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

\+ CUSAA 66/2024

COMMISSIONER OF CUSTOMS .....Appellant

Through: Mr. Harpreet Singh, SSC with Ms. Suhani Mathur, Mr. Jatin Kumar Gaur, Mr. Munshir Khan, Mr. Parasram Bairagi, Mr. Sandeep Raj, Ms. Anushka Chowdhary & Mr. Inder Kumar

versus

RAJESH BHOLA .....Respondent

Through: Mr. Kishore Kunal & Mr. Bhushan Kumar Bansal, Advocates

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **30.07.2024**

CM APPL. 42917/2024 (Ex.)

Allowed, subject to all just exceptions.

This application stands disposed of.

CM APPL. 42918/2024 (172 Days Delay)

Bearing in mind the disclosures made, the delay of 172 days in filing the appeal is condoned.

The application shall stand disposed of.

CUSAA 66/2024

1. This appeal is directed against the order of Customs, Excise & Service Tax Appellate Tribunal ["**CESTAT**"] dated 24 July 2023. We note that upon taking into consideration the facts which had been

gathered in the course of inquiry, the CESTAT has ultimately held as follows:-

> "**9.** In order to consider the two issues, it would be appropriate to recall in gist, the impugned order. We note that the Commissioner Appeals has observed that despite various confessional statements of the Appellant, substantial quantity of gold, gold coins and jewellery had been released to him during the investigation itself. This fact itself is evidence that the confessional statement of the Appellant has no evidentiary value. He has further held that as per the report of DRI, DZU dated 12.02.2020, Panchnama dated 31.01.2020 and the photographs that out of total bullion of 2567.509 gms, 700 gms has MMTC PAMP markings, 190 gms bore markings of several Indian Banks & Jewellers and 679.84 gms had no markings to indicate its foreign origin. **He has gone on to observe that gold bullion weighing 999.02 gms has clear foreign markings.** Therefore, he has upheld the confiscation of the gold bullion bearing foreign markings. As regards 22 carat jewellery confiscated by the adjudicating authority, Commissioner (Appeals) has noted that the appellant is in family business of gold, gold coins and gold jewellery. He has explained the source of the jewellery as ancestral property and some quantity has also been declared in his VDIS declaration and wealth tax returns. The Commissioner (Appeals) has gone on to hold that the primary requirement of Section 123 of the Customs act 1962, is that there has to be reasonable belief that the goods are smuggled goods. There is no record or evidence with the Department that the jewellery was made out of smuggled gold. He has also noted that the original intelligence based on which such searches were conducted by DRI related to appellant's engagement in illegal procurement of smuggled gold coins of foreign make with markings of King Edward and Elizabeth and storage of huge quantity of gold coins in shops as well as residential premises of the Appellant. There was no intelligence of conversion of such smuggled gold into jewellery. Therefore he released the jewellery, which had been confiscated. With reference to the gold coins confiscated by the adjudicating authority, the Commissioner (Appeals) has observed that 1236.91 gms of 22ct purity coins carry images of various Indian Banks, Indian jewellers, and companies such as Reliance etc. The gold coins that do not bear foreign markings cannot be suspected to be of smuggled nature. Some coins carry BIS Hallmark stamp which negates their foreign origin. However,2807.29 gms of gold coins of 22carat purity bore the images of King Edward, Elizabeth and images similar to those present on foreign coins and did not bear any BIS Hallmark. He has concluded that no evidence has been produced by the Appellant to indicate licit possession of such clearly foreign marked gold coins. Therefore, the Commissioner (Appeals) has

upheld the confiscation of coins weighing 2807.29 gms.

10. It is in the above factual matrix that we consider the issues before us. As regards the first issue, we note that the critical evidence on which the entire case has been based is on the statements dated 27.04.2017, 28.04.2017 and 29.04.2017 of the appellant, wherein he has stated that he had no bills/invoice for the gold with foreign markings. These statements have subsequently been retracted before the appropriate authority by the appellant. There are no other corroborative evidences which have been unearthed by the investigating team in support of their contention. We find that the appellate authority has concluded that sufficient independent evidence needs to be adduced to corroborate the department's contention regarding smuggled nature of the gold and in the absence of the same, it cannot be concluded that all the gold which was seized from the **business** & residential premises was smuggled. He has relied on the following decisions that support his conclusion:

