(2021) 12 CESTAT CK 0016

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 70261 Of 2020

Mahendra Kumar Bajpai And Anr. APPELLANT

Vs

Commissioner, Customs, Goods And Service Tax And Central Excise RESPONDENT

Date of Decision : 03-12-2021

Acts Referred:

Customs Act, 1962 — Section 7(1)(c), 11, 46, 108, 110, 111, 111(b), 111(d), 112, 112(b), 119, 122, 123, 135
Foreign Trade (Development and Regulation) Act, 1992 — Regulation 3(2), 3(3)
Foreign Trade (Regulation) Rules, 1993 — Rule 11, 12

Citation : (2021) 12 CESTAT CK 0016

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sl. No.,Description of the recovered gold bars,"No. of recovered

gold bars","Weight (in

grams)",Value (in Rs.)

1,Gold Bar MMTC (99.5) 9995,02,1999.100,6137237.00

2,"Gold Bar Valcambi Suisse 1 Kg. gold

999.0",06,5997.20,18411404.00

3,"Gold bar PAMP Suisse 1 Kilo gold

995.0",05,4997.000,15340790.00

,Total,13,12993.300,39889431.00

present at the time of search stated that Shri Agrawal was on tour to Jhansi for some work. Further stated that he was in the business of stock,,,, broking and also having shop in the name of Kala Jagat Jewellers, Kanpur.",,,,

12. Search was also conducted at the shop premises on the same day at Kala Jagat Jewellers, wherein nothing incriminating was recovered.",,,,

13. Follow up search was also conducted at residential premises of Shri Bajpai at Shiv Katra, Kamalpur, Kanpur on 31.01.2018, wherein also nothing",,,,

incriminating was recovered. The Customs Officers also issued summons to Shri Girish Agarwal through his wife Smt. Mohini on 31.01.2018 to,,,,

appear for tendering statement, at their office at Varanasi on 05.02.2018. However, he did not appear on the said date and thereafter another",,,,

summons on 06.04.2018 requiring presence on 15.04.2018. In response, a letter was received from W/o Shri Agrawal, informing therein that he has",,,,

not returned home and his wife has no information. Again notice issued appearance on 27.02.2018, which was also not attended. Again similar letter",,,,

of wife of Shri Girish Agrawal was received by the Customs. In response to further summons issued on 28.02.2018 for appearance on 08.03.2018, in",,,,

response a letter was received from Smt. Mohini informing that Shri Agrawal is seriously ill and undergoing treatment, he is not in a position to appear",,,,

in compliance of the summons. It was also stated that when he recovers, he will join investigation.",,,,

14. Call details of mobile No. 9336814496 of Shri Girish Agrawal had been obtained. On the basis of details a summary chart of calls between mobile,,,,

number of Shri Girish Agrawal and mobile number 9935327436 of Shri Bajpai have been prepared, which shows too many calls between them even in",,,,

odd hrs., which establishes their nexus and the involvement of Shri Girish Agrawal in the illegal trading/ sales/ purchasing of foreign origin gold bars.",,,,

15. From the aforementioned facts and circumstances, it appeared to Revenue that the seized gold bars, totally weighing 12993.30 gms. are of foreign",,,,

origin, further appeared that the gold come to India from Bangladesh and further carrying from Kolkata to Kanpur. It further appeared that Shri",,,,

Mahendra Kumar Bajpai was actively involved in carrying smuggled gold of foreign origin. It further appeared that Shri Girish Agrawal S/o late,,,,

Harishankar Agrawal resident of Kanpur, who is also Prop. of Kala Jagat Jewellers is not joining investigation and buying time. It further appeared",,,,

that it is involved in the smuggling of foreign origin gold bars in large quantity. It further appeared that he is required under Section 123 of the Customs,,,, Act wherein the case of seizure of gold on the reasonable belief that these are smuggled goods, the burden of proving that these are not smuggled",,,,

goods, is on the person from whose possession the goods were seized; and if any person, other than the person from whose possession the goods",,,,

were seized, claims to be owner thereof, also on such other person. It further appeared that both Shri Bajpai and Shri Agrawal have failed in",,,,

discharging their onus to satisfy the licit possession of gold. Accordingly, show cause notice dated 16.07.2018 was issued jointly on Shri Girish",,,,

