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

Appeal(s) Involved:

C/21257/2018-SM, C/21256/2018-SM

[Arising out of Order-in-Original No.327/2013 dt. 24/11/2013 passed by Commissioner of CUSTOMS , COCHIN]

[Arising out of Order-in-Original No.348/2013 dt. 24/11/2013 passed by Commissioner of CUSTOMS , COCHIN]

Pabitha Thillainathan
D/o Thillainathan No 298/2 Modrn Strret 10-15 Colombo
SRILANKA -
SRILANKA

Appellant(s)

Kirthucase Mary Thawamani
No 23/76 Rishwyke Road Colombo
SRILANKA -
SRILANKA

Appellant(s)

Versus

Commissioner of Customs Cochin-cus
CUSTOM HOUSE
COCHIN - 682009
KERALA

Respondent(s)

Appearance:

Shri S. PALANIKUMAR ADVOCATE
NO.10, SUNKURAM STREET, PARRYS,
CHENNAI - 600 001
TAMILNADU

For the Appellant

Shri Gopakumar, Jt. Commissioner(AR)

For the Respondent

Date of Hearing: 08/01/2019
Date of Decision: 08/01/2019

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

Final Order No. 20020-20021 / 2019

Per : S.S GARG

Appellants have been filed these two appeals against the impugned order dt. 24/11/2013 passed by the Commissioner of Customs whereby the Commissioner has ordered absolute confiscation of the gold under Section 111(d), (i), (l) and (m) of the Customs Act, 1962 and also imposed penalties on both the appellants. Since the facts of the cases are identical and the impugned order, though passed separately, both dated 24/11/2013, both the appeals are being taken up together for discussion and disposal.

2. Details of both the appeals are hereunder:

Appeal No.	OIA	OIO	Decision	Penalty
C/21256/2018	No. COC-CUSTM-000-APP-017-14-15 dated 02/04/2014	No.327/2013 dt. 24/11/2013	Absolute confiscation of 159.42 grams of gold	Rs.10,000/-
C/21257/2018	No. COC-CUSTM-000-APP-018-14-15 dated 02/04/2014	No.348/2013 dt. 24/11/2013	Absolute confiscation of 231.35 grams of gold	Rs.6000/-

3. Briefly the facts of the present case are that both the appellants are Srilankan nationals. They arrived at Kochi International Airports on various dates from Colombo, Srilanka. They were intercepted on their arrival at Cochin International Airport by the Customs Officers and search of their baggage and person resulted in the recovery of assorted gold articles and jewelry. The impugned gold articles and jewelry were not declared by the appellants as required under Section 77 of the Customs Act, 1962. After due process of the law, the original authority ordered absolute confiscation of the impugned goods under Section 111(d), (l), (m)

and (o) of the Customs Act read with Section 3(3) of the Foreign Trade (D&R) Act, 1992 and also imposed penalty under Section 112(a) of the Customs Act, 1962 to the tune of Rs.10,000/- and Rs.6000/- respectively. The Orders-in-Original were passed by the Commissioner of Customs. Aggrieved by the said order, appellants filed appeals before the Commissioner(Appeals) who rejected the appeals on the ground that the appeals do not lie before him as per the provisions of Section 128(1) of the Customs Act, 1962 and without going into merit he rejected the appeals. thereafter appellants filed revisions before the Revisionary Authority who directed the parties file appeals before the CESTAT and accordingly these appeals have been filed before this Tribunal.

4. Heard both sides and perused records.

5. The learned counsel for the appellants submitted that the impugned orders ordering absolute confiscation of gold chain weighing 128.70 grams and bangles weighing 111.40 grams valued at Rs.6,80,000/- seized from Smt. Kirthucase Mary Thawamani and gold chain weighing 75.35 grams and bangles weighing 156.00 grams valued at Rs.6,55,877/- seized from Smt. Pabitha Thillainathan and imposition of penalties under Section 112(a) & (b) of the Customs Act are not sustainable in law and the same have been passed without appreciating the case law and the binding judicial precedent. He further submitted that admittedly the appellants are foreign nationals from Sri Lanka and they were wearing the gold ornaments and have not concealed the same. He further submitted that the

Commissioner in the impugned orders has recorded contradictory facts. He pointed out that the Commissioner has observed in his order that the appellants were possessing ornaments made of crude gold whereas in the seizure report, it has been mentioned that the description of the gold is 22 ct. Further the Commissioner observed that the appellants have not declared the jewelry to the customs and thereby indulged in smuggling. He further submitted that they being foreign national, were not required to make declaration on their arrival in India. He further submitted that on identical facts, the Kerala High Court in the case of Vigneswaran Sethuraman Vs. UOI [2014(308) ELT 394 (Ker.)] has set aside the confiscation and imposition of penalty. He further submitted that against the decision of the Kerala High Court, the Revenue filed a review petition before the High Court and the Division Bench of the Hon'ble High Court dismissed the petition which is reported in 2015(325) ELT 573 (Ker.). he also submitted that on identical facts, the Revisionary Authority has remanded the matter to the original authority and the original authority has set aside the absolute confiscation but imposed redemption fine and penalty. He has produced copies of the decisions on record. He also produced the copy of the order passed by the Commissioner(Appeals) dt. 18/12/2014 wherein the Commissioner(Appeals) has followed the decision of the Kerala High Court in the case of Vigneswaran Sethuraman cited supra and set aside the absolute confiscation. Copy of that order is also placed on record.

