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

Customs Appeal Nos. 75265, 75635-75638 of 2018

(Arising out of Order-in-Appeal Nos. 98-104/Pat/Cus/Appeal/2017 dated 23.11.2017 passed by the Commissioner of Customs (Prev,), Patna.

1. **Shri Arjun Sah**

S/O Late Mewa Lal Sah,
Kalyani, Bara Lane, P.S.-Towan Thana,
Distt.- Muzaffarpur (Bihar).

2. **Shri Ankur Kumar Jain,**
3. **Shri Krishna Kumar Jain,**
4. **Shri Saurav Kumar Jain,**
5. **Shri Santosh Kumar Jain,**

In front of Bank Road,
3rd Floor of Rupbahar Vastralaya,
Raxaul, West Champaran.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Customs (Prev.), Patna.
Division, Central Revenue
Building, Birchand Patel Path,
Patna-800001.

Appearance:
Shri Tarun Chatterjee, Advocate for Sl. No. 2,3,4, & 5 and Shri H. K. Pandey, Advocate for Sl. No. 1. for the Appellant (s)
Shri S. Guha, A. C. (AR) for the Respondent (s)

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

Date of Hearing: -07.11.2019

Date of Pronouncement:-02 January, 2020

ORDER NO. FO/A/75002-75006/2020

Per Shri P. K. Choudhary:

Briefly stated, the facts of the case are that on 03.12.2015, the Government Railway Police personnels recovered 4 numbers of gold bars of foreign origin (one kg each) at Sugauli Railway Station from Shri Sumit Goyanka and Shri Awadhesh Kumar Pandey who were travelling in Mithila Express. The gold bars with foreign marking were concealed in their shoes. The apprehended persons alongwith the gold so detected were handed over to the Customs Officers at Muzaffarpur which initiated the proceedings under the Customs Act, 1962 by making seizure of the said gold bars under Section 110 of Customs Act, 1962.

2. In their statements recorded before the Customs Officers, both the persons admitted the foreign nature of the seized gold and its recovery from their shoes at Sugauli Railway Station by GRP personnels. They stated that the said gold bars were handed over to them by one Shri Santosh Kumar Jain of Birganj, Nepal at the residence of Shri Krishna Kumar jain alias Pappu Jain at Raxaul. Both the persons also accepted that they were involved in this illegal act of smuggling of foreign gold bars since long and in past they used to carry illegal gold from silliguri to Delhi also. Usually, they used to get the delivery of gold bars either from Shri Santosh Kumar Jain or from his two sons namely Shri Saurav Kumar Jain alias Raja and Ankur Kumar Jain alias Vicky Jain at the residence of Shri Krishna Kumar Jain alias Pappu Jain of raxaul. They gave the Mobile Nos. 9308147326, 7488014077, 7765985607, 9386688877, 9473017907 & 9386688883, who used to supply gold bars to them. On verification of these numbers from the telecom service provider, it was found that Mobile No. 7765985607 is in the name of Shri Ankur Kumar Jain alias Vicky Jain S/o Shri Santosh Kumar Jain C/o Shri Krishna Kumar Jain alias Pappu Jain, of Raxaul (West

Champaran); 9386688877 is registered in the name of Shri Santosh Kumar Jain C/o Shri Krishna Kumar Jain, Raxaul (West Champaran) and Mobile No. 9473017907 is registered in the name of Shri Krishna Kumar Jain alias Pappu Jain. They further stated tht the gold was to be delivered at Muzaffarpur to Shri Vikash Agarwal, Prop. M/s Agarwal Gold House, Near Garibsthan Road, Muzaffarpur-842005 (Mobile No. 9334082557) and Shri Dhiraj Kumar, Prop. Of M/s Dhiraj Jewellers, Patna-800004 and that they used to get money delivered at Shri Krishna Kumar Jain's residence through HAWALA from Shri Rajesh Kumar Agarwal, Shri Arjun Sah and Shri Ram Naresh Chaurasiya all of Muzaffarpur (Bihar).

3. On the basis of statements recorded under Section 108 of Customs Act, 1962 of Shri Sumit Goyanka & Shri Awadhesh Pandey and call details record obtained from various telecom service providers, follow up investigation was conducted. On search of residential premises of Shri Arjun Sah Rs.5,00,000/- (Rupees Five Lakhs) only was recovered which on inquiry was found to be lawfully acquired by him and accordingly released to him before issuance of the Show Cause Notice. On search of residential premises of Shri Ram Naresh Chaurasiya, 299 gms. of primary gold was recovered and a separate proceeding was initiated against him by the Department.

