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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 26th September, 2019

+ CUSAA 25/2019

PRINCIPAL COMMISSIONER OF CUSTOMS..... Appellant
Through: Mr. Amit Bansal and Mr. Aman
Rewaria, Advs.

versus

AHAMED MUJJABA KHALEEFA Respondent
Through: Mr. Pramod Kumar Sharma,
Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER
26.09.2019

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D.N. PATEL, CHIEF JUSTICE (ORAL)

CUSAA 25/2019

1. This appeal was admitted for the following substantial questions of law :

“i. Whether the Ld. CESTAT has failed to appreciate that the Commissioner, (Appeals) has relied upon evidences i.e. invoices/bills which were not produced at the time of investigation and adjudication proceedings ?

ii. Whether the Ld. CESTAT failed to appreciate that the onus of proving that the goods are not smuggled falls under the ambit of Section 123 and accordingly the burden of proving the fact that the goods are not smuggled and have been purchased locally shall be on the person from whose possession the goods were seized ?;

iii. Whether the Ld. CESTAT failed to appreciate that the statement of the Respondent under section 108 of the Customs Act, 1962 was corroborated by circumstantial evidences viz travel ticket, boarding card, baggage tag, Railway tickets etc for reaching conclusion of smuggling of gold by him ?”

2. Four packets of gold jewellery, weighing 2.015 kgs and valued at ₹ 47,55,400/- allegedly concealed by him in his underwear, were seized, from the respondents, on 1st February, 2013, when he was about to board Train No. 12172 at Hazrat Nizamuddin Railway Station. The printout of a ticket of Indigo Airlines, in the name of the respondent, for Flight No. 6E-24, of the same day, i.e., 1st February, 2013, was also seized, whereunder the respondent had travelled from Dubai to New Delhi, along with the Boarding Card for the said flight.

3. The seizure was effected under *Panchnama*. The statement of the respondent was, thereafter, recorded under Section 108 of the Customs Act, in which he admitted that the seized gold jewellery had been brought, by him, from Dubai, concealed in his underwear. He further deposed that the jewellery had been given to him in a shop by two persons namely, Imtiaz and Azim, who worked as salesmen in a

gold jewellery shop, and the jewellery was required to be delivered to a recipient in Mumbai.

4. As the respondent had been unable to produce any document or other evidence, evidencing licit possession of the aforesaid gold jewellery, by him, a **Show Cause Notice**, dated 16th July, 2013 was issued to him, by the Additional Commissioner of Customs (Preventive), requiring the respondent to show cause against the confiscation of the seized gold under Section 111(d), (i) and (m) of the Customs Act, 1962, as also against the imposition of penalty.

5. Adjudication of the aforesaid Show Cause Notice, dated 16th July, 2013, resulted in the passing of **Order-in-Original**, dated 9th January, 2014, by the Additional Commissioner, whereby the aforesaid seized gold jewellery, weighing 2.015 kg, was absolutely confiscated under clauses (d), (i) and (m) of Section 111 of the Act, and penalty of ₹ 25 lakhs was imposed on the respondent under Section 112 thereof.

6. The respondent appealed, against the said Order-in-Original, to the Commissioner of Customs (Appeal) (hereinafter referred to as “the Commissioner (Appeals)”).

7. Vide **Order-in-Appeal**, dated 9th March, 2015, the Commissioner (Appeals) allowed the appeal of the respondent, and, thereby, reversed the aforesaid Order-in-Original, dated 9th January, 2014 of the Additional Commissioner.

8. Observing that foreign markings were not contained on all the seized jewellery, the Commissioner (Appeals) held that the allegation of smuggling of the seized gold could not be fastened, on the respondent, solely on the basis of the confessional statement recorded from him, in the absence of any corroborative evidence. It was further observed, by the Commissioner(Appeals), that the seizure of the gold from the respondent, at the Hazrat Nizamuddin Railway Station, even if viewed in conjunction with the fact that the respondent had, admittedly, travelled from Dubai to New Delhi on the same day, i.e. 1st February, 2014, could not lead to any incontrovertible finding that the gold jewellery had, in fact, been smuggled by the respondent, or even carried by him, from Dubai to New Delhi. The Commissioner (Appeals) noted that the respondent had, in fact, stated that the gold jewellery had been handed over, to him, outside the IGI Airport, New Delhi and had also submitted copies of invoices/bills, against which the jewellery was stated to have been purchased by him. This, according to the Commissioner (Appeals) resulted in a “plausible contention” having been made out by the respondent.

9. The Revenue appealed, against the aforesaid Order-in-Appeal, dated 9th March, 2015, of the Commissioner (Appeals), to the Customs and Service Tax Appellate Tribunal (hereinafter referred to as “the CESTAT”).

10. Vide the impugned final order, dated 15th May, 2018, the appeal, of the Revenue, was dismissed by the CESTAT. The

CESTAT held that the case of the Revenue was entirely dependent on the confessional statement of the respondent. The CESTAT concurred with the observations, of the Commissioner (Appeals), that the fact of his having travelled from Dubai to New Delhi, on 1st February, 2013, when seen in conjunction with the fact of his having proceeded to the Hazrat Nizamuddin Railway Station, on the same day, did not necessarily prove that the gold, seized from the respondent, was, in fact, smuggled by him from Dubai. Inasmuch as the respondent had produced invoices, under which, purportedly, he had purchased the gold – which was subsequently seized – within India, the CESTAT held that the Revenue had been unable to conclusively make out a case of smuggling of gold by the respondent.