> (i) Directorate of Revenue Inteligence vs Mahendra Kumar Singhal [2016(333)ELT(250) Del] of Delhi High Court where in the HighCourt relied on Supreme Court's decision in the case of Vinod Solanki vs Union of India which held that there can be conviction only if there is an independent corroboration of the retracted statement.
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> (ii) Ajit Singh vs Addl Commissioner of Customs [2016(332) ELT 01(Del)] of Delhi High Court wherein the Court held that if thestatement made by an accused under section 108 of the Customs Act has been retracted later, then it must be corroborated by other evidences and materials on record.
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> (iii) PunidhapuLokeswara Rao vs Commissioner of Cus(Prev), Calcutta [2003 (161) ELT 1016(Tri-Kolkata) which was subsequently upheld by the Calcutta High Court. The Tribunal had observed "it is well settled proposition of law that confessional statements need independent corroboration"

11. We note that there are catena of decisions that have consistently held that retracted statements cannot be the sole basis for action under the Customs Act without any independent corroborative evidence. This is further buttressed by the Tribunal's decision in the case of **Priya Ltd vs Commissioner of Customs (Import), Mumbai [2019 (370) E.L.T. 1668 (Tri. - Mumbai)]**, where it was held:

> "6. ....According to Learned Authorised Representative, the statement of the Director of the importing-company which has admitted to the misdeclaration and has confirmed the various acts of omission and commission made with that intent needs no further corroboration. It is also submitted that the deposit

of a substantial portion of the demand by the appellant during investigation attests to the genuineness of this admission. Learned Counsel, however, submits that the deponent of the statement had retracted it before a notary public and the affidavit, sworn for that purpose, elaborates on the limited aspects of the correspondence between import and export packages that was grossly exaggerated in the impugned order.

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8. According to us, the decision in re K.I. Pavunny doubtlessly permits reliance upon a confession to suffice but, nevertheless, the admonition to exercise prudence in practice by corroboration with other evidence cannot be ignored. Referring to the decision of the Tribunal in Sidhharth Shankar Roy v. Commissioner of Customs, Mumbai [2013 (291) E.L.T. 244 (Tri.—Mumbai)], Learned Authorised Representative contends that retraction of statement is not in conformity with the test prescribed therein and must be rejected. The circumstances in which the statement of the appellant therein were accorded special importance is no template for the present dispute. It's also the contention of the Learned Authorised Representative that substantive difference between Section 28 of Customs Act, 1962 and Section 11A of Central Excise Act, 1944 has been commented upon in Associated Cement Companies Ltd v. Commissioner of Customs [2001 (128) E.L.T. 21 (S.C.)] to support the contention that, for demand of duty under Section 28, there is no requirement for establishing a motive.

9. Considering that the adjudicating authority has placed overwhelming reliance on the statement of the Director and as the retraction of that statement has not been taken into consideration, we are of the opinion that the adjurement in re K.I. Pavunny mandates independent corroboration. The declaration in the shipping bill, according to us, in the absence of any other evidence must be accepted as truthful assertion of the contents therein. The impossibility of carrying such large number of CDs in the corresponding import package within the declared weighment would lend credibility to the argument of the Learned Counsel that nothing other than stickers and licence had been imported. It is also surprising that, along with revision of the classification, the adjudicating authority compelled a change in the description of the imported goods. We failed to see the necessity for, or logic of, that."

11. We note in the instant case, the Appellate authority has rightly

held in para 5.3.5 of the impugned order that "in view of the above, any conclusion that the seized gold, gold coins and jewellery which was not released and which has been subsequently confiscated were smuggled into India or made from the smuggled gold, on the basis of the statements of the appellant dated 27.04.2017, 28.04.2017 and 29.04.2017 is not sustainable". In the light of several decisions which have also been relied upon by the Commissioner (Appeals) in the impugned order, we are, therefore unable to accept the contention of the department that the statements were tendered voluntarily by the appellant and its subsequent retraction is a mere afterthought."

2. As is manifest from the above, both the appellate authority and the CESTAT have considered the requirement of bifurcating gold which has been seized into those which could be identified with Indian markings and those which had foreign marks. It is in respect of the case of gold which had foreign marks alone that the charge of smuggling has come to be upheld.

3. In light of the aforesaid, we find no merit in the instant appeal. The same shall accordingly stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 30, 2024/RM