which was handed over to Shri Bikash Sarkar for service.

2.4 Further on 25.04.2017, residence of Shri Gobinda Das (the Appellant) was also searched. The appellant was not present in his house at that time. No incriminating documents were recovered during the course of search. On the same day, attempts were also made to effect search at the residence of Shri Bapi Das, which was also found

locked. The residences of Shri Asit Roy and Shri Shyam Sarkar were also attempted to be searched on the same day, but both the premises were found locked and on local enquiry, it revealed that the inmates were absent since 22.04.2017. Search was conducted at the residence of Shri Bharat Biswas on the same day, but nothing incriminating was found.

2.5 The statement of Shri Asit Roy was also recorded wherein he stated that he met with Shri Bharat Biswas and his brother-in-law, Shri Shyam Sarkar in connection with exchange of Bangladeshi Taka as he lost his job, he contacted Shri Bharat Biswas and Shri Shyam Sarkar for some earnings and they gave him a proposal of carrying smuggled gold from Ranaghat to Kolkata or Hridaypur and deliver the same, for which, he will get money of Rs.1000/- per trip. Shri Shyam Sarkar used to call him at the new house of Shri Bharat Biswas and used to handover him the gold smuggled from Bangladesh for carrying to Kolkata. Shri Bharat Biswas was involved in illegal trade of foreign currency also. He involved himself in gold smuggling work since February, 2017 and used to carry smuggled gold from Ranaghat to Kolkata. Initially, he along with Shri Shyam Sarkar used to deliver the smuggled gold at Hridaypur but later, used to deliver at Burrabazar. One person named Shri Bapi Das alias Chhotobabu used to take delivery at Hridaypur. Some employees of Shri Bapi Das used to take delivery at Burrabazar. Sometimes, Shri Shyam Sarkar or Shri Bapi Das or Shri Bharat Biswas used to give him his commission. He further submitted that Shri Shyam Sarkar or Shri Bapi Das or Shri Bharat

Biswas used to contact him over phone. He also submitted that that neither he nor Shri Shyam Sarkar has any legal/licit documents for the recovered 140 pieces of gold biscuits smuggled from Bangladesh.

2.6 The statement of Shri Shyam Sarkar also recorded , who stated that he is involved in the business of his brother-in-law, namely, Shri Bharat Biswas. Shri Bharat Biswas has illegal business/trading of Bangladeshi Taka for which he along with Shri Bharat Biswas used to travel to the Hridaypur residence of Shri Bapi Das alis Chhotobabu and also to his office at Nalini Seth Road. Shri Bharat Biswas has told him to carry gold 20-22 times in a month from Ranaghat or Barasat, for which, he would pay Rs.1000 per trip and admitted that since last November, he is involved in this work of carrying gold.

2.7 On 22.04.2017 at morning, he as per the direction of Shri Bharat Biswas, met Shri Mansoor (a Bangladeshi) at Aranghata Railways Station and received 140 pcs. of biscuits in packed condition in two packets, one containing 60 pcs. and the other containing 80 pcs.. Then, he called Shri Asit Roy and asked Shri Asit Roy to come to the new house of Shri Bharat Biswas, where he handed over 60 pcs of gold biscuits to Shri Asit Roy. Thereafter, they boarded train from Ranaghat for Dum Dum Railways Station and then from Dum Dum Metro Station to Mahatma Gandhi Road Metro Station, where they were intercepted. He also submitted that he does not have any legal/licit documents of 140 pcs. of gold biscuits recovered from them.

2.8 Statements of Shri Rakesh Saha, Shri Nathuram Saha, Shri Bikash Sarkar and Shri Haralal Das, were also recorded, who stated

that they were the employees of the Appellant, Shri Gobinda Das and they receive payment from the buyers of gold on behalf of Shri Bapi Das and the Appellant, Shri Gobinda Das. Shri Bikash Sarkar oversees the whole work. They also stated that Shri Bapi Das, brother of Shri Gobinda Das, also runs a shop from Room Nos.505 & 509 at 32, Nalini Sett Road, Kolkata-700007 and deals in gold business. They also submitted that Shri Gobinda Das has suggested them to work in his gold shop, namely, M/s D.G.Gold House, Room No.305, wherein their duty was to collect the gold's sale proceeds from different buyers, whose names and addresses were supplied by Shri Bapi Das and Shri Govinda Das (the Appellant). The recovered cash is the money brought by them on that day as the sale proceeds due from different purchasers, who purchased the gold from Shri Gobinda Das (the Appellant) and his brother Shri Bapi Das. They could not produce any legal/licit documents for the recovered cash.