Agrawal and Shri Mahendra Kumar Bajpai, proposing to confiscate seize foreign origin 13 pcs. of gold bars weighing 12993.30 grms. Valued at Rs.",,,,

3,98,89,431/- under Section 111(b) and (d) of the Customs Act. Further, proposing seizure of the two bags used for carrying under Section 119 of the",,,,

Act. Further, penalty was proposed on Shri Girish Agrawal and Shri Mahendra Kumar Bajpai under Section 112(b) of the Act.",,,,

16. In response to show cause notice, Shri Girish Agrawal filed his reply inter-alia stating that it is a case of town seizure and the allegation of",,,,

smuggling is not proved. Learned Counsel of Shri Girish Agrawal filed written submission at the time of personal hearing inter alia stating as follows:-,,,,

â??The Officers of GRP intercepted one person Sh. Mahendra Kumar Bajpai s/o late Mohan Lal Bajpai r/o 6/37, shivkatra Kamalpur,",,,,

Harzinder Nagar, Kanpur. During the search of the said person the officers found 13 pieces of foreign origin gold under the presumption",,,,

that the said foreign origin gold bars were brought into India without legal documentations and by way of smuggling and since the gold,,,,

belongs to the foreign origin gold bars the officers of GRP handed over the accused person alongwith the gold to the Customs Officers of,,,,

Division â?" Varanasi after preparing the fard and supurdnama both dated 30.01.2018. During the investigation and inquiry from Shri,,,,

Mahendra Kumar Bajpai it came to the knowledge of officers that Shri Mahendra Kumar Bajpai earlier also brought gold and handed over,,,,

to me 3 times. On the basis of the statement of Sh. Mahendra Kumar Bajpai the officers visited my residential premises as well as the,,,,

business i.e. M/s Kala Jagat Jewellers. The officers also obtained the statement of Smt. Mohini Agrawal, my wife and recorded the same",,,,

dated 31.01.2018. the custom department also summoned me which was although complied but I could not appear for recording of the,,,, statement under Section 108 of the Customs Act, 1962. Relying upon the statement of Shri Mahendra Kumar Bajpai it was concluded that",,,,

Shri Mahendra Kumar Bajpai is working as an employee for me and have been smuggling the gold of my behest and have been handing,,,,

over the gold bars to me. It is stated by Shri Mahendra Kumar Bajpai that the 13 gold bars seized by the Customs Officers were also being,,,,

brought by him for me. On the basis of the investigation by the Customs Officers it was concluded that the aforesaid 13 foreign mark gold,,,,

bars were being brought in a clandestine manner in violation of the provisioins of Section 7(1) (c), 11 and 46 of the Customs Act, 1962 read",,,,

with 122 of Customs Act, 1962 and, therefore, same are liable to confiscation under Section 11(b) and (d) of the Customs Act, 1962.â??",,,,

1. I, Shri Girish Agarwal am the owner of M/s Kala Jagat Jewellers and my firm is engaged in manufacturing and sale of jewelries. It is",,,,

wrongly alleged in the show cause notice that I am involved in smuggling of foreign origir brand gold with the help to Shri Mahendra,,,,

Kumar Bajapi. It is also wrongly alleged that Shri Mahendra Kumar Bajapai is an employee of my firm. My firm M/s Kala Jagat Jewelers is,,,,

a limited liability firm & we are strictly following the provisions of companies Act as well as other laws. As a matter of fact Shri Mahendra,,,,

Kumar Bajpai is an acquaintance to me but he has nothing to do with my business activity at all. According to the statement of Shri,,,,

Mahendra Kumar Bajpai dated 30.01.2018 it was me who has booked his ticket in AC-II Tier 1 Kalka Mail from Kanpur to Calcutta,,,,

whereas there is no evidence brought on the record establishing the fact that tickets were booked by me or Shri Mahendra Kumar Bajpai,,,,

has travelled in Kalka Mail in AC-II Tier, similarly no evidence has been brought on the record that it was me who has booked seat No. A 1-",,,,

43 for Shri Mahendra kumar Bajpai in Howrah Jodhpur Train. The department has not brought any evidence on record to prove that Shri,,,,

