CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/21096,21113/2016-SM

[Arising out of OIA No. 261-262/2016 passed by Commissioner of Customs(Appeals), BANGALORE]

Shri R.N. Palaksha
Shri K.r. Mahesh Kumar — Appellant(s)

Versus

CC, Bangalore — Respondent(s)

Appearance:

Shri G.B. Eswarappa, Advocate — For the Appellants

Smt. Kavitha Podwal, Superintendent(AR) — For the Respondent

Date of Hearing: 09/05/2018

Date of Decision:___________

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. _______________

Per : S.S GARG

These two appeals have been filed by the appellants against common impugned order passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has upheld the Orders-in-Original and rejected the appeals of the appellants. Since the impugned order is common and the issue is identical, both the appeals are being disposed of by this common order.

2. Briefly the facts of the present case are that the Officers of the Customs Air Intelligence Unit (AIU), Bangalore International Airport(BIA),

Bangalore intercepted the appellants who were trying to exit hurriedly through the Customs Green Channel at the arrival hall of BIA on 12/01/2014 arousing suspicion. The appellants, both Indian nationals on enquiry by the officers informed that they had arrived from Dubai (the UAE) to Bangalore by Emirates Flight No.EK-568. The Customs Declaration Form furnished by the appellants were examined and it was found that the appellants had not declared any dutiable / prohibited goods or gold jewellery or bold bullion and left it blank i.e. declaring nil value of dutiable goods being imported as zero which indicated that they did not carry any dutiable goods. On reasonable belief, the officers subjected their check-in-baggage as well as body search of each of the appellants which resulted in detection of a gold chain, a gold kada and a gold coin (impugned goods recovered from Shri R.N. Palaksha) and gold chain (impugned goods) around the neck of Shri K.R. Maheshkumar under their over garments so as ensure that the impugned goods are not visible to others. On enquiry, the appellants accepted the fact that the impugned jewellery made of gold was being carried by them from Dubai; that the impugned gold jewellery was made of gold weighing 507.650 grams & 349.00 grams of 23 carat / 99.50 purity, respectively with a clear intention to smuggle without declaring the same to the Customs, with an intention to evade payment of customs duty payable thereon. The impugned jewellery available with the appellants was seized vide mahazar dt. 12/01/2014. Further, the impugned jewellery was totally appraised at Rs.15,04,243/- & Rs.10,40,718/-, respectively on the basis of certificate issued by the authorized valuer of the Customs Department. As the appellants had not declared the impugned jewellery which was in their possession at the time of arrival, such act of non-declaration to the Customs authorities falls within the definition of smuggling as per Section 2(39) of Customs Act, 1962 and thereby such impugned jewellery was rendered liable to confiscation under the provisions of Section 111(d), 111(i) and 111(l) of Customs Act, 1962. Further by their act of smuggling of the impugned goods without declaring the same in the customs declaration slip on their arrival, intending to evade customs duty payable thereon, the appellants-passengers have also rendered themselves liable to penalty under the provisions of Section 112(a) and 114(AA) of the Act. The original authority passed the order for absolute confiscation of the impugned jewellery under the provisions of Section 111(d), 111(i) and 111(l) and 111(m) of the customs Act, 1962 and imposed penalty of Rs.1,50,000/- under Section 112(a) and Rs.50,000/- under Section 114AA on Shri R.N. Palaksha and Rs.1,00,000/- under Section 112(a) and Rs.50,000/- under Section 114AA on Shri K.R. Maheshkumar. Aggrieved by the orders, appellants filed appeals before the Commissioner(Appeals) who rejected the same.

3. Heard both sides and perused records.

4.1. Learned counsel for the appellants submitted that the impugned order has been passed in gross violation of the principles of natural justice as the appellants have not been heard in person and they have not been issued the show-cause notice after obtaining their statement under coercion. He further submitted that the appellants are innocent as there is no antecedents against them so as to treat the impugned goods to be smuggled. He further submitted that it is unambiguous and clear from Section 124 of Customs Act that there should be oral notice, at least, even if the affected waives written show-cause notice. It is mandatory under the same legal provision that opportunity of personal hearing should be granted to the affected whereas in the present case the same has not been complied with as is apparent from the face of the records. He further submitted that without compliance with the Section 124, the adjudicating authority confiscated the goods absolutely and imposed penalties and the same is without authority of law since due process is not followed. In support of this submissions, the learned counsel relied upon the following decisions:-

i. Rajshri Forex Ltd. Vs. CCE, Indore [2001(136) ELT 121 (Tri. Decision)
ii. Kapson Polycoats (India) Pvt. Ltd. Vs. CC, New Delhi [2002(145) ELT 89 (Tri. Del.)]
iii. Kemtrode Pvt. Ltd. Vs. CC, Bangalore [1999(105) ELT (Tri.)]
iv. Sachdeva & Sons, Amrithsar Vs. CC, Bombay [1987(29) ELT 917 (Tri.)]
v. Laxmi Cotton Industries Vs. UOI [2015(323) ELT 264 (Gau.)]