2.9 Seized gold was also tested in Customs House Chemical Laboratory, Customs House, Kolkata and the purity of the gold in the samples varies between 99.6% to 99.8% by weight.

2.10. On 12.06.2017, a notice under Section 150 of the Customs Act, 1962, for disposal of the seized gold, was issued to Shri Shyam Sarkar and Shri Asit Roy, who did not stake any claim of the seized gold.

2.11 Thereafter, on the basis of the further investigation, a show-cause notice dated 13.10.2017 was issued to Shri Bharat Biswas, Shri Shyam Sarkar, Shri Asit Roy, Shri Bapi Das and Shri Gobinda Das (the Appellant) for absolute confiscation of 140 pcs. of gold biscuits

recovered during investigation and for imposition of penalty on the appellant and for seizure of currency amounting to Rs.43,12,280/- and for imposition of penalties on all the appellants.

2.12 The matter was adjudicated wherein it was concluded that the seized currency and gold of 140 pcs biscuits were absolutely confiscated and penalties on the co-noticees were imposed and a penalty of Rs.4,88,18,000/- was imposed on the appellant.

2.13 Aggrieved by the said imposition of penalty on the appellant, the appellant is before us.

3. The Id.Counsel appearing on behalf of the appellant submits that in the reply to the Show Cause Notice, the appellant is denying and disputing the allegations made in the show cause notice in respect of his alleged involvement in smuggling, contending inter alia, that the gold was recovered from Shri Shyam Sarkar and Shri Asit Roy. The appellant was not aware of that the said gold was smuggled from Bangladesh. The said two persons from whom the gold was recovered did not say that the gold was to be delivered to the appellant. No gold was recovered from the premises no. 305 of 32, Nalini Seth Road, Kolkata-700007. There is no evidence that the appellant was, in any way, involved in respect of the said gold recovered from those two persons. The recovered Indian Currency was not the sale proceeds of the smuggled gold. The Department did not proceed further to investigate from the persons from whose the said Indian Currencies were collected by the employees of the appellant in spite of mentioning the name of the person. The statement of the employees of the appellant cannot be

relied upon since they are not the parties to this proceedings and there is no corroborative evidence to establish that the Indian Currencies were sale proceeds of the smuggled gold. There is no admission of the appellant of his involvement in the smuggling of gold. Nobody has taken his name. There is no evidence to implicate the appellant with the case of smuggling. documents recovered from the shop premises do not reveal the transaction of smuggled gold. The department failed to show that the currency was the sale proceeds of the smuggled gold and the same are not confiscable under Section 121 of the Customs Act, 1062. The condition precedent for imposing penalty under Section 112 has not been satisfied. No. sub-rule of Section 112 was also mentioned. The Commissioner of Customs (Prev.) passed the Order-in-Original. The appellant submits that the show cause notice has pre-judge since it was containing the finding and the said finding has been incorporated in the Order. The said finding of wholly based on suspicion and presumption and contrary to record. Nobody said that the gold was to be delivered to Gobinda Das nor the gold biscuits were meant for delivery to Gobinda Das. There is no evidence that Gobinda Das received and dealt with smuggled gold. Telephone Number used by Gobinda Das has not been proved and there is no evidence to that effect. Gobinda Das came to the picture when his shop premise was searched and some Indian Currency was recovered. The appellant disowned the ownership of the Indian Currencies. The statements of the employees were not enough to conclude that the Indian Currencies were the sale proceeds of the smuggled gold. The employees' statements are not corroborated by any

other evidence. Their statements are not relevant since the Adjudicating Authority did not verify the same in terms of Section 138B of the Customs Act, 1962. Department did not proceed to investigate further in this matter from the buyers of the gold from whom Indian Currencies were collected by the employees. Low consumption of electricity and other documentary evidence for not carrying on business is not sufficient for holding the Indian Currency as sale proceeds of smuggled gold. Non-appearance in response to Summons, ipso facto does not mean that the appellant was involved in this smuggling. There is no evidence that the Indian Currencies were the sale proceeds of this smuggled gold. The finding is not sufficient for imposition of penalty on the appellant since the involvement of the appellant in smuggling has not been proved beyond doubt. Decisions referred in the case of Ramchandra has not been dealt with. The Order is non-speaking.

