

**IN THE HIGH COURT OF PATNA**

**Miscellaneous Appeal No.405 of 2018**

**COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX  
PATNA, 5TH FLOOR, CENTRAL REVENUE BUILDING  
BEER CHAND PATEL PATH, PATNA**

**Vs**

**1) GOPAL PRASAD**

**2) SUJEET KUMAR**

**3) CHANDESHWAR PRASAD**

**Ashwani Kumar Singh & Anil Kumar Sinha, JJ**

**Dated: November 15, 2019**

**Appellant Rep by:** Mr Rajesh Kumar Verma, Standing Counsel Mr Akshansh Ankit, Adv.

**Respondent Rep by:** Mr Umesh Chandra Verma, Adv., Mr Brajesh Kumar Singh, Adv.

**Cus** - Smuggling of gold biscuits - Commissioner (Appeals) reduced the penalty amount to Rs.8,00,000/- from Rs.10,00,000/- on each of the respondents and in appeal, the CESTAT set aside the order passed by the Commissioner (Appeals) and allowed the appeals filed by the respondents - Revenue is before the High Court and submits that Tribunal failed to appreciate the case of the appellant in true perspective; that Tribunal completely misconstrued the fact that the seized gold biscuits having having foreign marking and recovered from Sujit Kumar at Indo-Nepal Border in itself was the most reliable evidence that the seized gold biscuits were smuggled and contraband in nature.

**Held:** Findings recorded by the Tribunal would suggest that the evidences led on behalf of the parties were properly appreciated by the Tribunal and it has taken a plausible view - The reasons assigned by the Tribunal for arriving at its finding that the impugned order cannot be sustained are cogent and sound and they are neither illegal nor perverse - In absence of a substantial question of law raised in the appeal, the same is not maintainable - Revenue appeal is dismissed: High Court [para 13, 16, 17]

**Appeal dismissed**

**JUDGEMENT**

**Per: Ashwani Kumar Singh:**

Heard learned counsel for the appellant and learned counsel for the respondents.

2. This appeal has been preferred by the appellant against the final order no. 77608-77610/2017 dated 30.10.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata (for short 'the Tribunal') in Appeal Nos. C/75135, 75136 and 75137 of 2016 whereby the Tribunal has set aside the order dated 05.11.2015 passed in Appeal No. 126-128/Pat/Cus/Appeal/2015 by the

Commissioner (Appeals) of Customs, Central Excise and Service Tax, Patna (for short 'Commissioner (Appeals)').

3. On 19.04.2014 at 12:15 hours, the SSB officials of Bhelahi intercepted a person near Nahar Chowk, Raxaul with gold biscuits for foreign origin cut into two pieces and also recovered a Nokia mobile phone and Rs.1,100/-. The SSB officials handed over the intercepted person, namely, Sujit Kumar along with recovered goods to the officials of Custom Division, Motihari. The Custom officers recorded the statement of Sujit Kumar on 20.04.2014 and 21.04.2014 wherein he stated that the seized gold was given to him by Sri Chandeshwar Prasad, brother of Sri Gopal Prasad.

4. Vide letter dated 10.05.2014 addressed to the Commissioner of Customs, Patna, Sri Gopal Prasad claimed ownership of the gold biscuits. He stated that the said gold biscuits were purchased by him from M/s Bhawana International, Chandni Chowk, Delhi on 14.04.2014.

5. A show cause notice was issued to Sujit Kumar, Gopal Prasad and Chandreshwar Prasad. The adjudicating authority confiscated the gold biscuits cut into two pieces and one Nokia mobile phone and also imposed penalty of Rs. 10,00,000/- each under Section 112(b) of the Customs Act, 1962 on the respondents.

6. In appeal, the Commissioner (Appeals) reduced the penalty amount to Rs.8,00,000/- from Rs.10,00,000/- on each of the respondents.

7. The respondents challenged the order passed by the Commissioner (Appeals) before the Tribunal vide Appeal Nos.C/75135, 75136 and 75137 of 2016. After hearing the parties, vide impugned order dated 30.10.2017, the Tribunal set aside the order passed by the Commissioner (Appeals) and allowed the appeals filed by the respondents.