Mahendra Kumar Bajpai has travelled on the same train as he has stated in his statement dated 30.01.2018.,,,,

2. In the statement it is stated by Shri Manendra Kumar Bajpai that earlier on 3 occasions he has brought 6,8,8 gold bars for me but the",,,,

same is supported by no evidence and the false accusation have been made against me. Even since there have been inspection by the,,,, Customs Officers of Custom (P) Headquarters, Lucknow at my residence on 31.01.2018 as well at my business premises, no recovery was",,,,

made in accordance with the statement of Shri Mahendra Kumar Bajpai.,,,,

3. The statement tendered by Shri Mahendra Kumar Bajpai stating that for the very first time he has visited Calcutta with me is nothing but a,,,,

concocted statement and no evidence again whatsoever have been brought on record supporting the same. There is no evidence that earlier,,,,

I have accompanied him and introduced him with some Calcutta trader, no enquiry or investigation was made from the person alleged to",,,,

have delivered the goods to Shri Mahendra Kumar Bajpai. As a matter of fact there is no evidence to prove that the gold bar seized by the,,,,

Custom Authorities is of smuggled nature and brought from Bangladesh.,,,,

4. The aforesaid bars were seized by the Custom officers on the ground that the said gold bars are showing foreign marking and therefore,,,,

it is established that the said gold bars were brought into India by the way of smuggling. Out of the aforesaid 13 bars 2 bars are of MMTC,,,,

and does not bear any foreign mark which established that the gold bars although bears a foreign mark but also available in India and,,,,

cannot be said to be of smuggled in nature no evidence has been brought on the record that the aforesaid 13 bars of gold were brought,,,,

into India through Bangaldesh. There is no allegation in the show cause notice that the aforesaid bars (brought by Shri Mahendra Kumar,,,,

Bajpai, in his statement that he has brought the aforesaid gold bars from the Calcutta) which is within territory of India and if the aforesaid",,,,

gold bars were brought by him from Calcutta then there is no violation of the Customs Act.,,,,

5. Without prejudice to the aforesaid it is further submitted that mere possession of gold bar of foreign marking which is being brought from,,,,

within India territory, itself does not establish that the goods were of smuggled nature. In the present case it is alleged gold bars not only",,,,

bears the foreign marked but some of the gold bars also bear the marking of Indian Brand. There is no evidence to establish that the,,,,

alleged gold bars were smuggled into India from Bangladesh and therefore mere having the foreign mark on some of the gold bar does not,,,,

establish that the said gold bars were smuggled into India. Further reliance is placed on the following case laws:-,,,,

2000 (126) E.L.T. 180 (Bom) State of Maharashtra Vs. Prithviraj Pokhraj Jain,,,,

Smuggling- Evidence-Foreign markings- Mere markings cannot be taken as evidence."" as proof of fact of foreign origin of goods as such",,,,

markings and labels only hearsay evidenceâ??.,,,,

6. Shri Mahendra Kumar Bajpai in his statement has admitted that he is one of my employees, whereas there is no evidence to establish this",,,,

statement as well. My residential premises as well as my business premises - M/s Kala Jagat Jewellers were visited by the officers of Customs,,,,

Authority and no evidence what so ever have been found to establish the Shri Mahendra Kumar Bajpai was working as one of my employee.,,,,

The entire proposition that he is working as my employee is far from truth and appears to be an incorrect statement.,,,,

7. As per ""Fard"" when Shri Mahendra Kumar Bajpai was caught by the GRP officers apart from the recovered Gold bars, the officers also",,,,

recovered one Mobile Hand set of ""OPPO"" company in working condition. According to the ""Supurdanama"" also only one ""OPPO"" mobile",,,,

set was handed over by the officers of GRP to the Custom Authorities where as in the ""Panchanama"" the officers were showing recovery of",,,,

one ""SAMSUNG"" handset also. As a matter of fact the GRP who caught the accused person showing recovery of only ""ONE"" handset of",,,,