3.1 The findings of the Adjudicating Authority as contained in the adjudication order, are the only finding which are not sufficient for inferring involvement of the appellant in the smuggling of gold. The carrier of the gold did not say that the gold to be delivered to Gobinda Das or the gold was meant for delivery to Gobinda Das. The recovery of Indian Currency by itself does not mean that the same are sale proceeds of the smuggled goods. The appellant did not claim the said currency and/or disowned the same. There is no evidence for holding these currencies as sale proceeds of smuggled gold. The essential requirement for holding the said Indian Currency as sale proceeds of smuggled gold was not satisfied. Non-appearance in response to

Summons is not sufficient to show that the appellant was guilty of any offence. The said findings are not sufficient for imposing penalty under Section 112(b) of the Customs Act, 1962.

4. On the other hand, the Id.A.R. for the Revenue, has strongly supported the impugned order and submits that it is a admitted fact that 140 pcs. of gold biscuits of foreign origin recovered from Shri Shyam Sarkar and Shri Asit Roy, was smuggled from Bangladesh to India and they have not objected for pre-trial disposal of the same. Moreover, from the whole of the investigation, it reveals that Shri Asit Roy and Shri Shyam Sarkar have smuggled the gold on behalf of the appellant. To that effect, they have made a statement. Moreover, during the course of search at the premises of the appellant, sale proceeds of smuggled gold sold were also recovered and it was admitted by the employees of the appellant that these are sale proceeds of smuggled gold. Therefore, penalty on the appellant is rightly imposed.

5. Heard the parties and considered the submissions.

6. On careful consideration of the submissions made by both the sides, we have to examine that in the facts and circumstances of the case, can the penalty be imposed on the appellant under Section 112(b) of the Customs Act, 1962 ?

7. As the appellant has challenged the imposition of penalty on him, we find that during the course of investigation, in the statements of Shri Shyam Sarkar and Shri Asit Roy nowhere was recorded they have met the appellant or they were smuggling gold for the appellant. In fact,

they have mentioned that they were working for Shri Bharat Biswas and Shri Bapi Das, co-noticee to the show-cause notice. Further, during the search of the premises of the appellant, four persons, namely, Shri Nathuram Saha, Shri Haralal Das, Shri Rakesh Saha and Shri Bikash Sarkar were found and from the possession of Shri Nathuram Saha and Shri Rakesh Saha, cash was recovered and small bag containing an amount of Rs.3,78,500/- was recovered from the drawer of the office, but these four persons, namely, Shri Nathuram Saha, Shri Haralal Das, Shri Rakesh Saha and Shri Bikash Sarkar, were not made party to the show-cause notice from whose possession, the huge cash has been recovered and whose statement, were replied to say that the said cash recovered is the sale proceeds of the smuggled gold. Moreover, none of the buyers of the said alleged gold sold by them was interrogated. Moreover, the statement of the appellant was never recorded during course of investigation. These facts are not in dispute.

7. We further take note of the facts that merely on the basis of the statements of the employees of the appellant, it has been concluded that the seized currency is the sale proceeds of smuggled gold, but nowhere it has been established from whom the gold was purchased and to whom the gold was sold and how the money was transacted.

8. We further take note of the facts that the smuggled gold and the cash recovered have been absolutely confiscated in this case and no other co-noticee has challenged the impugned order before us.

9. We find that the similar issue has been examined by the judicial pronouncement in Ramchandra Vs. Collector of Customs reported in 1992 (60) ELT 277 (Tribunal), wherein this Tribunal has observed as under :

"5. It is also seen that the charges under the Gold (Control) Act has been dropped against all the persons to whom show cause notice has been issued and the charges under the Customs Act has been dropped against the other two. It would appear that the penalty of Rs. 50,000/- on the appellant has been imposed for breach of Section 121 of the Customs Act. Before violation of Section 121 is established the following ingredients must be satisfied:

(i) there must be a sale. .

