

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.C/383/2012

[Arising out of Order-in-Appeal No.26/2012 dt. 23.08.2012 passed by
Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli]

Shri P. Balamurugan

Appellant

Versus

Commissioner of Customs,
Tiruchirappalli

Respondent

Appearance :

Shri B. Satish Sundar, Advocate
For the Appellant

Shri B. Balamurugan, AC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing : 05.12.2018
Date of Pronouncement : 31.12.2018

FINAL ORDER No. 43169 / 2018

Per Shri Madhu Mohan Damodhar

The brief facts of the case are that based on specific intelligence, department officers had searched Room No.2 of S.S. Lodge, Karur on 09.08.2010 and recovered 1 kg. of Gold bar with foreign markings (FMG) valued at Rs.18,00,000/- from one Shri C. Rajan. The officers seized the gold bar in presence of witnesses. From the investigations made, it appeared to the

department that the said C.Rajan had made arrangements to sell gold bar to one Sri Ramesh through one Shri Sathik; that Shri P.Balamurugan (appellant herein) was contacted by Shri C. Rajan and asked him to arrange 1 KG gold bar. Shri S. Balamurugan owner of M/s.Palanimurugan Jewellery handed over the gold bar on credit basis to Shri P.Balamurugan. Department harboured the view that the said persons were involved in possession and transaction of smuggled foreign gold bars and had contravened the provisions of Section 11 of the Customs Act, 1962, hence a show cause notice was issued, inter alia proposing confiscation of goods under Section 111 ibid and as also imposition of penalties under Section 112 on the concerned noticees. Original authority ordered absolute confiscation of the gold bar and imposed penalty of Rs.1,50,000/-, inter alia on Shri P. Balamurugan (appellant). In appeal, the Commissioner (Appeals) vide impugned order dt. 23.08.2012 inter alia concluded that appellant had not proved beyond doubt that gold bar is a legally imported one and upheld the penalty imposed under Section 112 ibid. Aggrieved, the appellant is before this forum.

2. When the matter came up for hearing on 05.12.2018, on behalf of appellant, Ld. Advocate Shri B. Satish Sundar made oral and written submissions which can be broadly summarized as under :

i) From a reading of the sequence of events, it can be seen that acquisition of the gold bar by the appellant was from M/s.Palanimurugan Jewellery of Karur on credit basis under proper bill. This is also spoken to by the proprietor of Palanimurugan Jewellery namely S.Balamurugan, who in turn has clarified that the gold bar in question was purchased from M/s.Surana Corporation under proper documentation and the payment for the same was made to M/s.Surana

Corporation by banking channels. M/s.Surana Corporation have also confirmed the sale of the gold bars to M/s.Palanimurugan Jewellery. Therefore, the contention of the appellant is that he had purchased the gold bar in question in the normal course of business under proper bills / invoices and there is absolutely no material to show that the gold bar in question was smuggled at a point anterior to its purchase. In fact, nobody talks about the alleged smuggling of the gold bar in question. In this connection, the appellant seeks to rely upon the order of this Hon'ble Tribunal in the case of S.K.Chains Vs. Commissioner of Customs, Mumbai reported in 2001 (127) ELT 415 (Tri. Mum.) [Paras 4 to 10], which has since been followed in Samir Kumar Roy Vs. Commissioner of Customs – 2001 (135) ELT 1036 (Tri.-Kolkata) and in Kapildeo Prasad Vs. Commissioner of Customs (Preventive) reported in 2002 (142) ELT 668, which has been affirmed by the Hon'ble Patna High Court in 2011 (272) ELT 31 (Pat.). In the last of the cases, above cited, it was pointed out that merely because there is variation in the weight, purity and markings cannot be a ground to suspect the transaction and it cannot be held that section 123 is invocable in such cases and the gold confiscated on the ground that it is not shown that it is not smuggled.

ii) The burden under section 123 of the Customs Act, 1962 is rebuttable and the burden so cast is not so heavy as that of the prosecution. If the person charged has a reasonable and plausible explanation, which is capable of being accepted, then the burden would once again shift to the department to show by absolute proof that the gold in question is smuggled. In the present case, the only allegation of the department is that on perusal of the bills of entry submitted by Surana Corporation, the markings which were found on the seized gold bar

were not found in the said bills of entry but that does not discount the fact that the gold bar in question was sold by Surana Corporation to M/s.Palanimurugan Jewellery which in turn was sold to the appellant.

iii) In light of the facts enumerated and applying the ratios of the aforesaid orders / judgments, it has to be held that the gold bars under seizure is not confiscable as there is no material to suggest that the same is smuggled and there is enough material in favour of the appellant to show that the gold bar in question had been acquired by him in the normal course of trade from the vendor namely M/s.Palanimurugan Jewellery, Karur. The allegation and findings of the authorities below to the effect that the markings on the gold bar being different from the bill of entry and details submitted by Surana Corporation who has sold to M/s.Palanimurugan Jewellery is a mere suspicion without there being any substantive proof and on that basis alone the gold bar in question cannot be confiscated.

3. On the other hand, on behalf of Revenue, Ld. A.R Shri B. Balamurugan opposes the appeal. Ld. A.R further contends that implicatory role of the appellant has been clearly established by both the original authority as well as the Commissioner (Appeals). He further submits that it has also been established that the gold bar confiscated was not the same as the one claimed to have been purchased out of the gold imported by MMTC Ltd., Chennai. In consequence, the gold bar has been rightly confiscated and the appellant, has very actively participated in possession etc. of the gold bar and on account of which imposition of Section 112 of the Customs Act is fully justified.

