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

Customs Appeal Nos. 76465-76469 of 2016

(Arising out of the Order-in-Order No. 09/Cus/CC(P)/WB/2016 dated 23.05.2016 passed by Commissioner of Customs (Prev.), W.B. Kolkata.)

Commissioner of Customs (Prev.), WB, Kolkata.
3rd Floor, 15/1, Strand Road, Customs House, Kolkata-700001.

...Appellant (s)

VERSUS

Shri Vinod Kale,
M/s. Slidhanath Gold & Silver Refiners, Hariganga, Basak Road, (77, Amiya Sagar Par).
Agartala, Tripuira West-799103. & others.
Shri Maran Saha,
Shri Mantosh Dhar Partner
Shri Swarnalika Jewellers
Shri Vipul Yelpale.

. ...**Respondent(s)**

APPERANCE :
Shri Subrata Debnath, Authorized Representative for the Appellant
None, for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77367-77371/2023

DATE OF HEARING : 13.10.2023
DATE OF DECISION : 13.10.2023

PER K. ANPAZHAKAN :

These five appeals have been filed against the impugned order dated 23.05.2016, passed by Commissioner of Customs (Prev), Kolkata. As the issue involved in all these appeals emanate from the impugned order, all the five appeals are taken up together for decision.

2. In the impugned order, the Ld. Commissioner has ordered for release of the seized 6 pieces gold bangles, 16 pieces of gold sticks and I piece gold chain strip collectively weighing 1862.633 gms and valued of Rs.54,33,368/- in the absence of any evidence suggesting that the

seized gold is of foreign origin and irregularly imported thus rendering the seized goods out of the purview of customs Act, 1962. He also dropped the proceedings initiated against the Respondents Sri Maran Saha, Shri Mantosh Dhar, Shri Vinod Kale, Shri Vipul and M/s Swarnalika Jewellers. Aggrieved against the impugned order, the Appellant (Department) has filed these appeals.

3. In their grounds of appeal, the Appellant has made the following submissions:

(i) In the instant case it has been found that DRI officers have recovered metal, 16 (sixteen) sticks of gold coated with silver colour substance, 6 (six) bangles of gold and one strip of chain made of gold which clearly indicated the intention of Shri Maran Saha i.e. to hide its actual identity so that it looks like silver sticks.

(ii) During the course of investigation, Shri Mantosh Dhar had failed to produce any Purity Certificate issued by the M/s Sidhanath Gold & Silver Refiner, though such certificates were reportedly issued by the said M/s Sidhanath Gold & Silver Refiner. The worker of M/s Sidhanath Gold & Silver Refiner named Shri Vinod kale had stated in his statement dated 08.01.2014 that he had issued the Cash Memos as per direction of the shop owner.

(iii) The gold seized from Shri Maran Saha on 13.11.2013, did not have the hear / Leaf Shape of solid metal with purity of 99.50 and logo punched thereon, the way gold is returned to the customers after being purified by M/s Sidhnath Gold & Silver Refiner.

(iv) Shri Mantosh Dhar submitted total five "issue & Cash Memo" of M/s Sidhanath Gold and silver Refiners, Agartala, bearing running Sl. No. 1

to 4 and No. 6 covering the period from 20.05.2013 to 08.11.2013, which speaks for itself how those Cash Memos were fabricated out of an afterthought to account for the amount of the seized gold in haste, totally Ignoring that the said of M/s Sidhanath Gold and Silver Refiners was not operating for Shri Mantosh Dhar alone and they must have issued such "issue & Cash Memo" to many of their customers over the period from May 2013 to November, 2013.

(v) As regard gold in bangle shape, Shri Mantosh Dhar had stated on 19.11.2013 that he had purchased the bangles from various customers, but when asked to reveal details of the Customer who held such heavy bangles made of solid gold, Shri Dhar took refuge in stating that he himself got such bangles manufactured, declaring his previous account given in this respect under his statement dated 19.11.2013 as incorrect.