8. Challenging the aforestated order passed by the Tribunal, Mr. Rajesh Kumar Verma, learned counsel appearing for the appellant submitted that the impugned order is bad in law as also on facts. The Tribunal failed to appreciate the case of the appellant in true perspective. It also failed to consider the submissions made by the appellant, which were based on convention and statutory and constitutional scheme. He has further contended that the Tribunal completely misconstrued the fact that the seized gold biscuits having having foreign marking and recovered from Sujit Kumar at Indo-Nepal Border in itself was the most reliable evidence that the seized gold biscuits were smuggled and contraband in nature. He has further contended that the Tribunal failed to follow the correct proposition of law inasmuch as it failed to treat the statement of Sujit Kumar and Shambhu Dayal Sharma, proprietor of M/s Bhawana International recorded under Section 108 of the Customs Act as an evidence.

9. Per contra, learned counsel appearing for the respondents submitted that there is no error in the order passed by the Tribunal. The Tribunal has correctly appreciated the law and facts involved in the case and has passed the order giving sound reasoning. According to him, the order impugned is neither illegal nor perverse. He has drawn our attention towards the findings recorded by the Tribunal in the order impugned in order to substantiate his argument that no substantial question of law is involved in the present case.

10. The findings of the Tribunal are recorded in paras 5 to 9 of the order impugned dated 30.10.2017, which read as under :-

*"5. I find from the impugned order that Shri Sujit Kumar was intercepted by the SSB officers on 19.04.2014. Subsequently, SSB officers handed over Shri Sujit Kumar and the seized material to the Customs Officials, Motihari, Shri Sujit Kumar, in his statement dated 20.04.2014 and 21.04.2014, stated that the seized gold biscuit was given to him by Shri Chandreshwar Prasad/Shah. The gold was scheduled for delivery to Shri Mahavir Shah/Prasad in his shop M/s Shakuntala Jewellers at Bakergunj, Patna. It is also stated that both Shri Chandreshwar Prasad/Shah and Shri Gopal Prasad/Shah used to carry gold from Nepal to India illegally. Shri Gopal Prasad/Shah by his letter dated 10.05.2014 addressed to the Commissioner of Customs, Patna stated that he was engaged in manufacture and sale of gold and silver ornaments and running a jewellery shop by the name of Saraf Jewellers. He stated that he purchased two pieces of gold bars from M/s Bhawana International, Chandni Chowk, Delhi on 14.04.2014 vide bill no. B1/R1/002 dated 12.04.2014 and B1/R1/003 dated 14.04.2014 respectively. It is also stated that on his instructions his brother Shri Chandreshwar Prasad/Shah handed over the gold to Shri Sujit Kumar for carrying it to Patna to hand it over to Shri Mahavir Prasad/Shah to make gold ornaments in exchange of the said gold. It is categorically claimed by the appellant that the gold bars were purchased by him legally and the SSB Officials illegally seized the same. Shri Sujit Kumar wrote a letter to Commissioner of Customs, Patna from Central Jail, Muzaffarpur stating that he had produced the bills for the seized gold to Customs authorities on 20.04.2014 but the said officials tore off the bill and sent him to jail.*

*6. I find that Shri Gopal Prasad/Shah filed surrender-cum-bail application before the Ld. Economic Offence Court. By order dated 21.07.2014, the Id. Economic Offence Court granted bail to the appellant on the ground that the complaint petition filed on behalf of the prosecution without sanction order from the Commissioner of Customs. In absence of the sanction order, the Id. Economic Offence Court cannot take cognizance. I find that the investigating officers recorded the statement of Shri Shambhu Prasad Sharma, proprietor of M/s Bhawana International, where he stated that he has not sold the said seized gold. Shri Shambhu Prasad was shown photographs of the seized gold where he denied and reiterated that the said gold bars were not sold to Shri Gopal Prasad/Shah by him. On perusal of the retail invoices, dated 12.04.2014 and 14.04.2014, I find that the goods were sold under the description of 'gold bars'. They have paid output VAT of 1% on the selling price. The company's VAT TIN and PAN have been mentioned. The investigating officers had shown the photographs of the seized gold. There is no material available on record to show that the retail invoices placed by the appellant are false or fabricated. Apparently, the retail invoices are VAT paid and the VAT registration number and PAN were mentioned.*

