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

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 76036 of 2016

(Arising out of Order-in-Original No. CCP/NER/9/2016 dated: 30.03.2016 passed by Commissioner of Customs (Prev.) North Eastern Region.)

M/s. Narendra Kumar Jain
(Shiw Market, Fancy Bazar, Guwahati- 781001.)

...Appellant

VERSUS

Commissioner of Customs, Shillong
(North Eastern Region, 110, M.G. Road, Shillong- 793001.)

...Respondent

With

Customs Appeal No. 76046 of 2016

(Arising out of Order-in-Original No. CCP/NER/9/2016 dated: 30.03.2016 passed by Commissioner of Customs (Prev.) North Eastern Region.)

M/s Ramjanam Ray
(Shiw market, Fancy Bazar, Guwahati- 781001.)

...Appellant

VERSUS

Commissioner of Customs, Shillong
(North Eastern Region, 110, M.G. Road, Shillong- 793001.)

...Respondent

APPERANCE :
Present for the Appellant: Mr. Ramakant Gaur & Ms. Sneha Arya, both Advocate
Present for the Respondent : Mr. Tariq Sulaiman, Authorized Representative

CORAM:
HON'BLE MR. R. MURALIDHAR (JUDICIAL)
HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No.75062-75063/2024

DATE OF HEARING : 10.01.2024

DATE OF PRONOUNCEMENT: 24th January, 2024

PER: RAJEEV TANDON

The present appeal has been filed by Narendra Kumar Jain, Director M/s. Rara Brothers Pvt. Ltd. (RBPL), Guwahati and his one time employee

Ramjanam Ray assailing the Order in Original No. CCP/NER/9/2016 dated: 30.03.2016.

2. The facts of the case in brief are: The DRI conducted a search at Khanapara Bus Stand on 02.11.2014 and apprehended two persons viz. Dipal Kundu and Debashish Kundu. The personal search of the two led to recovery of 12 gold bars of foreign origin valued at Rs. 1 crore 59 lakh collectively weighing approximately 6000 gms. In follow up action, business premises of RBPL were searched on 04.11.2014. During the said search primary gold of foreign origin weighing 89.820 gms valued at Rs. 2.94 lakh were recovered from the said premises of RBPL.

3. A brief chronological history of the important developments of the case is as under:

S.No.	Date	Particulars
1.	02.11.2014	Seizure of 6 kilogram of foreign origin gold biscuits from the possession of Dipal Kundu and Debashish Kundu at Guwahati bus stand.
1.	04.11.2014	Seizure of 89.820 gms of gold from the office premises of the appellant assuming the same to be smuggled.
2.	02.11.2014	Statement of Dipal Kundu recorded. He allegedly stated that a person named 'Chhotu' paid him a certain amount to carry the seized gold bars, believed to be of foreign origin, to Ramjanam of Shankar Jewellers, Shiw Market, Fancy Bazar, Guwahati.
3.	02.11.2014	Statement of Debashish Kundu recorded. He allegedly stated that he was not aware that the seized gold was illegal and it happened due to his ignorance.
4.	04.11.2014	Statement of N.K Jain, the appellant, recorded. He allegedly stated that Dalbinder Singh was a part time driver and Ramjanam was no longer his employee, that he did not have any documents in support of 89.820 gms of gold seized from his possession and admitted that the said gold to be of foreign origin.
5.	04.11.2014	Statement of Dalbinder Singh recorded. He allegedly stated that Ramjanam was still an employee of Rara Brothers Pvt. Ltd. and that he did not know Dipal Kundu or Debashish Kundu.

6.	20.11.2014 and 21.11.2014	Statement of Ramjanam Ray recorded. He allegedly stated that he was still working with Rara Brothers (P) Ltd. and that he did not know Dipal Kundu or Debashish Kundu.
7.	13.12.2014	Statement of Chhotu alias Shiva Sharma recorded. He allegedly stated that he did not know Dipal Kundu or Debashish Kundu, and that he never handed over any gold to them.