4. Heard both sides and have gone through the facts of the case.

5.1 Appellant herein has been implicated in arranging to obtain the impugned one Kg. gold bar. The conclusion of the original authority, which has been upheld by the lower appellate authority, is that transaction of valuable gold bar worth Rs.18 lakhs on credit basis was not acceptable in normal trade; that the purported purchase bill was prepared intentionally only after seizure of the gold bar; that transaction value was not genuine and therefore malafide intention of dealing with smuggled gold is established. We find from the facts on record that appellant herein (Shri P. Balamurugan) in his statement dt. 07.09.2010, had affirmed that he had purchased 1 kg. gold bar from M/s.Palanimurugan Jewellery on credit basis vide Bill No.6 dt. 09.08.2010; that he did know that the gold was an imported one and in his reply dt. 25.04.2011 to the SCN, the appellant reiterated the same facts and also contended that the gold was seized outside the Customs barrier, hence had attained characteristics of domestic goods and in consequence, question of applicability of Section 111 of the Customs Act, 1962 did not arise. It is interesting to note that during investigation Shri S. Balamurugan of Palanimurugan Jewellery had deposed that he had brought one kg gold bar from M/s.Surana Corporation on 08.08.2010. On further enquiry, M/s.Surana Corporation confirmed that Palanimurugan Jewellery had purchased 1 kg. imported gold bar on 09.08.2010 vide credit invoice No.G1591. It was also informed that they had received payment for the above invoice through RTGS dt. 10.08.2010. It is further seen that Surana Corporation have sought to link the impugned gold bar with the lot of 1000 nos. of 1 kg. gold bars imported by MMTC Ltd., Chennai on 27.07.2010. The show cause notice dt. 04.02.2011 issued in this case narrates inter alia, that seized gold bar had foreign markings (FMG). It is also narrated that a seizure mahazar had been drawn after recovery of the gold jewellery, however no mention has been made in the SCN as to the

description of the foreign markings on the gold bar. However, in paras 53 & 54 of the order of the original authority, it is indicated that gold bar under seizure had markings "COMMERZ BANK 1 KILO GOLD 995.0 AH MELTER ASSAYER Switzerland A 21011", whereas the gold bars that has been imported by MMTC Ltd., Chennai were of "ARGOR" brand, issued by M/s.Standard Chartered Bank, London. This discrepancy in markings has not been disputed by the appellant. It has only been argued during the hearing by the Ld. Advocate that discrepancy in markings is only "a mere suspicion" without there being any substantive proof and on this basis alone, the gold bar in question cannot be confiscated.

5.2 True, the gold bar in question was not seized in a customs area. However, as per the provisions of Section 123, which inter alia apply to gold, where any goods specified therein are seized under reasonable belief that they are smuggled goods, then the burden of proving that they are not smuggled goods shall be either on the person from whose possession the goods were seized or the person, if any, who claims to be the owner of the gold. As per the statements made by Shri C. Rajan, namely, the person from whose possession the goods were seized as also other implicated persons including the appellant herein, the gold bar had been "purchased" on credit basis from M/s.Palanimurugan Jewellery, Karur. An effort has also been made by these persons to connect the impugned bar with the import of 1000 gold bars made by M/s.MMTC Ltd., Chennai to contend that the impugned gold bar has not been smuggled. The only fly in the ointment is that there is a definite discrepancy in the markings found on the impugned gold bar vis-à-vis markings on the gold bars imported by MMTC Ltd., Chennai.

5.3 Viewed in this light, the claim of having acquired and being in possession of legally imported gold bar, will surely crumble. We are therefore of the

considered opinion that based on the facts on record, the burden of proving that the gold is not smuggled is inter alia on the appellants herein and secondly, such a burden has not been satisfactorily cast off. This being so, the impugned gold will now become liable for confiscation under Section 112 (d) ibid and the appellants herein will in consequence become liable for penalty under Section 112 of the Act. The operation of Section 123 ibid is applicable even to gold and other notified goods seized outside the customs area.

5.3 The case laws relied upon by the Ld.Advocate do not help the case of the appellant. In the case of *S. K. Chains* (supra), the Tribunal found that as far as foreign markings gold is concerned, the onus placed by virtue of Section 123 has been discharged by the appellant to the required extent. In the case of *Samir Kumar Roy* (supra), the Tribunal noted the admission of sale of the gold in question to the appellant therein and took the view that onus placed on the appellant under provisions of Section 123 has been discharged to the requisite extent. So also, in *Kapildeo Prasad* (supra), the onus cast upon the assessee to prove legal importation of gold was found to have been discharged. However, from the facts of the appeal at hand, this is not certainly the case. If no benefit of doubt can be given in the circumstances, it has to be held that the onus of proof has not been discharged by the appellant herein.

6. From the discussions, conclusions herein above, we therefore hold that imposition of penalty under Section 112 of the Customs Act, 1962 on the appellant is very much justified. However, taking into account that the role of the appellant *vis-à-vis* the role of the other persons implicated in the case, we hold that there is a case for reduction of personal penalty and the interests of justice would be adequately met by reducing the penalty imposed under Section 112 ibid from Rs.1,50,000/- imposed to **Rs.50,000/- (Rupees Fifty thousand only)**

So ordered. We make it clear that other than modification of penalty as ordered above, no further interference is made with the impugned order. Appeal is partly allowed on above terms.

(Order pronounced in court on 31.12.2018)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

gs