(ii) the sale must be of smuggled goods.

(iii) the sale must be by a person having knowledge or reason to believe that the goods were of smuggled origin.

(iv) the seller and purchaser and the quantity of gold must be established by the Customs authorities.

6. *In this case, however, none of the requisites of Section 121 have been fulfilled - no sale has been established, identity of the buyer and seller has not been established. As a consequence, the currency cannot be considered to represent the sale proceeds of the contraband goods and, therefore, no violation of Section 121 has been made out. Since the charge under Section 121 of the Customs Act has not been proved against the appellant the currency notes cannot be retained by the Department and have to be returned to the appellant. Imposition of penalty is also not legal and proper in the absence of proof of violation of any provisions of the Customs Act."*

10. Further, in the case of Madan Lal Gupta Vs. Commissioner of Customs, Lucknow reported in 2006 (205) ELT 246 (Tri-Del.), this Tribunal has observed as under :

"6. In respect of the seized currency, the contention of the appellant is that in view of retraction made on 29-7-99 where it was specifically stated that it was sale proceed. The appellant is relying upon the decision of the Tribunal in the case of Ramchandra (supra). In this case, the Tribunal held as under :-

"It is also seen that the charges under the Gold (Control) Act has been dropped against all the persons to whom show cause notice has been issued and the charges under the Customs Act has been dropped against the other two. It would appear that the penalty of Rs. 50,000/- on the appellant has been imposed for breach of Section 121 of the Customs Act. Before violation of Section 121 is established the following ingredients must be satisfied :

- (i) there must be a sale.*
- (ii) The sale must be of smuggled goods*
- (iii) the sale must be by a person having knowledge or reason to believe that the goods were of smuggled origin*
- (iv) the seller and purchaser and the quantity of gold must be established by the Custom authorities."*

11. Further, in the case of Hem Raj Soni Vs. Commissioner of Customs, Jaipur reported in 2014 (308) ELT 600 (Tri-Del.), this Tribunal has observed as under :

"7. The Hon'ble Punjab & Haryana High Court in the case of Gurmukh Singh v. Union of India & Others - [1984 \(18\) E.L.T.](#)

[274](#) (P&H) has observed that if there is no record wherein it could be shown that the petitioner had at any stage imported any goods in pursuance of the import licence, therefore it cannot be the case of the authorities that the seized currency is the sale proceeds of the smuggled goods. In the absence of such evidence the amount is returnable to the person from whom it is seized. The contention of the Revenue that they are competent to confiscate the sale proceeds of the smuggled goods under Section 121 of the Customs Act is wholly fallacious.

The Tribunal in the case of *Dattaji Deokar v. CC, Bhubaneswar-I - 2002 (147) E.L.T. 390* (Tri.-Kolkata) has held that Revenue is required to prove beyond doubt that the Indian currency was sale proceeds of smuggled gold and in the absence of any evidence on record to establish the same, the confiscation of the Indian currency is not justified."

11. Further, in the case of Commissioner of Customs, Jaipur Vs. Jagdish Prashad Soni reported in 2003 (158) ELT 457 (Tri-Del.), this Tribunal has examined the issue and observed as under :

"4. I have also gone through the record and I do not find any sufficient ground to disagree with the findings on fact recorded by both the authorities below that the retracted alleged confessional statement of Shri Satya Narain Soni, for having been remained uncorroborated from any other source, was insufficient to substantiate the charges against the respondents. No tangible evidence has been adduced by the Department to prove that the Indian currency recovered from the car of Shri Satya Narain Soni, respondent, was the sale proceeds of the smuggled goods. The person from whom he allegedly purchased the gold and that the person to whom he sold later on, both have not corroborated his version. No presumption that the money

recovered from his car was the sale proceeds of the smuggled gold could be legally drawn for want of any evidence to prove this fact. The findings recorded by both the authorities below are perfectly in conformity with the law laid down in the case of Ram Chandra, supra, and I do not find any sufficient ground to disagree with the same. Therefore, the impugned order of the Commissioner (Appeals) deserves to be upheld”.