6. On the other hand, the learned AR defended the impugned order and submitted that there was a violation of import procedure and the appellants have not declared the jewelry they were wearing, before the Customs Department.

7. After considering the submissions of both sides and perusal of the material on record, I find that this issue is squarely covered by the decision of the Kerala High Court in the case of Vigneswaran Sethuraman cited supra wherein the Hon'ble High Court has discussed in detail regarding the declaration to be made by foreign tourist entering into India and the various provisions of the Customs Act relating to seizure of such goods. After elaborately discussing various procedures, the Hon'ble High Court in paragraphs 15 & 16 has observed as under:-

> ***15.****Section 77 of the Act stipulates that the owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer. The term "baggage" is defined in Section 2(3) of the Act to include unaccompanied baggage. Motor vehicles are excluded from the purview of the said definition. The declaration under Section 77 is to be made by the owner of the baggage. The term baggage ordinarily connotes suitcases or bags or containers in which a traveller carries his/her goods or belongings. Section 2(22) of the Act defines the term goods to include baggage. Having regard to the stipulations in Section 77 and the definition of the term "baggage" occurring in Section 2(3) of the Act, the body of a passenger cannot be said to be baggage. In the instant case, the gold chain was worn by the petitioner and was not carried in his baggage. It was therefore not necessary for the petitioner to declare the gold chain worn by him. Section 80 of the Act clarifies the position. Section 80 stipulates that the baggage of a passenger, which contains any article which is dutiable or the import of which is prohibited, may be detained at the request of the passenger for the purpose of being returned to him on his leaving India. The term baggage thus connotes something which is distinct and different from the passenger who has brought the baggage. Section 81 of the Act*

empowers the Central Board to frame regulations regarding the declaration of the contents of any baggage, its custody, examination, assessment to duty and clearance of baggage and transit of baggage from one customs station to another or to a place outside India. Going by the stipulations in Sections 77, 80 and 81 of the Act, I am persuaded to take the view that the provisions therein can have no application to the instant case where the petitioner, a tourist coming from Sri Lanka had on his person a gold chain which he was wearing and was not kept concealed in his body. Such being the situation, clauses (l) and (m) of Section 111 of the Act can have no application.

16.*That takes me to the question whether the petitioner had imported or attempted to import or brought to Indian Customs Waters for the purpose of being imported, gold ornaments, contrary to any prohibition imposed by the Act or any other law, so as to attract clause (d) of Section 111 of the Act. Necessarily therefore the question whether the Act or any other law prohibits a tourist coming to India from wearing gold ornaments arises for consideration. The second respondent has in the impugned order held that a foreigner cannot import even a single gram of gold free of duty or on payment of duty. He does not however refer to the law which imposes the prohibition. The learned counsel appearing for the respondents was also not able to bring to my notice any provision in the Act or the Baggage Rules, 1998 to that effect. No provision in any other law to that effect was also brought to my notice, in the absence of any prohibition imposed by the Act or any other law to the effect that a foreign tourist arriving in India cannot wear gold ornaments on his person or wear gold ornaments of 24 carat purity, clause (d) of Section 111 could not have been invoked to confiscate the gold chain worn by the petitioner. The gold chain was not concealed in any package and therefore it could not have been confiscated invoking clause (i) of Section 111. Even if it was dutiable, as it was not concealed in any manner in any package either before or after it was unloaded, it could not have been confiscated invoking clause (i) of Section 111 of the Act. At best, only the duty payable could have been levied. There is also yet another reason why the impugned action cannot be sustained. Even assuming for the sake of arguments that a foreign tourist arriving in India cannot wear gold ornaments on his/her person in view of an express provision of law in that regard (such a statutory provision was not brought to my notice and it is not referred to in Ext. P3 order), the respondents should have informed the petitioner that he cannot wear it for the reason that the import of it is prohibited and given him the option of having the goods detained for the purpose of being returned to him on his leaving India as contemplated in Section 80 of the Act. The respondents have not stated in Ext. P3 that such an option was extended to him and therefore for that reason also, the impugned order is liable to be set aside.*

8. Further I find that the Department's review petition before the Division Bench of the Kerala High Court has also been dismissed. Further I also find that in the impugned order, the Commissioner of Customs has wrongly observed that the gold ornaments were made of crude gold whereas in the seizure report, it has been observed that the purity is 22 crt. Further I find that the Commissioner on identical issue vide its order dt. 18/12/2014 has also set aside the absolute confiscation by following the decision of the Kerala High Court. In view of these facts, I am of the opinion that the impugned orders are not sustainable in law in view of the judgment of Kerala High Court cited supra. Therefore I set aside the impugned order by allowing both the appeals of the appellants and allow the Department to re-export the impugned goods confiscated by them. Consequently both the appeals are allowed.

(Operative portion of the Order was pronounced
in Open Court on **08/01/2019**)

S.S GARG
JUDICIAL MEMBER

Raja...