4. As both 6000 gms as well as 89.820 gms of gold, seized by the department, under the reasonable belief that the said gold was smuggled into the country, the onus under Section 123, to establish the licit import of the seized gold, shifts onto the persons from whose possession the said gold was recovered. It is on record that there are no claimants for 6000 gms of seized and confiscated gold. As per investigations conducted by the department said gold was made over to Dipal Kundu by one Chhotu for carriage of the said gold from Imphal to Guwahati, meant to be delivered to Ramjanam Ray and which gold as informed to him by Chhotu had been brought from Tamu Town of Myanmar to Moreh and then to Imphal. Dipal Kundu however informed that he was not aware as to who the owner of the said gold was. Dipal Kundu admitted to carrying out the transference of such gold from one place to another for a consideration. As Dipal Kundu and Debashish Kundu are not the appellants in the present appeal, nor has the said 6 kg. of gold seized from their possession been claimed by either of the two appellants herein. We refrain from dwelling into details of this aspect of the seizure, enquiry and its outcome.

5. As for the seizure of 89.820 gms of gold effected on 04.11.2014, from the business premises of RBPL, we note that the same was seized as the Director Narendra Kumar Jain could not produce any document, at the time of seizure in support of the said gold. Narendra Kumar Jain in his statement dated 04.11.2014 admitted that Ramjanam Ray, the other appellants continued to be their employee, that Dalbinder Singh was a part time driver who also looked after his office work and that he did not have any document in support of 89.820 gms of foreign origin gold recovered and seized from his possession. Narendra Kumar Jain also denied any knowledge about Dipal Kundu and Debashish Kundu the other accused carriers, from whose possession the seized/confiscated 6000 gms of gold was earlier recovered. Statement of Ramjanam Ray recorded on 20.11.2014 also did not yield any substantive information about the seized gold. He also denied any knowledge about Dipal Kundu or Debashish Kundu. However, the authorities alleged that Ramjanam Ray could give no satisfactory answers when confronted with call data records evidencing conversation between his phone number and that of Dipal Kundu.

6. The department in its investigations therefore arrived at the conclusion that on the basis of the statement of Ramjanam Ray it appeared that Narendra Kumar Jain had concealed vital facts and tried to keep Ramjanam Ray away from the investigations. They state that Narendra Kumar Jain was thereafter summoned several times but each time he did not honour the same and did not cooperate with the enquiries. Deliberating on the role of the key persons Dipal Kundu and Debashish Kundu who have been charged as concerned with acquisition, possession and carriage of foreign marked smuggled gold liable for seizure, they therefore have been subjected to appropriate action in law and penalties imposed upon them under Section 112(b) (ii) of the Customs Act. As per the role of Chhotu @ Shiva Sharma, again on the basis of the enquiries conducted and evidence gathered he has been found to be an active abettor concerned with acquisition, possession etc. of the said foreign marked smuggled gold and therefore subjected to appropriate penal action under Section 112(b) (ii).

7. Coming to the principle accused in the matter Narendra Kumar Jain and his employee Ramjanam Ray, as they have categorically denied anything to do with the seized 6000 gms foreign marked gold, it may not be of any necessity to dwell into the investigation and its outcome thereto as there is no connection thereof with the 89.820 gms of foreign marked gold seized from the business premises of RBPL. We note that the learned Commissioner in her order has also referred to both RBPL as well as Narendra Kumar Jain being involved in similar offences of smuggling of foreign marked gold under the Customs Act. While we agree with the contention of the learned Advocate that the appellants role in any of the other offences, as may have been registered against him, of a like nature have no bearing with the issue in the present matter, we note that such a reference by the learned Adjudicating Authority in the order is perhaps only by way of stating the background of the appellant, as per records of the department and that the contumacious conduct if any of the appellant in other matters would not be determinative nor influence the facts of the present case and infringement in law. Thus, as far as the absolute confiscation of the said 6000 gms of foreign origin gold valued at Rs. 1 crore 59 lakh is concerned, there being no challenge to the said part of the order we continue to maintain the same in the present appellate proceedings.