4.2. He further submitted that gold or gold article (jewellery) enjoy free entry into India under Export Import Policy. However, its entry into India is subject to fulfilling of certain conditions under FEMA because of which it becomes restricted as per RBI guidelines. It is his further submission that any goods, not only gold or articles of gold when assume the characteristics of smuggled, they qualify to be treated as prohibited depending on the facts and circumstances of a case. He further submitted that in the present case, the appellants were wearing the jewellery in usual open manner on body without concealment besides they being not frequent flyer and also ignorant of the legal provisions in respect of the same, they deserve lenience. He further submitted that hiding or concealing of items in unusual and ingenious manner like rectum concealment, shoe sole concealment, false bottom concealment, concealment inside mixie, concealment inside refrigerator / TV / motor etc. of the kind are held to be concealment done consciously. These kinds of concealments have been recognized as concealment by interpreting law and facts. In support of this submission, he relied upon the following decisions:-

i. DRI Vs. Pushpa Lekhumal Tolani [2017(353) ELT 129 (SC)]
ii. Pushpa Lekhumal Tolani Vs. Addl. Commissioner of Customs [2008(227) ELT 368 (Del.)]
iii. Mohammad Hussain Ayyub Chilwan [2017(368) ELT 1275 (Commissioner(Appeals)]
iv. Yakub Ibrahim Yusuf Vs. CC, Mumbai [2011(263) ELT 685 (Tri. Mum.)]
v. Vignshwaran Sethuraman Vs. UOI [2014(308) ELT 394 (Ker.)]
vi. Mohd Zia Haque [2014(314) ELT 849 (GOI)]

5. On the other hand, the learned AR defended the impugned order and submitted that both the authorities have considered the submissions of the appellants and has rightly come to the conclusion that the goods have illegally been smuggled by the appellants and therefore

authorities have rightly confiscated the gold jewellery and have imposed penalties under Section 112(a) and Section 114AA of the Customs Act. She further submitted that the appellants in their statement have conceded that appellants have concealed the gold in order to avoid payment of customs duty. She further submitted that the appellants have not declared the value of imported goods and they were trying to pass through the green channel and they were intercepted by the Customs officers on suspicion. She also submitted that once they have conceded, there was no need to issue the show-cause notice.

5.1. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by both the parties, I find that the strict provisions of Section 124 of the Customs Act have not been complied with as no show-cause notice was given to the appellants. Further I find from the various decisions relied upon by the appellant that even if a show-cause notice is waived, even then, a oral show-cause notice and an opportunity of hearing should be granted to the affected party, if the goods are liable for absolute confiscation. Whereas in this case, the goods have been absolutely confiscated without issuing the show-cause notice. Further I find that the appellants are not frequent flyers as per their travel documents and they were wearing the jewellery in a usual manner and have not concealed in a manner that it cannot be detected by ordinary means. The decisions relied upon by the appellants wherein it has been held that how the concealment is normally resorted to for the purpose of avoiding the payment of customs duty. I also find that the gold is not a prohibited item. It can be imported only with certain conditions as prescribed under Exim Policy as well as guidelines laid down by the RBI.

5.2. In the case of Yakub Ibrahim Yusuf cited supra, it has been held that prohibited goods refers to goods like arms, ammunition, addictive drugs, whose import in any circumstance would danger or be detriment to health, welfare or morals of people as whole, and makes them liable to absolute confiscation. It does not refer to goods whose import is permitted subject to restriction, which can be confiscated for violation of restrictions, but liable to be released on payment of redemption fine. The gold do not fall under the prohibited category and therefore it cannot be absolutely confiscated. Further I find that in the case of Mohd. Zia Ul Haque cited supra, the Revisionary Authority in identical circumstances has held that if the gold ornaments are brought by passenger without declaration, then the same are not liable to absolute confiscation without giving any option to redeem the same. It is further held that when the goods are not prohibited, the adjudicating officer shall give option to pay redemption fine in lieu of confiscation, as the officer thinks fit, which discretion has to be exercised judiciously and if the passenger is not a habitual offender and not carrying the said goods for somebody else, nor did he conceal the goods in any ingenious manner, should be given option to redeem the goods on payment of redemption fine.

6. Therefore keeping in view of my above discussion, I am of the considered view that in the present case considering the facts and circumstances, the order of absolute confiscation is not sustainable in law and therefore I set aside the order of absolute confiscation in both the cases and give an option to the appellant to redeem the goods on payment of redemption fine of **Rs.3 lakhs (Rupees three lakhs only)** in the case of appellant Shri R.N. Palaksha and **Rs.2 lakhs (Rupees two lakhs only**) in the case of appellant Shri K.R. Maheshkumar. As far as penalties imposed on them for violation of Section 112(a) and Section 114AA is concerned, I uphold the penalties on both the appellants. Consequently, both the appeals are disposed of on the above terms.

(Order was pronounced
in Open Court on **..................**)

S.S GARG
JUDICIAL MEMBER

Raja…