

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

REGIONAL BENCH - COURT NO.1

Customs Appeal No.76189 of 2016

(Arising out of Order-in-Original No.CCP/NER/6/2016 dated 16.03.2016 passed by
Commissioner of Customs (Prev.), North Eastern Region, Shillong.)

Smt.Kamalesh

(W/o Om Prakash, RZ-255, Gali No.9, Vishnu Garden Extn., West Delhi-110018.)

...Appellant

VERSUS

Commissioner of Customs (Prev.), Shillong

.....Respondent

(North Eastern Region, 110, M.G. Road, Shillong.)

WITH

(i) Customs Appeal No.76190 of 2016 (Shri Prasanta Saha v. Commissioner of Customs (Prev.), Shillong); (ii) Customs Appeal No.76191 of 2016 (Paramjeet Kaur v. Commissioner of Customs (Prev.), Shillong); (iii) Customs Appeal No.76201 of 2016 (Sahib Jain v. Commissioner of Customs (Prev.), Shillong); (iv) Customs Appeal No.76207 of 2016 (Anil Kumar Jain v. Commissioner of Customs (Prev.), Shillong); (v) Customs Appeal No.76529 of 2016 (Smt. Pinki v. Commissioner of Customs (Prev.), Shillong); (v) Customs Appeal No.76552 of 2016 (Smt. Renu Thapar v. Commissioner of Customs (Prev.), Shillong);

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APPEARANCE

Ms.Reena Rawat & Shri Jeetendra Singh, both Advocates for the Appellant (s)
Shri S.Debnath, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 76066-76072/2023

DATE OF HEARING : 12 July 2023
DATE OF DECISION : 12 July 2023

Per : ASHOK JINDAL :

All the appeals are arising out of the common order for imposing penalties on the appellants and absolute confiscation of the gold recovered during the course of search.

2. The facts of the case are that the officers of DRI intercepted Shri Prasanta Saha, appellant along with Smt.Kamalesh, Smt. Paramjeet Kaur, Smt. Pinki and Smt.Renu Thapar, co-appellants at about 2.45 p.m. at Guwahati railway station and recovered 5837 gms. of gold under presumption that the same was primarily gold of foreign origin and seized the same under Customs Act, 1962. Statements of the appellants were recorded. DRI recorded the statements of all the appellants who produced the voucher with regard to custody of the said gold with them. But a case was made out against the appellants that the said gold was of foreign origin smuggled clandestinely and brought in India from Myanmar. Later on, the statement of one of the appellants namely Shri Anil Kumar Jain and his son Shri Sahib Jain was recorded who confirmed that that they have issued the voucher No.06/2004 dated 22.09.2014 for 3327.40 gms of gold to M/s. New Coin Maker for making gold coins. After completion of the investigation, a show cause notice was issued to all the appellants alleging that the said 5837 gms. of gold recovered from the possession of the appellants was smuggled into India from Myanmar and proposed confiscation of the seized gold and to impose penalties on the appellants under section 112 of the Customs Act, 1962. The matter was adjudicated. The impugned gold was absolutely confiscated and penalties on all the appellants were imposed. Against the said order, the appellants are before us.

3. Ld.Counsels appearing on behalf of the appellants submit that Shri Prasanta Saha is an employee of Late Shri Shyam Sunder Heera at the relevant time and was working for him and as per his instructions, he used to carry transport of gold because Mr.Heera was having firm in the name and style of M/s. New Coin Maker in Kolkata, where he used to make coins as per the orders received from other goldsmiths from all

over India. It is the submission of the appellant that at the time of seizure the appellants produced the voucher certifying that 3327.40 gms. of gold has been issued M/s. New Coin Maker for making gold coins on job-work basis by M/s. Tansukhrai Ratanlal Jewellers, Fancy Bazar, Guwahati. The appellant also produced delivery note issued by one M/s. Jindal Bullian Pvt.Ltd. and M/s. Bhunia Jewellers Pvt.Ltd., Delhi for possession of the gold, but the said parties did not claim ownership of the gold later on due to DRI investigation. As the sample of the gold was drawn and same was tested and as per the result the purity of the gold was 995.0 only, which is not of gold of foreign origin. It is the contention of the appellants that gold was not seized at port or airport. It is only a town seizure and having no mark of foreign origin and purity of the gold is also not in conformity as the gold of foreign origin therefore it cannot be believed that the gold in question of foreign origin and have brought in India through illicit means from Myanmar. It is only assumption and presumption by the DRI officers. Moreover, the statements recorded during the course of investigation have not been tested by the adjudicating authority in terms of section 138 (b) of the Customs Act, 1962. Therefore, the said statements cannot be relied upon as held by the Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt.Ltd. Vs. UOI –[2016 (340) ELT 67 (P & H)] and Ambika International Vs. UOI & anr. – CWP No.12615 of 2016 dated 17.06.2016. It is further submitted that mere suspicion cannot result to allege that the goods are smuggled as held by the Hon'ble Apex Court in the case of J.A. Naidu, etc.etc. vs. State of Maharashtra [1983 (13) ELT 1611 (SC)]. The Ld.Counsel also submitted that the penalties against the appellant cannot be proceeded on the assumption and presumption as held by the Hon'ble Supreme Court in the case Oudh Sugar Mills Ltd. v. UOI [1978 (2) ELT (J172)(SC)]. He also relied on the decision in the case of Commissioner of Customs, Lucknow v. Sanjay Soni [2022 (381) ELT 509 (Tri.-All.)]. Therefore, it is prayed on behalf of the appellant that the absolute confiscation of 3327.40 gms of gold and imposition of penalty on the