11. Aggrieved thereby, the Revenue has preferred the present appeal, before this Court under Section 130 of the Customs Act.

12. We have heard Mr. Amit Bansal, learned Senior Standing Counsel for the appellant and Mr. Pramod Kumar Sharma, learned counsel for the respondent, at considerable length.

13. In our considered opinion, it is not possible to sustain either the Order-in-Original of the Commissioner (Appeals), or the impugned final order, dated 15th May, 2018, passed by the CESTAT.

14. Gold is notified under Section 123 of the Customs Act, which reads thus:

“123. Burden of proof in certain cases.—

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold [and manufactures thereof] watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify.

(Emphasis supplied)

15. Being a notified item, the burden to prove that the gold jewellery was not smuggled, was on the respondent.

16. Concededly, the respondent had travelled from Dubai to New Delhi on 1st February, 2013. The gold was seized, from the possession of the respondent on the very same day, i.e. 1st February, 2013, from the Hazrat Nizamuddin Railway Station.

17. There could, therefore, be only one of two possibilities, i.e., either that the respondent had, in fact, smuggled the gold from Dubai,

by air or that, as he sought to contend, the gold had been sold to the respondent within India, after he had left the airport.

18. Though the appellant, predictably, sought to adopt the latter stance, his statement, under Section 108 of the Act, confessed that he had, in fact, smuggled the gold from Dubai to New Delhi by air, on route to Mumbai where it was to be delivered.

19. The said statement, which is admissible in evidence, was never retracted by the appellant. Neither is there any evidence to indicate that the statement was recorded under coercion.

20. Though the appellant maintained that he had purchased the gold within India, the identity of the purchaser remain undisclosed during investigation as well as during adjudication, and it was only at the stage of appeal, before the Commissioner (Appeals) that the appellant belatedly produced documents, purportedly invoices whereunder he had purchased the gold.

21. There is no explanation forthcoming as to why, if, in fact, the gold had been purchased by the appellant within India, the aforesaid invoices were not available with the respondent till the stage of appeal.

22. Cases, such as this, involve mere assessment of facts, and it is not expected, either of the adjudicating, or of the appellate authorities, to strain at their sinews, in order to hold either in favour of the assessee or in favour of the Revenue.

23. A common sense approach is required to be adopted.

24. We find, from a reading of the Order-In-Original of the Commissioner (Appeals) that he has merely referred to various judicial pronouncements, instead of dispassionately appraising the facts before him.

25. We are unable to subscribe to the view, held by the Commissioner (Appeals) and endorsed by the Tribunal, that the respondent had succeeded in discharging the onus, cast on him by Section 123 of the Act, to prove licit acquisition of the gold jewellery seized from his possession. The quantity seized was not-miniscule, but was over two kilos.

26. The belated explanation of the respondent, at the stage of appeal, that the gold had been sold to him in India, and was intended to be given to some undisclosed person in Mumbai, is too facile to merit acceptance.

27. We are, therefore, persuaded to believe the un-retracted confessional statement of the respondent under Section 108 of the Act that, in fact, he had smuggled the gold from Dubai.

28. Close on half a century ago, a three-Judge Bench of the Supreme Court held, in *Balumal Jamnadas Batra v. State of Maharashtra, 1983 (13) E.L.T 1558 (SC)* that, in the case of goods, which were notified under Section 123 of the Act, the benefit of doubt

would enure in favour of the accused, if he could prove that he was an innocent receiver of smuggled goods – or, needless to say, in licit possession of the goods seized from him.

29. The Supreme Court, in that case, held that the very appearance of the goods, and the manner in which they were packed, indicated that they were newly manufactured and brought into India very recently from another country. Reliance was placed, by the Supreme Court, on the conduct of the appellant in that case, including his untruthful denial of the possession, as indicating the smuggled character of the goods.

30. Borrowing a leaf, as it were, from the said decision, in the present case, we are of the opinion that the facts that (i) the respondent had admittedly travelled from Dubai to India on the day when the gold was seized from him, (ii) the gold was over 2 kg in weight, (iii) neither during investigation, nor at the stage of adjudication, did the respondent disclose any evidence, or even reveal the name of the person who, purportedly, had sold the goods to him in India, or the person to whom the goods were to be delivered in Mumbai, (iv) in his statement, under Section 108 of the Act, the respondent categorically admitted having smuggled the gold from Dubai to India and (v) the said statement was never retracted, seen in conjunction, clearly belie the respondent's assertion that he had come into possession of the seized gold by licit means.

31. These facts, cumulatively seen, in our view, clearly indicate that the seized gold was smuggled.

32. We are of the opinion that the respondent cannot be said to have successfully discharged the burden, cast on him by Section 123 of the Act, to prove licit possession of the seized gold.

33. In view of the aforesaid provisions of the law and the facts and the judicial pronouncement, the respondent could not explain the possession of the gold which is 2.015 kgs and looking to the statement under Section 108 of the Customs Act, 1962 of the respondent, also no explanation has been given as to who has given the gold to the respondent when the goods were seized.

34. The substantial questions of law, as framed by this Court on 9th August, 2018, in the present case, are, therefore, answered in favour of the Revenue and, against the respondent.

35. In view of the aforesaid reasons, the aforesaid questions are answered accordingly, this appeal is allowed and disposed of.

CHIEF JUSTICE

C.HARI SHANKAR, J.

SEPTEMBER 26, 2019/kr/dsn