(vi) Only two of the customers whose names featured in the bunch "GOLD VOUCHER" SUBMITTED BY Shri Mantosh Dhar on 19.11.2013, namely, Shri Naren Banik and Sri Rupak Roy could be located during the course of investigation. However, the other two Customers were found to be non-existent. The name of Shri Prakash Chandra Ghosh (ref. voucher no. 17 dt. 24.10.2013) did not surface during the course of investigation. Out of 21 nos of gold vouchers (received), resumed from Shri Dhar, only three customers had stated to have given gold/old and used ornaments to Shri Mantosh Dhar.

(vii) In respect of the judgement of CEGAT, Eastern Bench, Kolkata in the case of Dattaji Deokar Vs. Commissioner of Customs, Bhubaneswar-I, [2002 (147) ELT 390 (Tri.-Kolkata) cited in the adjudicating order, it is submitted that in that case a portion of the seized gold biscuits, for which the appellant had furnished purchase records was released by CEGAT, whereas the rest of the gold biscuits under seizure were ordered to be confiscated. Hence, the ratio of the said judgement is not squarely applicable in the instant case.

(viii) The Cash Memos dated 18.10.2013 seized from the possession of Shri Maran Saha were of purchase of old silver. It was found on enquiry that they relate to different types of silver ornaments sold to Shri Mantosh Dhar in quantities 934 gm and 920 gms for amounts Rs.57,711.6 and 56,304.00 respectively. Hence, in no way they are related to the gold seized from the possession of Shri Maran Saha.

(ix) It cannot be concluded summarily that the burden of proof under Section 123 of the Customs Act, 1962 has been discharged by the Appellants

(x) The Adjudicating Authority had failed to appreciate that the signature of Sri Vinod Kale appearing on the "ISSUE & CASH MEMO" of M/s Sidhanath Gold and Silver Refiners exactly matches with the signature of Vinod kale made in his statement recorded by the DRI Officers. It was never mentioned that Shri Kale could not write Hindi or English. Instead, he stated in his statement that he could not write Hindi or English.

(xi) It has been mentioned in the SCN that Shri Mahesh More of Subhash Avenue Bye Lane, Dinobandhu Market, Ranaghat, Nadi, who was supposed to receive the gold articles from Maran Saha at Kolkata Airport on 13.11.2013, had stated that he had never received and gold from Shri Mantosh Dhar around 13th -15th November, 2013. Shri Mantosh Dhar also admitted in his statement that Shri Mahesh More was not aware and was yet to be informed about the gold to be delivered to him. In view of such definite findings, the requirement of examination of call details of the said three persons was not at all found necessary.

(xii) the documents maintained and submitted by Shri Mantosh Dhar appears to be manufactured at a later stage to hide the smuggled nature of the gold being dealt by him and was seized from the possession of Shri Maran Saha.

(xiii) In view of the above submissions, they contended that the impugned order is not legal and proper and hence liable to be set aside.

4. The submissions of the Appellants are summaraized as below:

(i) The articles of gold seized from the pocession of Shri. Maran Saha on 13.11.2013 consisted of gold purchased either from various individual customers or obtained from various individual customers for conversion of old ornaments into pure gold.

(ii) In terms of Section 123 of Customs Act, 1962, the burden of proving that the goods seized are not smuggled goods shall lie on the person who claims ownership of the seized goods. This section applicable to imported goods where there is a reasonable belief that the goods are smuggled into the country without payment of duty. In this case the goods were of indegenous origin and hence the provisions of Section 123 of Customs Act, 1962 are not applicable.

(iii) They have submitted 'Gold Vouchers' evidencing receipt of old gold for conversion into pure gold.

(iv) the department has not furnidhed any evidence to substantiate the allegation that the goods are smuggled in nature. Accordingly, they prayed for rejecting the appeals filed by the department.

