

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 52607 of 2019

(Arising out of order-in-appeal No. CC(A) CUS/D-II/Prev./536/2019-20 dated 17.01.2019 passed by the Commissioner (Appeals), New Customs House, New Delhi).

Anand Aggarwal

FF5, 13/41, Punjabi Bagh West
New Delhi.

Appellant

VERSUS

Commissioner of Customs (Prev.)

New Custom House, Near IGI Airport
New Delhi.

Respondent

APPEARANCE:

Sh. Rajesh Rawal, Advocate for the appellant

Sh. Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. 50518/2022

DATE OF HEARING: 18.01.2022

DATE OF DECISION: 16.06.2022

ANIL CHOUDHARY:

During the course of the search in the case of M/s Bright Traders, the follow up action search was conducted at the residential premises of Sh. Anand Aggarwal – the appellant, located at FF-5, 13/41, Punjabi Bagh West, New Delhi. During the course of the search, two yellow Gold bars engraved with the markings HERAEUS 9950, 1 kilo (on each bar) of 24 carats (9950) purity, totally weighing 2 kgs. and Indian Currency amounting to Rs. 11.31 lakhs were recovered and resumed vide panchnama dated 24.04.2017. The two gold bars were examined and appraised vide panchnama dated

24.04.2017 by the jewellery appraiser on 24.04.2017 itself. The jewellery appraiser had participated in the said panchnama proceedings and valued the 'two gold bars' engraved with the markings HERAEUS 9950, 1 kilo (each bar) 24 carats (9950) purity, totally weighing 2 kgs. at Rs. 59,10,000/-.

2. Summons were issued to the appellant on 22.05.2017 to appear on 30.05.2017. The appellant did not present himself before the summoning authority but vide letter dt. 30.05.2017 informed that he was busy in family social matter and hence, was unable to present himself before the summoning authority and requested for adjournment of the hearing for the next date. Accordingly, the appellant was issued summons again on 31.05.2017 to appear on 05.06.2017.

3. The appellant presented himself before the authority on 05.06.2017 and his voluntary statement was recorded under Section 108 of the Customs Act, 1962 wherein he, inter alia, stated that he started a proprietorship concern in the name of M/s New Sky International, 63/12B, Rama Road, New Delhi in the year, 2006; that the said firm used to import sanitary ware, PVC resin, mobile phones till, 2013 but was presently engaged in the local trading of the mobile phones; that he accepted the recovery of the two gold bars of 1 kg. each and cash of Rs.11,31,000/- resumed from his residence vide panchnama dated 24.04.2017; that regarding the recovery of two gold bars, he stated that both the gold bars were gifted by his in laws on the occasion of the marriage of his daughter solemnised on 19.01.2017; that 1 kg. gold bar was gifted to his wife by his father in

law and another 1 kg. gold bar was gifted by his brother-in-law to his daughter; that he submitted the 'Deed of Gift' dated 17.01.2017; that the source of the gold bars could be explained only by his brother in law, Sh. Arvind Jalan and father in law, Sh. Chandi Prasad Jalan; that he provided the residential address of both Sh. Arvind Kumar Jalan and Sh. Chandi Prasad Jalan; that his daughter, Smt. Shyama Agarwal had given her 1 kg. gold bar (gifted by her maternal uncle) to his wife for safe custody; that regarding the source of Rs.11,31,000/- found at his residence, he stated that the cash resumed was the sale proceeds of his firm, M/s New Sky International and he submitted the cash book of M/s New Sky International, for the month of April, 2017 (24.04.2017 to 14.04.2017); that the cash was the sale proceeds of the trading of the goods, mobile phones; that he would submit the copies of the VAT returns for the period from April, 2016 to April, 2017, income tax returns for the last two years and cash sales invoices for the month of April, 2017 within a week.

4. Since, the appellant had revealed that the gold bars recovered and resumed from his residence were gifted to his daughter and wife by his in laws, summons were issued to Sh. Arvind Jalan and Sh. Chandi Prasad Jalan on 15.06.2017 to appear on 30.06.2017 but none of them appeared. Sh. Arvind Jalan vide letter dated Nil informed this office that he was to attend a marriage function on 30.06.2017 outside Ahmedabad and requested to exempt from the summons date. He further informed that he would voluntarily join the investigations between 3rd to 5th July depending on the availability of the tickets. Sh. Chandi Prasad Jalan vide his letter dated Nil, informed

that due to his physical condition he was not able to undertake a long journey and requested to permit his son to appear on his behalf. He also informed that his son would appear voluntarily between 3rd to 5th July, 2017 depending on the availability of the tickets.