*7. The purpose of investigation is to search out and examine the particulars in an attempt to learn the facts about something hidden by the accused. Under the scheme of the Customs Act, 1962, there are certain provisions for investigation, such as-*

*Section 105 - Power to search premises,*

*Section 106 - Power to stop and search conveyances,*

Section 107 - Power to examine persons,

Section 108 - Power to summon persons to give evidence and produce Documents.

Section 109 - Seizure of goods, documents and things.

There are various provisions for confiscation of goods, conveyance, documents and other articles. It may be noted that with the development of the technology and electronic revolution, there is a wide scope for verification of accurate inside information of the offenders. The investigation starts from gathering of information which should be cross-checked to ensure its veracity by making independent enquiries. The powers given under Section 108 of the Customs Act, 1962, to summon persons to give evidence and produce documents are wide and general in nature where it discloses the corroborative evidences. In the present case, I find that the investigating officers have not verified the informations contained in the retail invoices produced by the appellants in so far as VAT registration No., PAN No. and VAT payment of M/s. Bhawana International. It has merely proceeded on the basis of the statement recorded by the jurisdictional Customs/Central Excise officers of M/s Bhawana International. It is noted that the said officers had merely recorded the statement of the proprietor of M/s. Bhawana International and no attempt was made to confront the evidence namely retail invoices of M/s. Bhawana International produced by the appellant. Therefore, the purchase documents as produced by the appellants cannot be discarded on the basis of the statement, without any verification of the content of the retail invoices. I find that in such similar situation, the Tribunal in the case of *Tejwal Dyestuff Industries v. Commissioner of C.Ex., Ahmedabad* [2007 (216) E.L.T. 310 (Tri.-Ahmd)] = **2007-TIOL-1438-CESTAT-AHM** held as under :-

"54. It appears that, having obtained confessional statements the Revenue Officers did not carry out the detailed investigation into the relevant aspects of the case, particularly, the Bank accounts of Bhimanis and the working of the assessee's factory. Recording of the confessional statement would not put an end to the investigation and the Revenue Officers should be careful to ensure that they are not tricked out of a regular and detailed investigation by making strategic confessions which are retracted by preparing affidavits soon after they are made and which affidavits are again strategically withheld from the Revenue Officers, so that they become complacent and do not carry out a fuller investigation. It appears that the Revenue Officers in the present case have fallen victim to this type of strategic confessional statements which have been retracted soon after they were made in the affidavits which were withheld by the deponents till the proceedings came up before the Commissioner, by which time the damage of not a making fuller investigation, thinking that the confessional statements are made and not retracted, was already done. The Revenue Officers have not even cared to investigate into the types of final products manufactured by the appellants despite detailed declarations which were on record with them, which showed that all these inputs, particularly LAB and Soda Ash were being used by them for their final products. Some of these declarations which are on record as Annexure 'A' (Collectively) show that at least for seven final products, LAB and Soda Ash were used as inputs, besides other inputs enumerated in the description of inputs in the declarations dated 22-2-1999, 3-4-2000, 12-4-2000 and 12-6-2000. It is not disputed that the returns were regularly filed and the fact that these inputs were used for the final products was mentioned from the

*very inception in the declarations made and the returns filed by the assessee before the Revenue authorities."*

*8. The other aspect of this matter that the appellant produced the stock Register showing the receipt of the said goods in their stock. In such situation, it is required to verify records and documents of M/s. Bhawana International for corroboration of the documents of the appellant. The customs officers had proceeded on the basis of the initial statement of Shri Sujit Kumar which was retracted from jail. The lower authorities observed that Shri Sujit Kumar in his initial statement admitted the smuggling of the gold. But, after considering the overall facts and circumstances of the case to the extent of purchase documents produced by the appellants such as retail invoices would prevail over the statements, unless the genuinity of the documents is doubted. Hence, I find force in the submission of the Id. Counsel for the appellant.*