12. The Hon’ble High Court of Madras in the case of M/s J.K.S. Air Travels Vs. Chief Commissioner of Customs, Chennai I reported in 2016 (331) ELT 173 (Mad.), has observed as under :

“15. *For invoking the provisions of Section 121, the following two pre-conditions have to be satisfied : -*

- a. The sale proceeds should relate to smuggled goods.*
- b. The sale should have been made by a person having knowledge or reason to believe that the goods are smuggled goods.*

16. *In the case on hand, there is absolutely no evidence to show that the said sum was relating to the sale proceeds of smuggled goods, which were sold by the petitioner, who was having knowledge or reason to believe that the goods are smuggled goods.*

17.

18. *Even before the appellate authority, no evidence was produced to prove that the said sum was relating to the sale proceeds of the smuggled goods, which were sold by the*

petitioner herein, who was having the knowledge or reason to believe that the goods are smuggled goods.”

13. In the light of the above judicial pronouncement and the facts and circumstances of the case, we find that no evidence has been adduced against the appellant for involvement in the activity of smuggled gold and no cogent evidence has been produced apart from the statements recorded during the course of investigation that the appellant was involved in the activity of smuggled gold and cash recovered during search was the sale proceeds of smuggled gold. Therefore, the penalty on the appellant is not imposable.

14. Further, in the case of G-Tech Industries Vs. Union of India reported in 2016 (339) ELT 209 (P & H), the Hon'ble High Court of Punjab & Haryana, has examined the issue and observed as under :

“15. *The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

16. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only*

after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice."

In the light of the above observations by the Hon'ble High Court of Punjab & Haryana, we hold that as the statements which have been relied upon the adjudicating authority have not been examined in terms of Section 138 (B) of the Customs Act, 1962, therefore, the said statement cannot be relied upon to impose penalty on the appellant.

15. In view of the above observations, we further take note of the fact that on similar set of facts in the appellant's own case, this Tribunal vide Final Order No.75415/2023 dated 12.05.2023, has observed as under :

"13. The Departmental Representative reiterated the findings of the Adjudicating Authority in paras 38.25.1 to 38.25.6 and para 38.29 to establish the role of the Appellant in the seizure and

subsequent confiscation of the gold biscuits. He relied upon the decisions cited by the Adjudicating Authority in the para 38.25.1 of the O-i-O in support of Customs Appeal No. 75921 of 2019 10 his argument that the statement of a co-accused can be relied upon and it is an admissible evidence.

14. Heard both sides and perused the evidences available on record.

15. We find that the entire case of the Revenue has been built on the basis of the statement of the co-accused. The adjudicating Authority has given his findings about the role of the Appellant in paras 38.25.1 to 38.25.6 and para 38.29. For the sake of ready reference the relevant paras are reproduced below.

"38.25.1. I have perused the reply of Shri Gobinda Das to the instant Show Cause Notice. I find that Shri Bishnupada Dey had on interception confessed on 02.04.2017 tht he was offired the work of carrying smuggled gold in lieu of monetary remuneration by Gobindababu @ Gobinda Das. I find that Bishnupada Dey had at the ouset admitted the role of Gobindababu i.e. Gobinda Das in the gold smuggling operations. I find that Bishnupada Dey taking the name of Gobindababu i.e. Gobinda Das without any hesitation and also furnishing a detailed picture of the activities of Gobindababu i.e. Gobinda Das clearly establishes that Gobinda Das was involved as a key person in this smuggling case and thus it is evident that Gobinda Das is a key person in the smuggling syndicate. In this context I rely on the order of the Hon'ble High Court of Kerala in case of K.P. Abdul Majeed Vs. Commissioner of Customs, Cochin in RC No. 1 of 2010, decided on 03.07.2014, reported in 2014 (309) ELT 67 (Ker.) wherein, inter-alia, it is stated that "the confessional statement of coaccused can be treated as evidence, provided that sufficient materials are available to corroborate the same". I also rely on the order of the Hon'ble High Court at Allahabad in the