5. None of them appeared as committed vide their letter dated Nil, summons were again issued to both of them on 17.07.2017 to appear on 28.07.2017 but again neither of them appeared. Summons were again issued to both of them on 01.08.2017 to appear on 11.08.2017 and again none of them appeared. Summons were again issued on 04.09.2017 to appear on 18.09.2017 with a covering letter mentioning clearly that, if they did not appear this time then it would be presumed that the gold bars recovered and resumed from the residential premises of the appellant were smuggled gold bars. This time also none of them appeared or sent any reply to the summons issued.

6. In spite of several summons issued to them, they have not joined the investigation by not complying the summons. Further, they have not submitted any legal documents evidencing the legal possession of the said goods as required under Section 123 of the Customs Act, 1962. Also, the appellant did not produce any legal documents evidencing the licit possession of the said two gold bars recovered and resumed from his residence on 24.04.2017.

7. The said two (2) gold bars of foreign origin, collectively weighing 2000 grams were valued at Rs. 59,10,000/- which were recovered and resumed from the residential premises of the appellant

at FF-5, 13/41, Punjabi Bagh West, New Delhi, and appeared to be illegally possessed as the appellant could not produce any legal documents for possession of the same, the said two (2) gold bars were placed under seizure vide seizure memo dated 03.10.2017 under the provisions of Section 110 of the Customs Act, 1962 on a reasonable belief that the said two (02) gold bars were liable for confiscation.

8. The appellant as promised in his statement dt. 05.06.2017 recorded under Section 108 of the Customs Act, 1962, submitted the copies of the Sale Ledger Account, Cash Sales Invoices/ vouchers for the period 01.04.2017 to 14.04.2017 and Sales Tax return of M/s New Sky International owned by him, for the period April, 2016 to June, 2017 evidencing the sale proceeds in support of the cash amount of Rs. 11,10,000/- resumed from his residence. The said documents were submitted vide letter dt. 23.06.2017. The sales invoices, Sale Account Ledger were scrutinized vis-a-vis Sales Tax Returns and same were found in order.

9. The appellant in his statement dated 05.06.2017 had revealed that both the gold bars were gifted by his in laws, Sh. Arvind Jalan and Sh. Chandi Prasad Jalan to his daughter and wife. Therefore, both were issued four summons each, but neither of them appeared before the summoning authority nor did submit any documents evidencing the source of two gold bars of foreign origin found in possession of the appellant. Hence, summons were again issued to the appellant on 11.10.2017 to appear on 13.10.2017.

10. Whereas the appellant appeared on 13.10.2017 and his voluntary statement was recorded on 13.10.2017 under Section 108 of the Customs Act, 1962 wherein he, inter alia, stated that the two (1 kg. each) gold bars gifted to his wife and daughter had already been consumed in making of jewellery for his daughter in her marriage solemnized on 19.01.2017; that two kgs. of gold bars of foreign origin recovered and resumed from his residence on 24.04.2017, are the gold bars which were lying with him for many years; that he did not remember the source of purchase of the said two gold bars of the foreign origin; that as far as he remembered the two gold bars were purchased from the open market; that he did not possess any purchase bills for the said two gold bars.

11. On the basis of investigation it has been alleged that the two gold bars were found engraved with the foreign markings HERAEUS 9950, 1 kilo (on each bar) of 24 carats (9950) were illegally smuggled. On the reasonable belief that the goods i.e. two yellow gold bars found engraved with HERAEUS 9950, examined and appraised vide panchnama dated 24.04.2017 found in possession of appellant, for which no legal documents could be produced by him, were smuggled in contravention of provisions of the Customs Act, 1962, hence were liable for confiscation.