8. As for the seized 89.820 gms gold, it is on record that the appellant had pointed out to the authorities, that it was legally procured at Guwahati, payment for which was duly reflected in the books of account and that they had submitted their old stock book, invoices and cheque details to the department. It is the appellant’s contention that the said gold was purchased through legitimate banking transactions. We also find that the appellant had sought the cross-examination of the persons concerned in this regard, before the adjudicating authority. The pleadings as rendered by the appellant before the adjudicating authority inter alia state:

> *"4……………………..*
>
> *C. That in the course of business, <u>my client's</u> company purchases old gold ornaments from various persons and refines the same and converts them to Primary Gold Bars having purity of 99.50%. In this context, it is pertinent to state that the said gold ornaments are purchased from various persons against proper bills and payments for the same are made by cheques through the bank account of <u>my client's</u> company bearing Bank Account No. 3213002100042862 maintained at Punjab National Bank, Fancy Bazaar, Guwahati. By way of proof that my client's company purchases old gold ornaments and pays for the same through their bank account a copy of the Item Register (including individual ledger accounts) relating to old gold ornaments purchased by the said company between the period April 2014 and 11.02.2015 is enclosed herewith and marked as "Annexure P-1". A perusal of the said item register will clearly demonstrate that the said company purchases old gold ornaments from the open market and converts the same to Primary Gold Bars of 99.50% purity. In order to prove that the payments for the purchase of the old gold ornaments are made through proper banking channels, a copy of the Bank Statement pertaining to the aforesaid account for the period between 1st March, 2014 and 31st January, 2015 is also annexed herewith*

and marked as "Annexure P-2". Perusal of the aforesaid Bank Statement will further establish that the payments for all the said purchases of old gold ornaments were made through proper banking channels by the said company.

D. That pursuant to purchase of the said gold ornaments and conversion of the same to Primary Gold Bars, the same is sold to various jewellers who purchase the same upon payment of relevant taxes and duties and such payments are also received through proper banking channels. In fact, the bank statement annexed herein will also show the payments received by the said company from various jewellers and dealers in bullion. A copy of the stock register of the said company for the period April 2014 to February 2015 is annexed herewith and marked as "Annexure P-3"."

9. We also note that the appellant have disputed the voluntary character of his statement dated 04.11.2014, tendered before the authorities however there appears no formal retraction thereof on records. As for not appearing before the authorities on subsequent summons the appellant Narendra Kumar Jain has however placed on record evidence for travel to Delhi, Jaipur etc. for treatment of his serious ailments. We also note that none of the persons questioned with during the course of investigation by the department had directly, indirectly implicated the appellant Narendra Kumar Jain or Ramjanam Ray (but for initial statement of carriers that the foreign marked gold was meant to be delivered to him and that too as per third persons say).

9.1. The relevant portions of the said statements are as follows:

"5………………………..

(a) ***Dipal Kundu:*** *That one Chhotu of Moreh had offered him Rs. 10,000 per trip for carrying gold from Imphal to Guwahati; that as his youngest son was suffering from bone disease he needed the money and agreed to the offer of Chhotu; that he brought 3 Kgs. of Gold on 15.10.2014 which was brought to his shop in Imphal by Chhotu; that Chhotu paid him expenses of Rs. 2,000 and Rs. 10,000 for carrying the said gold bars from Imphal to Guwahati; that as per Chhotu's instructions, he delivered the gold to one Shri Ramjanam of Shankar Jewellers; that on 31.10.2014, Chhotu handed over 6 Kgs. of Gold to him and paid him Rs. 3,000 for the journey and promised him Rs. 20,000 for transportation of the said gold which was to be delivered to Ramjanam; and that Chhotu did not tell him about the owner of the said gold as he was only a carrier.*

(b) ***Debashish Kundu****: That he had concealed the gold in his shoe as per his father's instructions; that his father had told him that the gold belongs to a trusted person and was being carried for that person; that he did not know that the said gold was illegal and he had never carried such gold earlier and had carried the same out of ignorance."*

9.2. Relevant extracts of the statements of the others investigated are as:

" ***(i) Narendra Kumar Jain****: That Dalbinder Singh was his part time driver who looked after office work; that Ramjanam Rai, of Bihar, was his old employee who has recently left the job; and*

that he has never purchased gold from Dipal Kundu of Imphal as he does not know him or his son Debashish Kundu.