case of Praveen Dumar Saraogi Vs. Vs. Union of India, Application No. 1471 of 1998, decided on 09.05.2013, reported in 2014 (299) ELT 151 (All.) wherein interalia it is stated that "Statement of co-accused recorded under Section 108 of the Customs Act, 1962 can be used against accused of a case When there is admission on part of co-accused, the same can be read against co-accused-complaint not liable to be quashed Section 135 of Customs Act, 1962, "Further reliance is placed on the order of the Customs Appeal No. 75921 of 2019 11 Hon'ble Supreme Court of India in the case of Naresh J. Sukhawani Vs. Union of India, SLP [C] No. 23708 of 1995, decided on 06.11.1995 wherein, inter-alia, it is stated that "Statement of coaccused whether usable without other corroborative evidence Attempt to export foreign exchange out of India- Carrier naming Shri Subhash Dudani who had given such foreign exchange to him for delivery at Hong Kong- Statement of Shri Dudani under Section 108 of the Customs Act, 1962 named Shri Sukhawani who had given the foreign exchange to him- Statement of co-accused Shir Dudani can be used as a substantive evidence connecting the petitioner with contravention of illegal export of foreign exchange-Section 30 of the Evidence Act, Section 161 of the Criminal Procedure Code, 1973." Thus, in view of the said observation I find that the evidence furnished by Shri Bushnupada Dey to be credible and reliable. Further, I find that the defense that the mobile telephone used by Gobinda Das was registered in the name of another person, it is usual practice of persons engaged in clandestine activities like smuggling of gold. I find Gobinda Das has used this ploy to evade the investigating agencies and also evade the legal consequences of being involved in such nefarious activities. In view of the aforesaid, the defense by Shri Gobinda Das @ Gobindababu that the mobile Number 8276875110 belonged to another person and thus the Call Details cannot be attributed to him is liable to be rejected outright.

38.25.6. In view of the aforesaid, I find that the defense submitted by Shri Gobinda das @ Gobindababu, is at Variance with the facts of the case, the admissions of Shri Bishnupada Dey in Course of his statements recorded under Section 108 of the Customs Act, 1962, which has specified the role of Shri Gobinda Das @ Gobindababu in the smuggling operations and is thus liable to be rejected outright.

38.29.I find Shri Gobinda Das @ Gobindababu has played a prominent role in the smuggling of subject gold from Bangladesh and its delivery at Kolkata/Dumdum. It is indisputable that Shri Gobinda Das @ Gobindababu had engained Shri Bishnupada Dey to carry the smuggled gold from Bisirhat to Kolkata in return flro monetary consideration. It is admitted that Shri Gobinda Das had introduced Shri Ratan Kumar Saha to Shri Bishnupada Dey and it is evident that he instructed Shri Dey to deliver the smuggled gold biscuits to Shri Customs Appeal No. 75921 of 2019 12 Saha. Summon was issued to Shri Gobinda Das @ Gobindababu for his appearance before the investigating officer but he did not honour the same. If Shri Gobinda Das was innocent of the charges of being involved in gold smuggling and not associated with such activity, then he could have without any inhibition appeared before the Investigating Officer and proven his inncocence. However, his abstaining himself during investigation and ignoring the Summon issued to him, proves that he was a key nam in the gold smuggling syndicate and actively colluded in such activities. I find Shri Gobinda Das @ Gobindababu has knowingly, consciously and actively involved himself in smuggling of gold of foreign origin which he knew or had reasons to believe were liable to confiscation under Section 111 (b) and Section 111 (d) of the Customs At, 1962, Shri Gobinda Das @ Gobindababu is thus liable to penalty under Section 112 (b) of the Customs Act, 1962. Held so.”

17. From the above findings, we observe that Bishnupada Dey, the co-accused in this case only implicated the Appellant. There is no evidence available on record to establish that the Appellant has asked Bishnupada Dey to carry the gold. The connection between the Appellant and Bishnupada Dey was a phone number. Mr. Dey was told to call the Appellant in the phone number 8276875110. On verification, the phone number was found to be registered in the name of Soumyadeep Talapatra. So, on the basis of these evidences alone it cannot be concluded that Mr. Dey was carrying the gold for the Appellant.