4. Residential cum business premises of Shri Krishna Kumar Jain alias Pappu Jain at Raxaul could be searched only after intervention

of Hon'ble High Court at Patna. During course of the examination by the Investigating Agency, Shri Krishna Kumar Jain, Shri Santosh Kumar Jain, Shri Saurav Kumar Jain alias Raja and Ankur Kumar Jain alias Vicky Jain, it was enumerated that both Sumit Goyanka and Awadhesh Pandey had worked with them for some time and Sumit Goyanka was class mate of Ankur Jain. However, they denied having any connection with the seized gold. Shri Vikash Agarwal, Prop. Of M/s Agarwal Gold House, Muzaffarpur and Shri Dhiraj Kumar, Prop. Of M/s Dhiraj Jewellers, Patna, in their statements recorded by the Investigating Agency denied to have any connection with the seized gold and acquaintance with the said persons. Shri Ram Naresh Chowrasiya, Arjun Sah and Rajesh Kumar Agarwal in their respective statements denied having any connection with the said persons of the seized gold.

5. Show Cause Notice was issued to 11 (Eleven) persons calling upon them to show cause to the Additional Commissioner, Customs (Prev.) Patna as to why the said seized 04 gold bars of foreign origin weighing 04 kgs valued at Rs.1,02,12,000/- (Rupees One Crore Two Lakh Twelve Thousand) only should not be confiscated under Section 111 (b) of the Customs Act, 1962 and penalty should not be imposed upon above all of them under Section 112(i) of the Customs Act, 1962.

6. After due process, the Adjudicating Authority passed order confiscating the seized gold under Section 111(b) of the Customs

Act, 1962 and imposed penalty under 112(i) of the Customs Act, 1962 as follows:-

(a) Shri Sumit Goyanka Rs.2,00,000/- (Rupees Two Lacs only).

(b) Shri Awadhesh Kumar Pandey Rs.2,00,000/- (Rupees Two Lacs only).

(c) Shri Krishna Kumar Jain, Rs.10,00,000/- (Rupees Ten Lacs only).

(d) Shri Santosh Kumar Jain Rs.10,00,000/- (Rupees Ten Lacs only).

(e) Shri Saurav Kumar Jain Alias Raja Rs.1,00,000/- (Rupees One Lacs Only).

(f) Ankur Kumar Jain alias Vicky Jain Rs.1,00,000/- (Rupees One Lacs only).

(g) Vikash Agrawal Prop. Rs. 50,000/- (Rupees Fifty Thousand only).

(h) Shri Dhiraj Kumar Rs.50,000/- (Rupees Fifty Thousand only).

(i) Shri Rajesh Kumar Agrawal, Rs.50,000/- (Rupees Fifty Thousand only).

(j) Shri Arjun Sah Rs.50,000/- (Rupees Fifty Thousand only).

No penalty was imposed on Shri Ram Naresh Chaurasiya as a separate case had been initiated against him for 299 gms. primary gold found from his residential premises.

7. On appeal, the said Order-in-Original was upheld by Ld. Commissioner (Appeals), Patna against which the following persons only are in appeal before the Tribunal:-

(i) Shri Krishna Kumar Jain,

(ii) Shri Santosh Kumar Jain,

(iii) Shri Saurav Kumar Jain alias Raja

(iv)Shri Ankur Kumar Jain alias Vicky Jain

(v) Shri Arjun Sah.

8. Ld. Advocate appearing for Shri Krishna Kumar Jain, Santosh Kumar Jain, Saurav Kumar Jain alias Raja Ankur Kumar Jain alias Vicky Jain submitted that the seizure was made by Police and subsequently handed over to Customs. As the statements of the persons carrying gold were recorded by Customs in Custody, their statements cannot be relied upon. That the two carriers were known to the family members does not prove anyway whatsoever that the seized gold bars had been delivered by them without any corroborative evidence; that conversation took place between the parties without giving conversation details is not sufficient to prove the allegation. He further submitted that all the family members of Krishna Kumar Jain have been implicated in the case without pinpointing their individual role in the deal, if any, which is not sufficient for inviting penal provisions since no incriminating evidence was found during the investigation. Ld. Advocate cited the following judgments in support of his submissions.

(i) Jai Narain Verma Vs. Collector 1994 (72) E.L.T. 567 (Tribunal)
(ii) Jitendra Pawar V. Commissioner 2003 (156) E.L.T. 622 (Tribunal)
(iii) Nunna Satyanarayana V. Commissioner 2001 (133) E.L.T. 679 (Tribunal)

9. The Ld. Advocate appearing on behalf of Shri Arjun Sah submitted that he is one of the three persons named as hawala operators making money available at Raxaul for procurement of smuggled gold, though nowhere in the proceedings it is mentioned that how much money was paid for procurement of the seized gold

and on whose behalf the said operators would have provided the money. He made the Bench go through the statements of both the carriers recorded by the Revenue and submitted that there is nothing to suggest that the appellant had provided/arranged money for the deal. It is on record that nothing incriminating was found during the follow up investigation conducted at the business and residential premises of the appellant. More so, the money recovered and detained at the time of search, being found lawfully acquired, was returned back to the appellant before issuance of the Show Cause Notice. He cited Tribunal's order passed in the case of Pradeep Kumar Vs. Commissioner of Customs, Lucknow 2000(17) E.L.T. 388 (Trib New Delhi) and submitted that the appellant's case is squarely covered by it.

10. The Ld. A. R. appearing for the Revenue argued that there is sufficient circumstantial evidence to show that the gold was smuggled from Nepal and was handed over to the carriers Shri Sumit Goyanka and Shri Awadhesh Kumar Pandey at the residence of Krishna Kumar Jain by Shri Santosh Kumar Jain. He made the Bench go through the investigation report that the residential premises of Krishna Kumar Jain at Raxaul could be searched only after intervention of Hon'ble High Court at Patna. It is on record that there was conversation between them and the carriers around the time of delivery. He cited Hon'ble Supreme Court's judgment in the case of Collector of Customs, Madras & Others V. D. Bhoormull,

1983 (13) E.L.T. 1546 (S.C.) wherein it was clarified that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree and all that is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. That the ownership of the seized foreign gold is not claimed by any one and it was seized while being carried/concealed in the shoes of the carriers from a train coming from Raxaul, a town bordering Nepal is sufficient to prove that both Shri Krishna Kumar Jain and Santosh Kumar Jain are deeply involved in the act of smuggling.

11. Heard both sides and perused the appeal records.

12. On perusal of the statements recorded from the appellant/accused persons, it is undisputed fact that the gold bars under seizure are smuggled into India. None has claimed ownership of the gold. The persons from whom those were recovered are not in appeal even. Thus, the confiscation of seized gold not being challenged, the only matter for consideration is imposition of penalty under Section 112 of the Customs Act, 1962.

13. I find that the though initial seizure was made by Government Railway Police, and was handed over to Customs and Customs initiated the proceedings under the provisions of Customs Act, 1962. On the basis of statements recorded from the two persons from whom the foreign gold was recovered, the Department

conducted search of different persons, examined them and recorded their statements. On inquiry from mobile service provider, it was found that there were conversation taking place between members of Jain family and the said carriers at the probable time of handing over the gold at the residence of Kamal Kumar Jain, though Conversation details is not available. Santosh Kumar Jain having his business in Birgunj, Nepal is also found to be using the address of Shri Santosh Kumar Jain in India. Ankur Kumar Jain and Saurav Kumar Jain are sons of Shri Santosh Kumar Jain. I find that the premise of Shri Krishna Kumar Jain at Raxaul was searched and they were examined only after intervention of Hon'ble High Court at Patna. In consideration of the circumstances, I have no doubt that they are involved in the present deal of smuggling. The law laid down by the Apex Court in the case of Collector of Customs, Madras & Others V. D. Bhoormull, 1983 (13) E.L.T. 1546 (S.C.) that the Department is not required to prove its case with mathematical precision to a demonstrable degree and all that is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue is applicable to the present issue. However, I find that the Department has not been able to establish/distinguish the specific role played by the family members namely Ankur Kumar Jain and Saurav Kumar Jain. Also, I find that the Department has not been able to establish the involvement of Shri Arjun Sah in the case and the penalty imposed upon them i.e. Shri Saurav Kumar Jain alias Raja, Shri Ankur Kumar Jain alias Vicky Jain and Shri Arjun Sah is not sustainable and accordingly ordered to be set aside with consequential relief, if any.

In so far as penalty on Shri Krishna Kumar Jain and Shri Santosh Kumar Jain is concerned, I am of the considered view that penalty of Rs.5,00,000/- (Rupees Five Lakh) only on each of them would serve the ends of justice.

14. The appeals filed by the appellants are allowed in the above terms.

(Pronounced in the court oné 02 January, 2020.)

Sd/-
(P.K. Choudhary)
Member (Judicial)

T.K.