12. Thereafter, the appellant vide his letter dated 14.10.2017 retracted both his statements dated 05.06.2017 and 13.10.2017, which were recorded under Section 108 of the Act inter alia stating that the statements were not voluntary statement, and he was pressurised to sign on the statement as recorded and dictated by the

Officer. In view of the aforementioned premises, it appeared to Revenue that the appellant has failed to discharge the onus on him under Section 123 to explain the licit source of acquisition of the gold having foreign marking. Further, the explanation he has given regarding gift, he is not able to corroborate the same and thereafter he has again stated that the gold received earlier in gift was used in making of jewellery and the gold under seizure was acquired several years back by way of purchase, but he does not have any documents in support. Thereafter, again by letter dated 14.10.2017 addressed to the Department, he submitted that the two gold bars of foreign originated were inherited by him from his father. Accordingly, the Department issued show cause notice dated 23.10.2017, requiring the appellant to show cause as to why not the gold bars of totally weighing 2000 gms., which appeared to be of foreign origin having market value of Rs.59,10,000/- be not confiscated under the provisions of Section 111(d) and (l) of the Act with further proposal to impose penalty under Section 112(a) and 114AA of the Customs Act, 1962.

13. The appellant contested the show cause notice and filed reply inter alia stating that the subject two gold bars were owned by his late father Sh. Mohan Lal Aggarwal. His late father during his life time had executed a will on 15.02.1999 with regard to his movable and immovable property. Under the said will his father has bequeathed the said two gold bars to him, which has been recovered and seized from his possession. It was further submitted that his father has passed away on 13.03.1999, and thereafter the death of his father, he was owner of the gold bars weighing 2000 gms. having foreign marking.

He further mentioned that he had brought the fact of will to the knowledge of the officer at the time of search/ investigation. However, the same was not considered.

14. The show cause notice was adjudicated by the Additional Commissioner who has accepted the explanation regarding the cash of Rs.11.10 lacs. As regards the two gold bars, it was observed that the appellant has changed his stand. He initially stated that these belong to his wife and daughter who have received the same in gift, and thereafter again he has changed his version but not produced the documents in support, and now at the adjudication stage he has come out with the third version that he has received the two gold bars from his father as per the will executed by his late father (died on 13.03.1999). It was further submitted that the appellant has submitted the copy of will of his father dated 15.02.1999. Learned Additional Commissioner observed that the appellant did not submit the copy of will at the time of investigation and have subsequently produced copy of unregistered will during the adjudication proceedings, which is almost after lapse of nine months from the date of search and recovery. Thus, the genuineness of the will was doubted and it was held that the appellant has failed to discharge the onus under Section 123 of the Customs Act and accordingly confiscation of the two gold bars was ordered by the adjudication order under Section 111(d) and (l) of the Act. Further, penalty of Rs. 5 lakhs was imposed under Section 112(a) and penalty of Rs. 1 lakh under Section 114AA of the Customs Act.

15. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), inter alia mentioning that his father had executed a will during his life time with regard to immovable and movable properties. By the same will he had bequeathed his valuables lying in the house, locker or anywhere else to his younger son Sh. Sandeep (brother of appellant). Further, he has bequeathed his movable assets, fixtures furniture, shares, cash, fix deposits as well as residential flat No. FF-5, 13/41, Punjabi Bagh West, New Delhi to his wife Smt. Sushila, mother of the appellant. By the same will he has bequeathed the two gold bars HERAEUS 9950, to his elder son - the appellant herein. Thus, the Court below has erred in rejecting the will and/or disbelieving the will. It was also urged that request for cross-examining the jewellery appraiser have been wrongly denied. He also relied on the rulings in the case of –

- (i) Ashraf Puliyyulla Parambil vs. CC, Chennai - 2007 (213) ELT 555 (Tri. Chennai)
- (ii) Nanalal K. Jain vs. CC (prev.) Mumbai - 2000 (124) ELT 401 (Tri.).

It was also urged that absolute confiscation of the gold bars is bad, without option to redeem the same.

16. Learned Commissioner (Appeals) was pleased to dismiss the appeal upholding the order-in-original.

17. Being aggrieved, the appellant is before this Tribunal inter alia on the grounds urged before the courts below. That the appellant had mentioned the fact of receiving the said two gold bars under will by succession from his late father. This contention is not by way of afterthought as alleged by the Court below, as the said contention also

finds mention in the show cause notice in para 17(ii). Thus, the Court below has committed a mistake of fact and the impugned order is vitiated. Learned Counsel for the appellant reiterates the grounds taken before the Court below and further urges that under the facts and circumstances the appellant have given a cogent explanation regarding the licit source of possession of the two gold bars. Further, the said cogent explanation was rejected arbitrarily by the Court below. It is also urged that the family of the appellant is in good financial position, which is also evident from the fact that the appellant has explained the source of cash of Rs.11.10 lacs found at the time of investigation. It is further urged that it is a matter of town seizure as the said two gold bars were recovered from the cupboard in the bedroom of the appellant. Save and except the foreign marking on the gold bars, there is no reason for the Revenue to raise suspicion of smuggling. Accordingly, the learned Counsel prays for allowing their appeal and setting aside the impugned order.

