

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal Nos. C/75479-75481/2018

Arising out of Order-in-Appeal No. 15/CUS(A)/GHY/17 dated 31.10.2017 passed by the Commissioner (Appeals), CGST, Central Excise & Customs, Guwahati.

1. Shri Sudip Saha
2. Shri Tanmoy Saha
3. Shri Alekh Hossasin

....Appellant (s)

Vs.

Commissioner of Customs (Preventive,) Shillong

...Respondent (s)

Appearance:

Shri Shri Bhaskar Deb, Advocate & Ms. Deepshikha Tapadar, Advocate for the Appellant (s)

Shri S. Guha, A. C. (AR) for the Respondent(s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: - 12.09.2018

Date of Pronouncement: 04.01.2019

Order No. FO/77233-77235/2018

Per Shri P. K. Choudhary:

The facts of the case in brief are that on 16.03.2016, DRI officers of Agartala, Tripura, intercepted two persons, namely Shri Tanmoy Saha and Shri Alekh Hossain, near kalibiscuiti at Melarmath area of Agartala alongwith their conveyances, one motor cycle and one bicycle. On enquiry, Shri Alekh Hossain took out 10 (ten) nos. gold biscuits wrapped with adhesive tapes and paper from his trouser pocket and handed over to the DRI officers. Each of the recovered gold biscuits had foreign marking as "MWG UAE 10 Tolas, 999.0 MWG

Melter Assayer". They could not produce any document showing the acquisition of gold biscuits.

The intercepted persons alongwith the recovered gold were brought to the DRI office at Ram Nagar Road No. 5, Agartala accompanied by the witnesses for further interrogation. The gold biscuits were physically examined by one registered gold smith, M/s. Shri Guru Jewelers, who certified that those biscuits were of 24 carats purity, total weighing 1165.710 gms.

2. The recovered 10 nos. of gold biscuits weighing 1165.710 gms. valued at Rs.33,82,650/- alongwith the materials used for wrapping the gold biscuits like newspapers, adhesive tapes, etc. the bi-cycle of Alekh Hossain and motor cycle bearing Reg. No. TR-01-W6637 of Shri Tanmoy Saha and the two mobile phones of the said two persons were seized under the provision of Section 110 of the Customs Act, 1962, on 16.03.2016 and a Panchanama was drawn detailing the events. On 01.04.2016, the seized 10 nos. of gold biscuits were taken to M/s. Sidhanath Computerized Gold Testing, 23 Central Road (Amiyasagar par), Agartala for testing their purity and as per their test report, the purity of the gold biscuits verified from 99.82% to 99.93% and were of 23.95 Carat to 23.98 Carat.

Shri Tanmoy Saha and Shri Alekh Hossain were arrested on 17.03.2016 under Section 104 of the Customs Act, 1962 for committing offence punishable under Section 135 of the Customs Act, 1962 and were produced before the Addl. Chief Judicial Magistrate, West Tripura, Agartala on the same day. Both the accused were, however, released on bail on the same day with a direction to appear

in the DRI office Agartala once in a week. During the course of investigation, voluntary statements from Shri Tanmoy Saha and Alekh Hossain were obtained under Section 108 of the Customs Act, 1962 on 16.03.2016. Both of them stated that the actual owner of the seized gold was Shri Sudip Saha. They were carriers and got payment against carrying of gold from Sudip Saha. On 31.01.2016, Shri Tanmoy Saha in his further voluntary statement, given under Section 108 of the Customs Act, 1962, reiterated the statement given earlier. He has also stated that on earlier occasions also, he had carried gold biscuits for Shri Sudip Saha. Further examination of Md. Alekh Hossain could not be done as he refused to appear before the DRI Officers in spite of repeated summons on 31.03.2016, 12.05.2016 and on 28.06.2016. The summons sent by Speed Post were returned undelivered by the postal authority with remarks "refused by addressee". Subscriber Details Record (SDR) provided by the telecom provider in respect of Mobile No. 8259936321 recovered from Sri Alekh Hossain and subsequent verification revealed that it was registered under a fictitious name. On 11.07.2016, Shri Sudip Saha in his voluntary statement given under Section 108 of the Customs Act, 1962 accepted that he was the actual owner of the seized 10 nos. of seized gold biscuits of foreign origin. He had received gold biscuits through Shri Tanmoy Saha and Shri Alekh Hossain 15 to 20 times prior to this occasion. He sold all these gold biscuits to one Raju whose contact number and address was not known to him. These three persons never retracted their statements subsequently. Show Cause Notice in the instant case, was issued on 08.09.2016.