5. Heard both sides and perused the appeal records.

6. We observe that the issue to be decided in these appeals is whether the evidences available on record indicate that the goods seized in this case are smuggled in nature or not. We find that the Commissioner has given a detailed finding as to why the seizes goods are not smuggled in nature. The relevant portion of the order is reproduced below:

> *"I find from the facts and circumstances of the case, that the gold seized from Shri Maran Saha on 13.01.2013 was not proved to be smuggled into India for the reasons that:*
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> *i) Nothing was concealed during interception of Maran Saha at the airport. On the 1st hand query whether he was carrying any costly item Sri Saha had told that he was carrying gold and silver. The goods were also not concealed in any manner but kept in his luggage.*
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> *ii) When search was conducted at the noticee shop after seizure of gold, Sri Mantosh Dhar claimed his valid ownership of the gold and handed over all the documents in support of his claim. I find the documents resumed from the shop of M/s Swaratika Jelwllers in form of register of otherwise are of varied nature which have interrelation and corroboration amongst them and are maintained for a considerable period of time which has not being categorically alleged to be manufactured documents to turn down the noticee's claim. No concrete evidence in the instant case suggests that the seized gold was of foreign origin.*
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> *iii) The SCN itself confirmed that the old gold was deposited by different customers against received voucher. I find that the investigation was able to track two person namely Sri Naren Banik and Sri Rupak Roy who admittedly in their statement dated 09.01.2014 have confirmed before the DRI authorities that they have made deposit of gold to the tune of 40 gm & 130 gms to Sri Mantosh Dhar of M/s Swarnalika Jewellers. Furthermore in respect of purchase of gold from Sri Prakash Chandra Ghosh pertaining to purchase voucher Sl No. 17 dated 24.10.2013 I find that the noticee has adduced documentary evidences of payment made through Noticee's Bank viz. Bank of Baroda*

on 24.10.2013 itself. I find that the name of seller & amount of money i.e. Rs.7,55,550/- reflected in the purchase voucher, matching perfectly with the Bank statements and the transaction was undertaken prior to the interception of Sri Maran Saha on 13.11.2013. Such an evidencing document cannot be overlooked and it only strengthens the claim of the noticee. I find in the case of Dattaji Deokar Versus Commissioner of Customs, Bhubaneswar-I referred in ELT 2002 (147) E.L.T. 390 (Tri.- Kolkata) wherein CEGAT, Eastern Bench, Kolkata has held that documentary evidence of seller's sale register and demand draft of State Bank of India issued in favour of seller indicating payment of consideration, sufficient to substantiate claim of legal acquisition. I find the ratio of the judgment applicable in the instant case.

iv) I find that retrieved old Cash memo dated 18.10.2013 in the name of Sri Mantosh Dhar during the course of seizure were also verified from the shop on 13.11.2013 by the investigating officer and they found that the old silver were sold to the controlling partner of the Noticee firm as reflected in the SCN.

v)Shri Mantosh Dhar in his statement dated 19.11.2013 admitted that the seized goods in the hands of Sri Maran Saha were all purchased by him from different customers and out of that he had given around 1846 GM to Sri Maran Saha to hand over the same to Sri Mahesh More of Ranaghat, Nadia, where the old gold's are refined in the refinery firm. He also handed over all the supporting documents to the investigating officers evidencing licit and legal ownership of the goods in his name and the name of his firm. I find that the burden of proof on the part of the notices under Section 123 of the Customs Act has been discharged with documentary evidence. The SCN itself confirms that the old gold was deposited from different customers against received voucher.

vi) it had been recorded in the SCN that Sri Vinod Kale was not able to write in Hindi and English. Hence one Sri Vipul Yelpale co-worker of the refinery firm had written the statement of Sri Vinod kale. I find that in reply to the SCN it has been pointed out by the noticee and further submitted orally during the PH that no summon were issued to Sri Vipul Yelpale and the summon dated 08.01.2014 was issued to Sri Vinod Kale at his residence. It has also been recorded in the SCN that Sri Vinod kale was unable to write in in English, hence a co-worker of the Refinery Sri Bipul Yelpale has written the statements for Sri Vinod Kale. I find from the records that no summon has been issued to Sri Vipul Yelpale and no investigation has been conducted against him whereas I find in the Show Cause Notice he has been made a noticee. I find no valid reason for issuance of instant SCN against Sri Vipul