(ii) Dalbinder Singh: *That he is the driver of Narendra Kumar Jain since the last 10 years; that Ramjanam Ray used to work in the shop of Rara Brothers and did miscellaneous work; that mobile number 8011582276 is registered in his name but used by Ramjanam Ray; that he does not know either Dipal Kundu or Debashish Kundu; and that Ramjanam Ray has gone to Bihar to celebrate Chhat Puja.*

(iii) Ramjanam Ray: *That he was working for Narendra Kumar Jain of Rara Brothers for the last 15 years; that he stays in a room on the terrace of residential apartment of Narendra Kumar Jain; that he earns Rs. 4,000 per month; and that he does not know either Dipal Kundu or Debashish Kundu.*

(iv) Chhotu @ Shiva Sharma: *That he is a driver by profession; that he does not know either Dipal Kundu or Debashish Kundu but knows one Dipal who is aged about 50-55 years; that he does not have any contact number of the said Dipal; that as he is a driver many people call him for travel between Moreh and Imphal and that is how Dipal Kundu may know his number; that he has never given any gold bars to Dipal Kundu or Debashish Kundu or Dipal; and that he has never indulged in smuggling of gold."*

10. From the aforesaid we find no clear implication of the two appellants. The only case against the appellant Narendra Kumar Jain now remains is with the reference to 89.820 gms of gold and not the 6000 gms recovered from Dipal Kundu and Debashish Kundu. In fact it has come out from the statements of the said two persons that they had obtained seized/confiscated 6000 gms of gold from Chhotu @ Shiv Sharma, who had not told him anything about the ownership of the said gold linking to Narendra Kumar Jain or even Ramjanam Ray.

11. Once the appellant has submitted evidence towards licit procurement of gold from local sources, paid through banking channels, evidence thereto duly recorded in the books of account, it was incumbent on the department to have verified the same. Furthermore, it is categorically placed on record by the appellant that the said documents were anterior to the date of search and seizure and their veracity can also not be doubted as most of them were taken over by the DRI officers and were in their custody at the time of seizure or have been tendered to the department duly authenticated by the banks issuing the same. The authentication by the bank, the document being anterior to the date of seizure, and the documents most of which were taken possession of at the time of seizure by the authorities, therefore clearly discharge the onus on the appellant to establish legitimacy of the seized gold, cast upon the appellants and we find the same to have been satisfactorily complied with. The onus therefore, is now on the department to sustain the legality or denounce the evidence tendered for justifiable reasons in law. The rejection thereof "*as an afterthought*" is clearly uncalled for. We also note that the appellant contends that this gold was of 99.50% purity and not of 99.99% purity as generally obtained in case of foreign origin gold. When it is alleged that the contraband gold was carried from Moreh to Imphal by Chhotu @ Shiva Sharma and the same was thereafter carried from Imphal to Guwahati by Dipal Kundu, meant to be delivered to one Ramjanam of M/s. Shankar Jewellery, enquiries were required to be conducted at the end of Shankar Jewellery. It therefore appears that the department has proceeded solely on the basis of surmises and conjectures and did not possess a shred of evidence to bring home the charges levelled. It is settled law that suspicion, no matter how strong, cannot take the place of evidence. In the instant case we find no evidence to nail the appellants. On the contrary the department has not cared to investigate the evidence tendered by the accused or have remained deliberately silent about its outcome.