3. Following the above seizure and Show Cause Notice, Addl. Commissioner of Customs vide his order dated 17.02.2017:-

(i) Ordered for absolute confiscation of the 10 Nos. of foreign origin gold biscuits totally weighing 1165.710 gms and valued at Rs.33,82,560/- (Rupees thirty three lakh eighty two thousand and five hundred and sixty) only seized vide case no 01/CL/IMP/DRI/AGT/2015-16 dated 16.03.2016, under Section 111(b) and (d) of the Customs Act, 1962.

(ii) Ordered for absolute confiscation of the old and used wrapping news papers and cello tape used as packaging material to conceal the recovered contraband gold seized.

(iii) Ordered for confiscation of the Bike 150cc Pulsar (old & used), bearing Reg. No. TR-01W 6637 and valued at Rs.50,000/- (Rupees fifty thousand only, which was used in the smuggling of the contraband gold biscuits, seized on 16.03.2016, under Section 115(2) of the Customs Act, 1962. He, however, gave an option to Shri Tanmoy Saha to pay a fine of Rs. 15,000/- (Rupees fifteen thousand only) in lieu of confiscation under Section 125(1) of the Customs Act, 1962.

(iv) Ordered for confiscation of the old and used bicycle, valued at Rs.200/- (Rupees two hundred) only, which was used in the smuggling of the contraband gold biscuits, seized on 16.03.2016, under Section 115(2) of the Customs Act, 1962. He, however, gave an option to Shri Alekh Hossain to pay a fine of Rs. 100/- (Rupees one hundred only) in lieu of confiscation under Section 125(1) of the Customs Act, 1962.

(v) Ordered for release of the two mobile handsets, Micromax bearing no. 8974643307 and Nokia bearing no. 8259936321, valued at Rs.400/- (Rupees four hundred) only and seized vide case no. 01/CL./IMP/DRI/AGT/2015-16 dated 16.03.2016, under Section 115(2) of the Customs Act, 1962 to their respective owners.

(vi) Imposed penalty of Rs.3,00,000/- (Rupees three lacs only) on Shri Tanmoy Saha, S/o Shri Subrato Saha, Village-Taranagar, P.O. Mohanpur Sidhai, P. S. Mohanpur, District- Tripura (WB), Tripura-799211 under Section 112(b) (i) of the Customs Act, 1962 for his involvement in the smuggling of 10 nos. of foreign origin gold biscuits totally weighing 1165.710 gms and valued at Rs.33,82,560/- (Rupees thirty three lakh eighty two thousand and five hundred and sixty) only.

(vii) Imposed penalty of Rs.3,00,000/- (Rupees three lacs only) on Shri Alekh Hossain, S/o Shri Mulekh Hossain, W No. 34 Rajnagar, P. O. battala, District- Tripura (W), Tripura-799002 under Section 112(b) (i) of the Customs Act, 1962 for his involvement in the smuggling of 10 nos. of foreign origin gold biscuits totlly weighing 1165.710 gms and valued at Rs.3382560/- (Rupees thirty three lakh eighty two thousand and five hundred and sixty) only.

(viii) Imposed penalty of Rs.6,00,000/- (Rupees six lacs only) on Shri Sudip Saha S/o Shri Dilip Saha, W. No. 19, Shibnagar, MBB Club Road, P. S. East Agartala, District- Tripura (W), Tripura-799004 under Section 112(b) (i) of the Customs Act, 1962 for

his involvement in the smuggling of 10 nos. of foreign origin gold biscuits totally weighing 1165.710 gms and valued at Rs.3382560/- (Rupees thirty three lakh eighty two thousand and five hundred and sixty) only.

(ix) Imposed penalty of Rs.5,00,000/- (Rupees five lacks only) on Shri Tanmoy Saha, S/o Shri Subrato Saha, Village-Taranagar, P. O. Mohanpur Sidhai, P. S. Mohanpur, District – Tripura(W), Tripura-799211 under Section 112(b) (i) of the Customs Act, 1962 for his involvement in the smuggling of at least 40 pieces of gold biscuits of foreign Origin, approximately valued at Rs.1.35 Crore, in past 15 to 20 occasions.

