CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

WEST ZONAL BENCH, MUMBAI

Customs Appeal No. C/85431 of 2015

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/166/14-15 dated 13-11-2014 passed by the Commissioner Central Excise (Appeals), Nagpur.

COMMISSIONER OF CUSTOMS & CENTRAL EXCISE, NAGPUR-I,
Nagpur. ....Appellant

VERSUS

SHRI MOHD. ASHRAF ARMAR,
117, Ayesha Mahal,
Mulglihonda,
Bhatkal (Karnataka). ....Respondent

<u>APPERANCE:</u>

Ms. Trupti Chavan, Asst. Commissioner, Authorised Representative for the Appellant
None, Advocate for the Respondent

CORAM: HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86046/2019

Date of Hearing: 22-01-2019
Date of Decision: 22-01-2019

PER: DR. SUVENDU KUMAR PATI

1. Modification of order for confiscation of gold passed by Jt. Commissioner vide Order-In-Original No. 01/SBA/JC/CUS/2014 dated

27-05-2014 by the Commissioner (Appeals), Central Excise and Customs, Nagpur is assailed by the Department in this appeal.

Factual backdrop of the case is that Appellant was caught red-handed on 22-3-2013 from Nagpur Air Port while carrying 1200.950 gm of gold valued at ₹ 27,02,137.50 beneath his socks to evade Customs duty of ₹ 9,74,121/-. Proceeding was initiated against him and vide Order-In-Original dt. 27-5-2014, order was passed for absolute confiscation of sized gold along with penalty of Rs. 6,75,000/- under section 112(a) and 112(b) and penalty of ₹ 75,000/- u/s 114AA of Customs Act, 1962. In the appeal before the Commissioner (Appeals), he modified the Order-In-Original by setting aside absolute confiscation and imposing fine of ₹ 5,50,000/- under section 125 (I) of Customs Act, 1962 subject to payment of appropriate customs duty along with interest in terms of Section 125 (2) of Customs Act, 1962. He confirmed penalty imposed on the appellant under section 112(a) and 112(b) Customs Act 1962 and under Section 114AA of the Customs Act, has been imposed in the Order-In-Original.

2. In the memo of Appellant and during course of hearing of the appeal, Learned Authorised Representative for Appellant's Department Ms. Trupti Chavan, Asst. Commissioner with reference to judicial decisions reported in *2003 (155) e.l.t. 423 (S.C.) Omprakash Bhatia v. Commissioner of Customs, Delhi and 2016 (341) E.L.T. 65 (Mad.) Malaar Diamond Gallery P. Ltd. v. Addl. Dir. General, Directorate of Revenue intelligence, Chennai vis-à-vis.* interpretation made therein

for "prohibited goods", as define in Section 2(33) Customs Act 1962, argued that if conditions and restrictions of import are not fulfilled before or after clearance of goods, the same goods may amount to "prohibited goods" for which absolute confiscation order was rightly passed by the adjudicating authority. He also submitted that Appellant's case is not covered under import of gold permitted in baggage nor under notification no. 12/2012, Cus. dt. 17-3-2012 meant for eligible passengers who can bring gold into the country on payment of concessional rate of duty and the intention of the Appellant to evade duty was not only apparent from his conduct in hiding gold and going through green channel during customs clearance at Airport but also from his unrebutted statement recorded by Customs Officer for which he prays to set aside the order passed by Commissioner Appeals.

3. Respondent remained absent during hearing of the appeal.

4. We have perused the case record as well as judgment passed by the Hon'ble Supreme Court, Delhi in Om Prakash Bhatia's case. Relevant interpretation of "prohibited goods", as made in para 9 of the said judgement is reproduced below for ready reference:

> *" From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include* ***any such goods*** *in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be*

prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in Shekih Mohd. Omer v. Collector of Customs, Calcutta and Others [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negative the said contention and held thus:-

'…What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restrictions is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues".

5. Going by the bare reading of the said interpretation, it can be said that in the definition of prohibited goods in terms of section 2(33) of the Customs Act, 1962, any such goods means any such restricted and prohibited goods ant not any other goods. It is in this contest the whole analyses of prohibited goods is made by the Hon'ble Apex Court

and not in respect of any other goods other than prohibited and restricted goods. Gold being a permitted goods for importation, cannot be said to be restricted goods in applying such an interpretation but ceiling on the maximum quantity that could be imported could never be equated with restriction or prohibition to such importation. Admittedly, Appellant's intention to evade duty by suppressing such import is apparent on record for which Commissioner (Appeals) has rightly confirmed fine and penalty under relevant provisions of the Customs Act but absolute confiscation of gold, which is permitted to be imported to India, solely on the ground that it was brought in concealment cannot be said to be in confirmity to law or contradictory to decision of Hon'ble Apex Court given in Om Prakash Bhatia's case. Hence the order.

6. Appeal is dismissed and the Order-In-Original No. 01/SBA/ JC/CUS/2014 dated 27-05-2014 passed by the Commissioner Appeals is hereby confirmed.

(Dictated & pronounced in open Court)

(DR. SUVENDU KUMAR PATI)
MEMBER (JUDICIAL)

(C J MATHEW)
MEMBER (TECHNICAL)

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