18. Next evidence relied upon by Revenue is that in another case 140 pieces of gold was seized from G.D.Gold House in Burrabazar, whose proprietor was one Mr.Gobinda Das. It was inferred that the Gobinda Babu mentioned by Mr. Dey and the Gobinda Das proprietor of G.D.Gold House were one and the same. This inference is not supported by any evidence. If both are one and the same Mr. Dey could have easily Customs Appeal No. 75921 of 2019 13 mentioned Gobind Babu as the proprietor of G.D.Gold House, in his statement. In his statement Mr. Dey has stated that he knows that Gobinda Babu has an office in Sonapatti at Burrabazar. When he knows details of that extent he could have easily referred him as the proprietor of G.D.Gold House. Hence, we find that the inference by the Revenue the Gobinda Babu referred by Mr. Dey and Gobinda Das, Proprietor of G.D.Gold House are one and the same is without any supporting evidence.

19. Revenue has mainly relied upon the statement of Mr Dey to implicate the Appellant in this case. They have relied upon some decisions in the Order-in-Original to support their claim that the statement of the co-accused is an admissible evidence. We have examined the decisions cited by the Adjudicating Authority and our observation about the relevancy of those cases in the present case is as below:

19.1 The First decision relied upon by the Revenue is Paraveen Kumar Saraogi Vs. Union of India reported in 2014 (299) ELT 151 (All.). The said decision was relating to granting of bail in a case of a complaint under Section 135 of the Customs Act, 1962 and subsequent application for quashing of bail under Section 482 of the Criminal Procedure Code. This is not a case similar to the present case on hand and hence, the said decision has no application in the Appellant's case.

19.2. The second decision relied upon by the Revenue is Naresh J. Sukhawani- Vs. Union of India reported in 1996 (83) ELT 258 (S.C.). In this case, the statement of co-accused was supported by other evidences like photographs and other intrinsic material as mentioned in Customs Appeal No. 75921 of 2019 14 paragraph 3 of the said decision and hence, the said decision is distinguishable on the facts of the case since in the case of the Appellant, there is no other evidence available to implicate the Appellant in the seizure of the gold. Such observation was also made by this Tribunal in the case of Narayan Das -Vs. Commissioner of Customs, Patna reported in 2004 (178) ELT 554 (Tri.-Kol.) and hence the decision of Naresh J. Sukhawani is distinguished.

19.3. The third decision relied upon by the Revenue is K.P. Abdul Majeed Vs. Commissioner of Customs, Cochin reported in 2014 (309) ELT 671 (Ker.). The facts of the case in the said decision, is also different since there were other evidences of 17 persons as mentioned in Paragraphs 2, 9 & 14 of the said order. Several persons have spoken about the involvement of the petitioner in the smuggling activity. The said judgment also mentioned that confessional statement of coaccused can be treated as evidence provided sufficient materials are available to corroborate the same. In the case of the appellant there is only one statement

and no other corroborative evidence. The said judgment has no relevance in the facts and circumstances of the Appellant's case.

19.4. The fourth decision relied upon by the Revenue is K.I. Pavunny Vs. Assistant Collector, Headquarter, Central Excise Collectorate, Cochin reported in 1997 (9) ELT 241 (S.C.). This decision is in respect of the confession of the accused himself and not by co-accused. The said decision also repeatedly speaks about the requirement of corroborative evidence by holding that the Rule of Practice & Prudence requires that confession should be corroborated by independent evidence. In the case Customs Appeal No. 75921 of 2019 15 of Appellant, there is no confession by the Appellant. Hence, the said judgment of K.I. Pavunny has no application in the facts and circumstances of the Appellant's case. The said decision was also delivered in a Criminal Appeal."

Finally, this Tribunal hold that no penalty is imposable on the appellant.

16. In view of the above discussions and observations, we hold that in the facts and circumstances of the case, there is no evidence available against the appellant to impose penalty under Section 112(b) of the Customs Act, 1962 on the appellant. Therefore, the penalty imposed on the appellant is set aside.

17. In the result, the appeal filed by the appellant is allowed.

(Pronounced in the open court on **24.07.2023**)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/

(Rajeev Tandon)
Member (Technical)

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