12. We find from the adjudication order that there is no word on the merit of the issue pertaining to the seizure of 89.820 gms gold and the involvement of the two appellants except for the following submission in para 15 of the adjudication order:

> *"15. ………………… I also find the complicity of Narendra Kumar Jain in the instant case is proved from the fact that the DRI officers in the course of follow-up investigation at the premises of M/s. Rara Brothers (P) Ltd. recovered/seized 2(two) pieces of primary gold of foreign origin weighing 89.820 gms from the possession of Narendra Kumar Jain since he could not produce any document in support of licit acquisition/possession of the said gold. Narendra Kumar Jain at that point of time admitted that he did not have any document in support of 89.820 gms of gold recovered from his possession and also that the said gold were of foreign origin. Regarding the involvement of Ramjanam Ray, in the instant case, I find in his statement though he subscribed that he did not know either Dipal Kundu or Debashish Kundu of Imphal, however, I find when he was confronted with the call detail records and evidence of conversations made through his mobile phone and that of Dipal Kundu he could not*

give any justification of such conversations and therefore, I do not find merit in his submission that he did not know either Dipal Kundu or Debashish Kundu……………… "

13. We note that the present case revolves around two distinct seizures of gold. The first involved the recovery of 6 kg of gold from individuals Dipal Kundu and Debashish Kundu, while the second seizure comprised 89.820 gms of gold from the shop of the appellant. No evidence in any manner is placed on record to connect the two cases and link the appellants to the confiscated 6 kg of gold.

13.1. As for the 89.820 gms of gold, it is noted further that the PAMP stamp was a trademark registered in India in 2003 and that MMTC had collaborated with PAMP and also sold such gold. Deeming this gold as smuggled without any corroboration is pure conjecturing. The failure of the department to address relevant financial records, despite same being in their possession is fatal to their case, as no doubts can be casted upon the evidence tendered by the appellant in discharge of their obligation under Section 123 of Customs Act, unless verified and found to be fabricated or untrue. Also the appellant has claimed that their request for cross-examination of witnesses has been overlooked, in gross violation of principles of natural justice. It has also been adverted to by the appellant that in 3 cases made against the appellant- N.K Jain, the same witnesses have been made as Panch Witnesses; whether the gold was recovered from Railway Station or Bus Stand or anywhere else. The presence of such stock witnesses therefore does cast a shadow of doubt on the investigations initiated. The appellant, Narendra Kumar Jain further states that in any of the three cases, the appellant has not staked any claim towards the seized gold.

14. The appellant has inter alia placed reliance on the following case laws:

(i) R.R. Shah Vs. Commissioner of Central Excise,[1]

(ii) Ajay Saraogi Vs. Union of India and others,[2]

(for relevancy of the statement of witnesses if not tested on the anvil of cross-examination).

15. In view of the discussions supra and for reason aforesaid, the law as settled, we are of the view that the department has failed to carry out proper investigations into the case and not having examined the evidence of alleged licit acquisition of gold by Narendra Kumar Jain, tendered to them/recovered by them during search and seizure operations does not lead their case any further. Under the circumstances confiscation of the seized 89.820 gms of gold is not merited. In view of the said finding no penalties are also imposable on the appellants. We therefore while upholding confiscation of 6000 gms of gold set aside the remaining part the order under challenge, lift the confiscation of 89.820 gms gold and imposition of penalty on the appellant- Narendra Kumar Jain.

16. As for imposition of penalty on Ramjanam Ray we note that the show cause notice and the adjudication order do not bring about any specific charge against him, other than mere heresay evidence and that denial of cross-examination to him have definitely impacted the opportunities of natural justice being offered to the appellant. The fact that no enquiry whatsoever was conducted at the premises of Shankar Jewellery where in

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1. 2016 SCC Online CESTAT 3607
2. FEA 2 of 2009

Ramjanam Ray was said to be employed (as per the version of the carriers) therefore fails to establish his role, if any into the matter. Subjecting the accused to penal consequences has to be necessarily on the basis of specific evidence and not surmises or conjectures. No penalty can be imposed for any ambiguity in any role played unless it is clearly established by way of a proper enquiry and specific conduct and performance evidenced.

17. The appeal is disposed of the aforesaid terms, with consequential relief as available in law.

(Pronounced in the open court on…24th January, 2024.)

Sd/-
(R.Muralidhar)
Member (Judicial)

Sd/-
(RajeevTandon)
Member (Technical)

K.M