OPPO"". The recovery of ""two"" handsets shown by the custom authorities is thus contradictory to version to GRP, cannot be used as",,,,

evidence.,,,,

8. Shri. Mahendra Kumar Bajapi during his statement has stated that his mobile No. 8400666094 where as the call details enclosed by the,,,,

custom authorities are of a different number. Shri Mahendra Kumar Bajpai in his statement nowhere stated that the aforesaid gold bars,,,,

were handed over to him by the man he met in Calcutta on the direction or on the telephonic conversation with me; he has also not stated my,,,,

number in use anywhere during investigation.,,,,

9. Also it is pertinent to mention here that the call records for the Mobile numbers 9935327436 for Shri Mahindra Kumar Bajpai and,,,,

9336814496 for my contact that have been affixed as an evidence are the numbers entirely different from the contact numbers stated by,,,, Shri Mahendra Kumar Bajpai as his contact number as 8400666094 at the time of investigation as well as my contact number which was,,,,

mentioned by my wife Smt. Mohini Agarwal at the time of investigation as 8299498727. Further to this she was enquired about some contact,,,,

number 8707505281 with my name by the customs officers, regarding the said enquired number my wife Mohini Agarwal has categorically",,,,

stated that she does not know anything about the number.,,,,

10. The CDR of two telephone numbers which have been relied upon by the Custom Authorities does not establish the telephone number,,,,

9935327436 belongs to Shri Mahendra Kumar Bajpai and 9336814498 belongs to me and Shri Mahendra Bajpai respectively. There are,,,,

no conversation details in respect of the said numbers to establish that I have directed Shri Mahendra kumar Bajpai to bring the gold bars,,,,

from Calcutta. The document relied upon by the department does not establish that the said CDR relate to the alleged smuggling of the gold,,,,

bars. Even the call details are not the sufficient proof to establish the charges of smuggling when there is no conversation detail on record.,,,,

Relies on the following case laws:-,,,,

(i) 2017 (354) E.L.T.275 Khemani Purshottam Mohandas Vs. CC, CSI Airport, Mumbai (Trib-Mumbai)",,,,

Penalty-Smuggling-Abetement-Evidence-Frequent mobile calls Between appellants and accused passenger, illegally carrying gold bars.",,,,

Department not able to produce conversation Details- In absence of corroborative evidence, charge of Abetement/conspiracy to smuggle",,,,

gold cannot be sustained on basis of suspicion, however, grave and plausible in Manner-Penalty not imposable-Section 112 of customs Act,",,,,

1962.â??,,,,

11. The entire case of the department against me is based on the statement of Shri Mahendra Kumar Bajpai who is also a co-accused. It is,,,,

well settled principle of law that the statement of co-accused cannot be relied upon especially in a case where charges of smuggling of,,,,

goods are made. The penalty under Section 112 of the Custom Act, 1962 has been proposed against me that I, did not appear before the",,,,

Custom Authorities even after the Summons under Section 108 of the Customs Act, 1962. Non appearance or right of silence does not",,,, establish that appellant indulged in smuggling or somehow connected with co-accused. Even otherwise it is only the presumption of the,,,,

department that I have avoided the summons due to my indulgence with Shri Mahendra Kumar Bajpai. No documentary evidence has been,,,,

brought into the record to prove my connection with Shri Mahendra Kumar Bajpai as such penalty under 112(b) of Custom Act, 1962 can",,,,

not be imposed against me.,,,,

12. I had nothing to do with the activity of Shri Mahendra Kumar Bajpai and without any documentary evidence in support to prove my,,,,

complicities with Shri Mahendra Kumar Bajpai in smuggling of alleged gold bars. Penal provisions under Section 112 (b) of custom Act,",,,,

1962 have been wrongly invoked against me and personal penalty should not be imposed against me. Violation of provisions of Section 7,,,,

(1) (c), 11 and 46 of the Custom Act, 1962 read with Section 123 of the Custom Act, 1962 and Sections 11 & 12 of the Foreign Trade Act",,,,

(Regulation) Rules 1993 is not attracted in my case.,,,,

17. The Additional Commissioner relying on the statement of Shri Mahendra Kumar Bajpai further observed that Shri Bajpai did not produce any,,,,

documents in support of the licit possession of the seized gold. Further, as per Shri Bajpai he was working for Sh. Girish Agarwal and after receiving",,,,

the gold at Kolkata he was carrying the same to Kanpur for delivery to Shri Girish Agrawal. It is further observed that the markings on gold was,,,,

removed and other marks have been put on the gold bars. It is further observed that Shri Bajpai has admitted that he is employee of Shri Girish,,,,

Agrawal who was carrying the gold from Kolkata, without any valid documents. Further, as per Shri Bajpai he was knowingly doing the work, for",,,,

earning his livelihood. It is further observed that, what have been admitted need not proved. It was further observed that the gold found in the",,,,

possession of Shri Bajpai, is prohibited gold, and such goods had been imported in violation of Import (Control) Order, 1955. It is further observed that",,,,

the appellant has not discharged his onus under Section 123 of the Customs Act, as to licit possession of gold. Further observed that the statement of",,,,

Shri Bajpai is reliable as he has not retracted his statement and thus the statement is sufficient to prove the culpability of these charges. It is further,,,,

observed that insptie of search at the premises of Shri Agrawal, no evidence has been found to establish that Shri Bajpai was an employee of Shri",,,,

Agrawal. Further, in view of the call detail record, there being frequent conversation between both the appellants and the explanation of Shri Agrawal",,,,

was not rejected and accordingly seized gold was absolutely confiscated under Section 111(b) and (d) of the Act, alongwith confiscation of the two",,,,

bags. Further, penalty was imposed under Section 112(b) of Rs. 25 lakh on Shri Mahendra Kumar Bajpai and Rs. 12 lakhs on Shri Girish Agrawal.",,,,

18. Being aggrieved, both the appellants had filed appeals before the Commissioner (Appeals) who vide the impugned order-inâ?"appeal, observed",,,,

that none of the appellant have claimed the ownership of the gold, which was recovered from Shri Bajpai. Further, relying on the findings in the order-",,,,

in-original, the appeals were dismissed. Being aggrieved, the appellants are in appeal before this Tribunal. Both the Counsels for the appellants and ld.",,,,

Authorised Representative for Revenue have been heard. Ld. Counsel for Shri Girish Agrawal urges as follows:-,,,,

18.1 The Adjudicating Authority as well as Commissioner (Appeals) has wrongly concluded that Shri Mahendra Kumar Bajpai is a close associate of,,,,

this appellant and helped the appellant in smuggling of gold on past 3 occasions also. The Adjudicating Authority as well as Commissioner (Appeals),,,,

has failed to appreciate that there is no evidence except the statement of Shri Mahendra Kumar Bajpai to prove the involvement of the appellant in,,,,

this smuggling of gold.,,,,

18.2 The Adjudicating Authority as well as Commissioner Appeals has also failed to appreciate that according to the statement of Shri Mahendra,,,,

Kumar Bajpai dated 30.01.2018, it was this Appellant who booked the ticket of Shri Mahendra Kumar Bajpai in AC-II Tier Kalka Mail from Kanpur",,,,

to Kolkata, whereas there is no evidence brought on record establishing the fact that tickets were booked by him, or Shri Mahendra Kumar Bajpai has",,,,

travelled in Kalka Mail in AC-II Tier. Similarly no evidence has been brought on record that it was Mr. Agarwal who has booked Seat No.A1â?"43,,,,

for Shri Mahendra Kumar Bajpai in Howrah Jodhpur Train. The department has not brought any evidence into record to prove that Shri Mahendra,,,,

Kumar Bajpai has travelled on the same train, as he stated in his statement dated 30.01.2018.",,,,

18.3 It is an admitted fact that the aforesaid Gold Bars were handed over to Shri

Mahendra Kumar Bajpai in Calcutta only, and therefore, the charges",,,,

of smuggling of Gold Bars are not sustainable. Secondly, if Shri Mahendra Kumar Bajpai was a close associate of the appellant and working as per his",,,,

direction, then there must be some conversation between the appellant and Shri Mahendra Kumar Bajpai on 29.01.2018 when the gold were delivered",,,,

to him in Calcutta. Further, Shri Mahendra Kumar Bajpai should have contacted the appellant when he was moving from Calcutta.",,,,

18.4 It is reiterated again that there was no conversation between the appellant and Shri Mahendra Kumar Bajpai on 29.01.2018 and 30.01.2018. If,,,,

the call details are presumed to be correct then there is no conversation between the appellant and Shri Mahendra Kumar Bajpai since 25.01.2018.,,,,

Therefore, it is quite evident that the statement of Shri Mahendra Kumar Bajpai is false and fabricated statement, and far from truth. Only on the",,,,

basis of statement of Shri Mahendra Kumar Bajpai, penalty under Section 112(b) of the Customs Act cannot be made sustainable against the",,,,

appellant. Further, the call detail records (CDRs) of two totally different phone numbers has been relied upon by the Department because the phone",,,,

number being used by the Appellant, as stated by the wife of the Appellant in her statement, and phone number used by Mahendra Kumar Bajpai as",,,,

stated by him in his own statement are different than the phone numbers CDRs of which have been relied and annexed by the Department.,,,,

18.5 Shri Mahendra Kumar Bajpai in his statement has stated that he is one of my employees, whereas there is no evidence to establish this fact as",,,,

well. My residential premises as well as my business premises - M/s. Kala Jagat Jewelers were visited by the Custom officers and no evidence,,,,

whatsoever was resumed to establish either the fact that Shri Mahendra Kumar Bajpai was working as one of my employee, or is Appellant was",,,,

involved in any kind of smuggling. The entire proposition is that he is working as an employee is far from truth and appears to be a false statement.,,,,

The learned Commissioner (Appeals) has erred in relying upon the said statement and imposed a heavy penalty against the appellant, only on the basis",,,,

of the said statement.,,,,

18.6 As per â??Fardâ? when Shri Mahendra Kumar Bajpai was caught by the GRP officers apart from the recovery of Gold Bars, the officers also",,,, recovered one mobile Hand set of â??OPPOâ? company in working condition. According to the â??Supurdanamaâ? also only one OPPO set was,,,,

handed over by the officers of GRP to the Custom Authorities, whereas in the â?? Panchnamaâ? the officers were showing recovery of one",,,,

SAMSUNG handset also. As a matter of fact the GRP who caught the accused person -showing recovery of only ONE handset of OPPO. The,,,,

recovery of two handsets shown by the custom authorities, is contradictory version to GRP, and thus cannot be used as evidence. The Adjudicating",,,,

Authority as well as the Commissioner (Appeals) has failed to appreciate that the call details relied upon in the show cause notice, is of a different",,,,

phone which was seized by the Customs Officer at the time of the seizure of the gold.,,,,

18.7 Shri Mahendra Kumar Bajpai during his statement has stated that his Mobile No. is 8400666094, whereas the call details enclosed by the Custom",,,,

Authorities are of a different number. Shri Mahendra Kumar Bajpai in his statement nowhere stated that the aforesaid gold bars were handed over to,,,,

him by the man he met in Calcutta on the direction or on the telephonic instruction of this appellant, he has also not stated his mobile number",,,,

anywhere. Also it is pertinent to mention here that the call records for the contact numbers 9935327436 for Shri Mahindra Kumar Bajpai and,,,,

9336814496 for my contact, that have been relied as an evidence, are the numbers entirely different from the one that was stated by Shri. Mahendra",,,,

Kumar Bajpai as his contact number - 8400666094 at the time of investigation, as well as my contact number which was mentioned by my wife Smt.",,,,

Mohini Agrawal at the time of investigation as 8299498727. Further to this she was enquired about some contact number 8707505281, with my name",,,,

by the Custom officers regarding the said enquired number, my Wife Mohini Agarwal has categorically stated that she does not know anything about",,,,

that number.,,,,

18.8 There are no conversation details in respect of the said numbers to establish that I have directed Shri Mahendra Kumar Bajpai to bring the gold,,,,

bars from Calcutta. The document relied upon by the department does not establish that the said CDR relate to the alleged smuggling of the gold bars.,,,,

Even otherwise the call details are not the sufficient proof to establish the charges of smuggling especially when there is no conversation detail on,,,, record. The Appellant places reliance upon judgment in 2017 (354) E.L.T.275 (Trib-Mumbai) KHEMANI PURSHOTTAM MOHANDAS VS.CC,",,,,

CSI AIRPORT, MUMBAI.",,,,

18.9 The entire case of the department is based on the fact that the aforesaid Gold Bars were being brought by Shri Mahendra Kumar Bajpai, by way",,,,

of smuggling from Calcutta. Shri Mahendra Kumar Bajpai in his statement categorically stated that someone in Calcutta has handed over the Gold,,,,

Bars to him. Whereas, the department has failed to investigate as to who has handed over the Gold Bars to Shri Mahendra Kumar Bajpai in Calcutta.",,,,

As a matter of fact no investigation has been made by the department regarding the purchase of said Gold Bars from Calcutta. The present case is,,,,

based on un-reliable and inadmissible evidence, and therefore, on the basis of the said in complete enquiry charges of smuggling of Gold is not proved",,,,

and hence penalty under Section 112(b) of the Customs Act cannot be imposed against the appellant. Mere foreign marking on the goods, which are",,,,

freely tradable in India, cannot become a ground for allegation ofsmuggling as held by the Honâ??ble HC of Bombay, in case of State of Maharastra",,,,

Vs. Pritviraj Pokhraj Jain reported at 2000 (126) E.L.T 180 (Bom.).,,,,

18.10 The appellant is not at all involved in the smuggling in gold, and therefore, penalty against the appellant under Section 112(b) of the Customs Act,",,,,

1962 has been wrongly imposed by the learned Commissioner (Appeals) Customs, Lucknow. The learned Commissioner (Appeals) Customs, GST &",,,,

Central Excise, Lucknow, has also failed to appreciate that there is not a single piece of evidence to establish that the Gold was smuggled on the",,,,

behest of the appellant, and the appellant is actively involved in the smuggling of aforesaid Gold bars. The order of the Adjudicating Authority as well",,,,

as Commissioner (Appeals), is totally based on assumptions and presumptions and hence liable to be set aside. It is well settled principle of law that",,,,

only on the basis of the statement of co-accused penal provision of under Section 112(b) of the Customs Act cannot be held sustainable in eyes of,,,,

law. No evidence whatsoever has been brought on the record to prove that the appellant is somehow concerned with the said smuggled gold, in",,,,

keeping, transporting or having possession of said smuggled gold.",,,,

18.11 The Learned Commissioner (Appeals) Customs, Lucknow without considering the said facts imposed a heavy penalty against the appellant",,,, under Section 112(b) of the Customs Act, 1962. Penalty cannot be imposed against the appellant without any concrete evidence to prove indulgence",,,,

of the appellant in smuggling of the gold.,,,,

18.12 The provisions of Section 112(b) of the Customs Act are not applicable on the appellant, since the gold was neither found in the possession of",,,,

the appellant nor was the appellant found to have been carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing of the",,,,

alleged smuggled gold. It is an admitted fact that nothing incriminating was recovered from the appellant or from his business and residential premises.,,,,

19. Learned Counsel appearing for Shri Mahendra Kumar Bajpai, Ms. Somya Chaturvedi inter alia urges that Shri Bajpai is an illiterate person.",,,,

Further urges that there is no proper service of the show cause notice, and the same was sent to his home address, while he was in judicial custody.",,,,

Thus, Sh. Bajpai has, had no opportunity to contest the show cause notice. It is further urged that it is a case of town seizure and hence there is no",,,,

presumption of smuggling. It is the onus on the Department to prove the allegation of smuggling which they have failed to do so. No reliance can be,,,,

placed on the statement of the appellant under Section 108 of the Act, as the said statement is not voluntary and rather under coercion and duress",,,,

while the appellant was detained and arrested by the Customs Department. Further, there is no enquiry made as to the source of the gold though it",,,,

was statement of Shri Bajpai - he was carrying the gold from Kolkata to Kanpur. It is further urged that no penalty is attracted under Section 112(b),,,,

of the Act. Further, reliance is placed on the following ruling:-",,,,

- Khemani Purshottam Mohandas vs. CC, CSI Airport-Mumbai 2017 (354) ELT 275 (Mum.)",,,,

- Ram Prasad vs. Commissioner of Customs, Amritsar 2003 (159) ELT 594 (Tri. Del.)",,,,

It is further urged that the sale and purchase of gold is permitted within the territory of India. It is further stated that the Department has wrongly,,,,

alleged that the gold is of foreign origin. It is further urged that inspite of inspection and recovery of gold by GRP at Mughalsarai Railway Station,",,,,

there is no independent witness brought on record by the GRP as to the fact of seizure from the appellant. Further, as per the recovery note (Fard)",,,,

prepared by GRP, they found gold as per the seizure list of the Customs, with one mobile phone of Oppo make. Further, urges that there is no proper",,,,

co-relation as per the call detail record, and same are not reliable. The appellant is a person of small means and remained in jail for about 18 months.",,,,

In the facts and circumstances, the penalty imposed on the appellant is bad, very high and disproportionate. Accordingly, prayed for allowing the",,,,

appeal with consequential benefits.,,,,

20. The learned Departmental Representative relied on the impugned order. As directed by the bench, Revenue has post hearing, submitted evidence",,,,

of service of show cause notice on Mr. Bajpai, in jail on 23.7.2018, which is evidenced or witnessed by the Jailor of District Jail, Varanasi. The",,,,

service receipt was forwarded by the Jailor to the Supdt. (P) Customs. Accordingly, he prays for dismissing the appeals.",,,,

21. Having considered the rival contentions, I find that :",,,,

(i) Admittedly, it is a case of town seizure;",,,,

(ii) In view of foreign markings on 11 out of 13 gold bars seized, the appellant â?" M.K. Bajpai failed to discharge the onus under Section 123.",,,,

(iii) The allegation of smuggling through Bangaladesh border is only presumption by Revenue, not established.",,,,

(iv) Mr. Bajpai admittedly received delivery at Kolkata, which is not disputed.",,,,

(v) Appellant Mr. Bajpai remained in jail for about 18 months (From 1 February 2018 to July 2019). The order in original was passed on 29.3.2019,",,,,

thus Mr. Bajpai did not have proper opportunity to defend himself.,,,,

(vi) Two of the gold bars (as per seizure list, and show cause notice paras 2 and 4) are of Indian Brand MMTC, total weight 1999.100 gms, valued at",,,,

Rs. 61,37,237/-.",,,,

(vii) Mr. Bajpai is a person of small means, and was only a carrier.",,,,

(viii) The reliability of statement of Mr. Bajpai recorded during investigation is doubtful, as he has alleged coercion and duress.",,,,

(ix) The complicity of Mr. G. Agarwal is not established. Only evidence brought on record is the evidence of frequent calls (as per CDR) between the,,,,

appellants, and the statement of co-accused, which cannot form the sole basis of imposing penalty.",,,,

(x) Mr. G. Agarwal has disowned the seized goods at the first instance, and also denied any connection of employer-employee or Principal â?" Agent",,,, with Mr. M.K. Bajpai.,,,,

(xi) Nothing incriminating was found from Mr. G. Agarwal in the follow up search at his residence and business premises.,,,,

(xii) only â??Oppoâ? Mobile phone was recovered by GRP at Mughalsarai Jn., Panchnama of Customs, showing recovery of two mobile phones",,,,

(Oppo & Samsung), raises doubt as to the genuineness of Samsung mobile phone.",,,,

(xii) Although the CDR raises a strong suspicion, but in absence of details of conversation, no allegation is established against Mr. G. Agarwal.",,,,

(xiv) No case of penalty under Section 112(b) is made out against Mr. G. Agarwal.,,,,

(xv) Section 111(d) is not attracted on the facts herein.,,,,

22. Accordingly, I hold as follows:",,,,

(i) The absolute confiscation of 11 gold bars (excluding the two with MMTC markings), is upheld under Section 111(b) of the Act.",,,,

(ii) Penalty under Section 112(b) on Mr. Girish Agarwal (Appellant in (Appeal No. 70272 of 2020) is set aside, with consequential benefits.",,,,

(iii) The penalty under Section 112(b) on Mr. M.K. Bajpai is reduced to Rs. 2,50,000/- (Rupees two lakhs fifty thousand), as he is only a carrier, and a",,,,

person of small means.,,,,

(iv) The confiscation of two gold bars-MMTC marking/brand, weighing 1999.100 gms, valued at Rs. 61,37,237/- is set aside. Revenue is directed to",,,,

return these two gold bars or the sale value (if disposed of) to Mr. M.K. Bajpai (from whose possession these were seized).,,,,

23. Thus, the impugned order stands modified and the appeals are allowed in the aforementioned terms.",,,,

(Pronounced on 03.12.2021).,,,,