(x) Imposed penalty of Rs. 5,00,000/- (Rupees five lacs only) on Shri Alekh Hossain, S/o Shri Mulekh Hossain, W. No. 34 Rajnagar, P. O. Battala, District – Tripura(W), Tripura-799002 under Section 112(b)(i) of the Customs Act, 1962 for his involvement in the Smuggling of at least 40 pieces of gold biscuits of foreign origin, approximately valued at Rs. 1.35 Crore, in past 15 to 20 occasions.

(xi) Imposed penalty of Rs.10,00,000/- (Rupees ten Lacs only) on Shri Sudip Saha S/o Shri Dilip Saha, W. No. 19, Shibnagar, MBB Club Road, P. S. East Agartala, District – Tripura(W), Tripura-799004 under Section 112(b) (i) of the Customs Act, 1962 for his involvement in the smuggling of at least 40 pieces of gold biscuits of foreign origin, approximately valued at Rs.1.35 Crore, in past 15 to 20 occasions.

(xii) Imposed penalty of Rs.50,000/- (Rupees fifty thousand only) on Shri Alekh Hossain, S/o Shri Mulekh Hossain, W. No. 34 Rajnagar, P. O. Battala, District – Tripura(W), Tripura-799002 under Section 117 of the Customs Act, 1962 for ignoring the consecutive summons issued to him under Section 108 of the Customs Act, 1962.

4. Aggrieved by the said order, the appellants filed appeals before the First Appellate Authority. The Id.Commissioner (Appeals) vide order dated 09.11.2017 upheld the order of the adjudicating authority except for the penalties imposed on the appellants vide Para No. 64, 65 & 66 of the Order-in-Original, which were set aside.

Hence the present appeals before the Tribunal.

5. The Ld. Advocate appearing on behalf of all the appellants, has emphasized on the procedural lapses on the part of the DRI officers mainly as they were not searched before the Gazetted Officer of Customs or a Magistrate. The signing officer i. e. I. O. is not a Gazetted Officer and on seizure of gold, no application was made to the Magistrate under Section 110(1b) of the Customs Act, 1962.

6. Shri S. Guha, Ld. Authorized Representative for the Department, submits that the appellants never rebutted the fact that gold was carried/smuggled by Shri Tanmoy Saha and Alekh Hossain for Shri Sudip Saha and Shri Sudip Saha admitted the ownership of the seized gold. They could not produce any licit document in support of the seized gold of foreign origin. They did not retract their statements given under Section 108 of the Customs Act, 1962. Moreover, they

have not raised the issue of retraction, if any, before the Judicial Magistrate even when they were produced before him after the arrest. He has also submitted that the allegations on procedural lapses raised by the appellants, appears to be frivolous and do not hold water in as much as, Shri Alekh Hossain himself took out from his trouser pocket (the seized gold biscuits) and handed over to the DRI officers and they were not searched. Also, they did not made any requisition for search in presence of the Gazetted Officer of Customs or the Magistrate. The Inspector or I.O. who has prepared the inventory and effected seizure is the Proper Officer as per Notification No.40/2012 Cus. (NT) dated 02.05.2012. Moreover, application under Section 110(1B) of Customs Act, 1962, was not made as the Department did not consider pretrial/immediate disposal of seized goods in the instant case.

7. Heard both sides and perused the appeal records.

8. On facts as stated above and under the circumstances of the case, I find that the investigation established the fact that gold biscuits of foreign origin were carried/smuggled by Shri Tanmoy Saha and Shri Alekh Hossain and ownership of the seized gold biscuits was claimed by Shri Sudip Saha.

9. In view of the above, I find no reason to interfere with the conclusion of the Commissioner (Appeals) that the seized gold biscuits are liable for confiscation under Section 111(b) and (d) of the Customs Act, 1962. I hold that the penalties imposed on the three appellants under Section 112 (b)(i), are justified considering their involvement in the smuggling of 10 pieces of gold biscuits of foreign origin. I find that the penalties imposed under Section 112 (b)(i) on the three appellants

for their purported smuggling on the basis of their voluntary statements only which is not corroborated with any evidence, have been rightly set aside by the First Appellate Authority as no penalty can be imposed on the appellants for their past acts of smuggling on presumption.

In view of the above discussions, the appeals filed by the appellants are dismissed.

(Pronounced in the open court on 04.01.2019)

Sd/

(P. K. Choudhary)
Member (Judicial)

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