*9. The Revenue in their para-wise comments filed by the Id. AR strongly relied upon the decision of the Hon'ble Supreme Court in the case of CC (Prev.) v. Vijay Dasharath Patel [(2007) 4 SCC 118] = **2007-TIOL-33-SC-CUS**. In that case the Hon'ble High Court rejected the appeal filed by the Revenue on the ground that there is no substantial question of law. The Hon'ble Supreme Court held that the High Court may not be entirely correct in holding that no substantial question of law arises for its consideration, and remanded the matter to the Tribunal for decision. It is categorically observed by the Hon'ble Supreme Court that the reference to the findings of the Commissioner as also that of the Tribunal was made only for the purpose of considering as to whether any substantial question of law arose for consideration before the Hon'ble High Court and for no other purpose. Therefore, the Hon'ble Supreme Court had not decided the matter on merit. In any event, I find that in the said case Revenue contended that the Bank's letter referred to invoices dated 25.10.1999 and in such circumstances, the question of effecting delivery by the Bank to the authorised dealer under delivery challan dated 23.10.1999, which is prior to the date of invoice is not credit worthy. It is also contended by the Revenue that the Tribunal proceeded on the basis of normal trade practice and ignored the evidences. The facts of the said case is not applicable in the present case. In this case, the appellant produced the retail invoices of M/s. Bhawana International and there is no material available on record that the said invoices are not genuine.*

*In view of the above discussion, the impugned order cannot be sustained. Accordingly, it is set aside. The appeals filed by the appellants are allowed."*

*11. As far as the statement made by the respondent no.2 Sujeet Kumar under Section 108 of the Customs Act, 1962 is concerned, the same would certainly not be hit by bar of admissibility under Section 25 of the Evidence Act, but the evidentiary value of such statement would also depend on various other factors. The statement under Section 108 of the Customs Act and its retraction are both required to be corroborated and proved. The same cannot be treated as substantive piece of evidence in terms of Section 3 of the Evidence Act, as it is not given by the witness and not subjected to cross-examination. It is also not given on oath. The Tribunal has taken note of the statement of Sujeet Kumar and his retraction made from jail in its order.*

*12. The Tribunal has given a categorical finding that the respondent no.1 herein had produced retail invoices of M/s Bhawana International in order to substantiate his claim that he had purchased two pieces of gold bars from Chandni Chowk, Delhi on*

14.04.2014 and on his instructions his brother Chandreshwar Prasad Sah (Respondent no.3) had handed over the gold pieces to Sujeet Kumar (Respondent no.2) for carrying it to Patna to hand it over to Mahavir Prasad to make gold ornaments in exchange of the said gold. It has also given a finding of fact that the proprietor of M/s Bhawana International was shown only photograph of the seized gold when he denied that the said gold bars were not sold to respondent no.1. The retail invoices of M/s Bhawana International submitted by the respondent no.1 containing VAT TIN and PAN were never shown to its proprietor. It is not the case of the appellant that the bill and retail invoices are false and fabricated.

13. Further, the findings recorded by the Tribunal, as reproduced herein above would suggest that the evidences led on behalf of the parties were properly appreciated by the Tribunal and it has taken a plausible view. The reasons assigned by the Tribunal for arriving at its finding that the impugned order cannot be sustained are cogent and sound. They are neither illegal nor perverse.

14. Under Section 130 of the Customs Act, 1962 an appeal would be maintainable before the High Court from every order passed in appeal by the Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having relation to the rate of duty of customs or to the value of goods for purposes of assessment) only if the High Court is satisfied that the case involves a substantial question of law.

15. Mr. Verma, learned Standing Counsel has not been able to satisfy us that any substantial question of law is involved in the present case.

16. In absence of a substantial question of law raised in the appeal, in our considered opinion, the same is not maintainable.

17. For the aforesaid reason, the appeal is dismissed.

18. The parties shall bear their own cost.