Yelpale. I further find that in the voluntary statement Sri Vinod Kale has stated that the "Issue & Cash Memos" were issued by him & Sri Vipul Yelpale. I find that the "Issue & Case Memos' were issued by Sri Vinod Kale in English vernacular which is contrary to the claim of the investigation. However, ongoing through the submission/voluntary statement of Sri Vinod kale I find that he has admitted to have taken up the process of purifying old gold and on completion of the process casted the pure gold of 99.5% purity to heart/leaf shaped solid. I find the purity attend in the process is 99.5% which is in conformity with the test results of CRCL. Whereas Sri Vinod kale in his statement stated that he did not have any evidence to prove that the work relating to issue & Cash Memos dated 20.05.2013, 17.07.2013, 04.09.2013 and 07.11.2013 were actually performed at the refinery, he has neither denied the issuance of the same as per direction of the shop owner Sri Ganesh Patel. I find no investigation extended to the end of Ganesh Patel to conclusively denied a claim of the notice and prove the issue & Cash Memos to be fake in nature. On the contrary I find that investigation has relied on conjectures and surmises in respect of the same.

vii)The recipients of the seized goods Sri Mahesh More in his voluntary statement dated 14.12.2013 admitted about his known relationship with the controlling partner of the noticee firm through their common friends Sri Ashok Shinde. The noticee claimed that his phone calls was also present in the respective phone number of Sri Maran Saha which was taken away by the investigating officers during the course of seizure. The call details had not been adduced on record failing to bring out the material facts and turn down conclusively what had been stated by Sri Maran Saha, Sri Mantosh Dhar and Sri Mahesh More. I find that lack of sustained investigation overlooking the details, lack of sufficient hard evidences to effectively turn down the claim of the noticee by the investigation and presence of documentary hard evidence on record corroborating the claim of the noticee on the contrary has contributed to the weakness of the SCN and have rendered the noticee with an opportunity to strongly defend their case."

7. We find that the gold seized were of 99.5 purity. There was no foreign marking available on the gold. In fact, they were in the shape of ornaments. The adjudicating authority has given a clear finding as to why the goods are not smuggled in nature. We agree with the findings

of the adjudicating authority. In order to seize the goods, there must be a reasonable belief that the goods are smuggled in nature. The Appellant drawn our attention to the decision of the Hon'ble Delhi High Court in the case of Shanti Lal Mehta Vs UOI and Others reported in 1983(14)ELT1715 (DEL), which elaborately dealt with Town seizures. The relevant portion of the Order is reproduced below:

> ***"54.*** *The other question which was argued before me was that the customs officer did not act on any reasonable belief when he searched the petitioner's premises on 15-12-1967 and seized the goods. Section 110 opens with the words "if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods". What is the meaning of "reasonable belief"? Did the officer entertain reasonable belief in the facts and the circumstances of this case? This is the other question to be decided. The Supreme Court has said that reasonable belief is a pre-requisite condition of the power of seizure that the statute confers on the officer. (See Collector of Customs v. Sampathu Chetty, AIR 1962 S.C. 316). The preliminary requirement of Section 110 is that the officer seizing should entertain a reasonable belief that the goods seized were smuggled.*
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> ***55.*** *Reasonable belief as required by Section 110 refers to the point of time when the goods in question are seized and not to a stage subsequent to the act of seizure. (M.G. Abrol v. Amichand, AIR 1961 Bom. 227). The condition precedent that there was such a reasonable belief anterior to the seizure must exist before the presumption under Section 123 can be invoked*
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> *xx xx xx xx xx xx xx*
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> ***58.*** *The second reason for entertaining a reasonable belief is that the seized goods were not accounted for by the petitioner on 15-2-1967 when the officer seized the goods from his possession. The seized goods consisted of 20 items of ornaments and diamonds. Out of these six items were released before the show cause notice was issued. One item was released at the adjudication stage. Six items were released by the Board on appeal. Only 7 items have been confiscated. These consist of 2 packets of diamonds and 5 ornaments. The petitioner claimed that they belonged to the queen mother of Nepal. A letter was written to queen mother. On her behalf a reply was received that she had given certain ornaments to the petitioner for polishing, remaking etc., though not for sale. But this was done later on. The letter was written on 3-7-1967. The reply was received on 24-7-1967. But*