appellants is not proper and therefore and to that extent, the impugned order is to be set aside.

4. On the other hand, the Ld.Authorized Representative supported the impugned order and submitted that during the course of investigation it is admitted by the appellant that they are bringing gold from Myanmar and the story concocted by the Ld.Counsel during the course of hearing is not having two facts and circumstances as per investigation. Moreover, the appellants could not produce any supportive evidence in support of their claim. Therefore, the impugned order is to be upheld.

5. Heard the parties, considered the submissions.

6. On careful considerations and perusal of records placed before us the only issue before us is that whether 3327.40 gms of gold can be absolutely confiscated without having any iota of evidence that the gold being smuggled in nature. In fact, it is a case of town seizure and the appellants were carrying job-work voucher with them in support of their claim. Moreover, the test report also certified that the purity of the gold is not up to the mark and the gold which is seized having no foreign marking to prove its foreign origin.

7. In that circumstances, it is to be seen that can it be alleged that 3327.40 gms of gold is of foreign origin.

8. We find that in the case of Sanjay Soni (supra) this issue came up before this Tribunal. This Tribunal observed as under:-

"29. So far, the appeal of Revenue against Mr. Sanjay Soni is concerned, I find that admittedly it is a case of town seizure. Out of the 5 gold bars and 1 cut piece seized from Mr. Sanjay Soni, there is foreign marking - 'rand refinery' only on one gold bar. There is no such foreign marking admittedly on the other pieces recovered and seized. Thus, I hold that in absence of any evidence brought on record as to the allegation of smuggling, the provisions of Section 123 of the Act are not attracted in the case of other 4 pieces and the cut piece of the gold bar seized. I hold Section 123 is attracted only in the case of one gold bar having foreign marking, as the person - Mr. Sanjay Soni from whom the foreign marked gold was recovered, have not been able to

explain the licit source and have also stated that this gold may have arisen by way of smuggling into India through Bangladesh. Accordingly, modifying the order of Commissioner (Appeals), I uphold the absolute confiscation with respect to one piece of gold having the marking 'rand refinery' weighing 998.600 gram valued at Rs. 31,95,520/-, as per the valuation report.

30. *So far, the other four pieces of gold bars having no foreign marking weighing 998.700 grams (3 bars) and 1 bar weighing 998.600 grams and the cut piece weighing 200.900 gms., I hold that these are not liable to confiscation, as admittedly it is the case of town seizure. I further hold that the provisions of Section 123 of the Customs Act are not attracted. Accordingly, I set aside the order of confiscation with respect to these four gold bars and the cut piece and further order that the same is to be released to the person from whom they were recovered - Mr. Sanjay Soni. The penalty imposed under Section 112(b) is reduced to Rs. 5,00,000/- (five lakhs).*

31. *Under the facts and circumstances, I find that Revenue has not been able to substantiate the charge of smuggling save and accept the statement under Section 108 recorded from Mr. Sanjay Soni. Such statement also loses its evidentiary value as Revenue has failed to examine Mr. Sanjay Sony in the course of adjudication proceedings, as held Supreme Court in the case of Andaman Timber Industries [[2015 \(324\) E.L.T. 641](#) (S.C.) = [2017 \(50\) S.T.R. 93](#) (S.C.)]."*

9. Admittedly in the case in hand it is a case of town seizure and gold in question was not bearing any marking of foreign origin. Moreover, purity of the gold is also less than the purity of foreign origin gold. In that circumstances, the provision of section 123 of the Customs Act, 1962 are not attracted to allege that the 3327.40 gms of gold in question is smuggled one.

10. Moreover, the statements recorded during the course of investigation have been retracted by the appellants during the course of adjudication by way of cross-examination, but no procedure has been followed in terms of section 138B of the Customs Act, 1962 to

testify the statements recorded during the course of investigation, therefore, as held by the Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs (supra) and Ambika Internation(supra), the statements are not reliable statements.

11. In that circumstances the Revenue has failed to make out a case against the appellants, therefore, the impugned order qua absolute confiscation of 3327.40 gms of gold is liable to be set aside and penalty on the appellants before us are not imposable.

12. In view of this, we hold that 3327.40 gms of gold be released to the appellants and no penalty is imposable on the appellants.

With these terms, the appeals are disposed of.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)