18. Learned Authorised Representative appearing for the Revenue opposing the appeal inter alia urges that as the seized gold bars are having foreign marking, it is onus on the appellant under Section 123 (i) & (ii) of the Customs Act to explain the licit source of possession of gold. As the appellant have repeatedly changed the stand regarding the source of acquisition, the Court below have rightly disbelieved the receipt of the two gold bars under will, by the appellant. It is further urged that Revenue has rightly exercised power of search and seizure which has resulted in the recovery of the two gold bars in question. Further, Section 111(d) of the Act provides that

any goods which are imported or admitted to be imported contrary to any prohibition imposed by order under this Act or any other law made for the time being in force, are liable to confiscation. Further, Section 111(l) of the Act states that any dutiable or prohibited goods found in excess than the declaration/ entry made are liable to confiscation. Learned Authorised Representative for the Revenue relies on the following rulings:-

- a) Om Prakash Bhatia -2003 (155) ELT 423 (SC)
- b) Sheikh Md. Omer – 1983 (13) ELT 1439 (SC)
- c) CC&CE, Delhi-IV vs. Achiever International 9 MANU/DE/ 6208/ 2012
- d) Jagdev Damodaran vs. Dy. Commissioner of Customs (ACC), Cochin -2017 (352) ELT 5 (Ker.).
- e) As was held by the Hon'ble Apex Court in Indu Ramchand Bharmani case 1992 (59) ELT 201 (SC), that even if the sellers have submitted the affidavits after a gap of 15 months (not at all the facts in this case) that the gold items were sold to the accused, the same shall not be reliable and the confiscation of gold items with respect to town seizure were held to be correct. In fact, the source of the gold bars in this case is not at all clear as he is repeatedly changing his statements. Thus, it would be presumed to be smuggled one as per the provisions of Sec. 123 of the Act.
- f) The appellant in order to rebut the presumptions, has taken several stands which are self-destructive, as was held by Hon'ble Delhi High Court in Indu Ramchand Bharmani case 1988 (38) ELT 459. The multiplicity of these stands by itself destroys the bonafides of any of these stands. The appellant started with one stand and ended with altogether different stand, these facts show a desperate attempt on the part of the appellant to somehow save the gold items.

Accordingly, he prays for dismissing of the appeal.

19. Having considered the rival contentions, we find that admittedly it is a case of town seizure. Further, neither there is any record of the appellant having entered into India from any foreign country during the recent past, nor any allegation that he was actively involved in smuggling of gold. Admittedly, it is a town seizure from the residence where the two gold bars in question were lying in the cupboard in the bedroom. As the two gold bars are having foreign marking, the onus is on the appellant to prove the licit source of acquisition. We find that during the course of investigation, the appellant had mentioned that the gold bars have been received from his late father, which finds mention in para 17(ii) of the show cause notice. Admittedly, the appellant has produced the copy of will at the time of adjudication proceedings. Under such facts and circumstances, we find that the Court below have erred in rejecting the will arbitrarily. We further find that the cogent explanation given by the appellant as regards receipt of the two gold bars by way of inheritance under will, have not been found to be untrue. As under the same will, late father of the appellant has also bequeathed immovable property to the mother of the appellant, thus there is hardly doubt as regards the will being not genuine. We further hold that documentary evidence is supported by oral evidence, have more weight and legality and overrides the oral statement with regard to source of the gold bars, stated initially.

20. In view of our aforementioned findings, we hold that the appellant have reasonably explained the licit possession of the two gold bars, as received by way of succession under the will of his father. But still the source of licit acquisition by father of appellant is not on record, neither the same is mentioned in the will dated 15.02.1999. Accordingly, we modify the impugned order as follows:-

- i) The order of confiscation is upheld under Section 111(m) with option to redeem on payment of duty and redemption fine of Rs.1,00,000/- (Rupees one lakh only).
- ii) Confiscation under Section 111(l) is set aside.
- iii) Penalty under Section 112(a) is reduced to Rs. 50,000/- (Rupees fifty thousand only).
- iv) Penalty under Section 114AA is set aside.

21. In the result, the appeal is allowed in part.

(Pronounced on 16.06.2022).

(Anil Choudhary)
Member (Judicial)

(Raju)
Member (Technical)

Pant