at the time of seizure all that the officer had before him were 2 packets of diamonds and 5 ornaments. Neither the diamonds nor the ornaments had any foreign markings or label to suggest to the customs that these were smuggled goods. In the search list these two packets of diamonds are described as "appearing to be diamonds". This shows that the customs officer did not believe them to be diamonds on any reasonable ground. The ornaments had no foreign label or making. They were ordinary ornaments as are worn in this country. There was nothing peculiar about them. Nothing extraordinary. On this material could any reasonable man entertain a belief that these were smuggled goods

59. *The belief must be such as any reasonable man in the circumstances of the case would entertain about the existence or non-existence of a thing. Simply because the goods were not accounted for at that time does not necessarily mean that the goods were smuggled goods. Unaccounted goods may be stolen goods. Reasonable belief could be entertained either on the basis of some external indicia or on the basis of some internal information that the goods had been illegally imported into India from Nepal or some other foreign country either without payment of duty or in contravention of any restriction or prohibition imposed by statute. There was nothing to suggest the foreign origin of the goods. There was nothing to suggest the illegal importation of the goods into the country.*

60. *The goods must be smuggled goods. The word `smuggled' means that the goods were of foreign origin and they had been imported from abroad. Only then does the presumption under Section 123 arise. The goods themselves did not suggest that the petitioner was an old smuggler or a dealer in smuggled goods. If there was such information with the customs, they ought to have disclosed it. The goods themselves did not suggest any illicit importation. Nor was there any inscription on the goods which could be the basis of the reasonable belief that the goods were of foreign origin. There was nothing in the appearance of the goods to suggest that they had been newly manufactured and brought into this country very recently from another country. In a word there was nothing absolutely from which inferences about their origin or recent import could arise. It was not a case where large quantity of gold with foreign markings was found hidden in the trousers of the accused as happened in Hukma v. State of Rajasthan, AIR 1965 S.C. 476.*

61. *In fact there is a finding by the Board in favour of the petitioner supporting his contention that there could be no reasonable belief in the mind of the officer when he seized the goods. On the penalty of Rs. 25,000/- imposed on the petitioner the Board observed : "there is no definite evidence to show that the appellant knew or had reason to believe that those items were smuggled. In the absence of this evidence the penalty imposed is not justified. The Board accordingly remits the* *personal penalty in full". If the petitioner did not know that the goods were smuggled, how could the customs officer reasonably believe that the goods were smuggled. The petitioner knew better.*

62. *The customs officer merely thought that as the goods had not been accounted for these are smuggled goods. At the time of seizure what happened was this. The petitioner was present at the shop. He told the customs officer that they were duly entered in his account books but his accountant had gone to the income tax officer. The officer did not wait for the man to arrive to explain the entries to him. He seized the goods and took them away. This was not a case of reasonable belief. It was a case of suspicion. A case of speculation. A case of guess work.*

63. *As a result Section 123 did not apply to the case. There was no reasonable belief. No presumption could be raised under Section 123. There was no obligation on the petitioner to prove that the goods were not smuggled. The burden of proof was wrongly cast on him. The entire inquiry was vitiated."*

8. In view of the above findings, we hold that the provisions of section 123 of Customs Act are not applicable in this case. Accordingly, we hold that the impugned order passed by the adjudicating authority is legal and proper and it does not warrant any interference. In view of the above discussions, we uphold the impugned order and reject the appeals filed by the department.

(Dictated and pronounced in the open Court)

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

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar