IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Cus.Appeal No.75235 of 2017

(Arising out of Order-in-Original No.29/Cus/CC(P)/WB/2016 dated 01.11.2016 passed by Commr. of Customs (Preventive), West Bengal, Kolkata)

Shri Madhukar Sonaba Bhagat
7, Kannulal Lane,
1st Floor, Room No.16 & 17,
Kolkata-700007.

Applicant (s)

VERSUS

CC (Prev.), West Bengal
15/1, Strand Road,
Kolkata-700001.

Respondent (s)

APPERANCE :

Shri B. N. Chattopadhyay, Consultant for the Appellant
Shri S. K. Naskar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.P.VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.75782/2019

DATE OF HEARING : 26.06.2019
DATE OF DECISION : 26.06.2019

PER P.V.SUBBA RAO :

This appeal is filed against the Order-in-Original No.29/Cus/CC(P)/WB/2016 dated 01.11.2016.

2. The issue, which calls for consideration in this appeal, is, in the facts and circumstances of the case whether the appellant has satisfactorily discharged his onus under Section 123 of the Customs Act,1962 to the effect that the gold seized from him is not smuggled gold and consequently, whether the seizure of the gold under Section

111 and confiscation of Indian Currency under Section 121 and imposition of penalty under Section 112 of the Act, are sustainable.

3. Brief facts of the case are that the Officers of P & I Branch at Kolkata Customs, received information that smuggled gold was being transacted at M/s Shree Ganesh Refinery, 7, Kannulal Lane, Kolkata and searched the premises in the presence of the appellant and two independent witnesses. The appellant is the owner of the shop premises, which was searched. During search, 9 (nine) cut pieces of yellow metal believed to be gold of foreign origin weighing 1718 grams and Indian Currency amounting to Rs.18,00,000/- were seized. It was believed that the gold was of foreign origin and the Indian Currency was the sale proceeds of smuggled gold. Statement of the appellant was recorded on 03.07.2014, in which, he said that the receipts of the gold from various customers were converted into 22 Carat as replacement. He also said that he would sell the gold and maintain stock at his shop, Shri Ganesh Refinery. He explained that some cut pieces out of the metal, were converted at his refinery after receiving gold from various customers and others were received from the customers for conversion and the Indian Currency was the sale proceeds of gold received from the various customers. However, he could not produce any Stock Register or documents showing legal possession of the gold and the Indian Currency. Subsequently, the appellant submitted some documents and explained that the metal and Indian Currency belonged to three different Companies, whose premises were also searched by the Customs Officers and no contraband was found. Statements were also recorded of these customers. Thereafter, a notice was issued to the appellant calling upon to explain as to why the seized gold and the Indian Currency should not be confiscated under Section 111 and why the penalty should not be imposed upon him and his Company under Section 112 and 114AA of the Customs Act, 1962.

4. After following due process, the Ld. Commissioner, vide the impugned order, –

(a) Ordered confiscation of the seized gold weighing 1718 grams valued at Rs.49,03,172/- under Section 111 (b) & (d) of the Customs Act, 1962 ;

(b) Ordered confiscation of the Indian Currency amounting to Rs.18,00,000/- seized from the appellant under Section 121 of the Customs Act, 1962 ;

(c) Imposed a penalty of Rs.6,00,000/- on the appellant under Section 112 of the Customs Act, 1962.

He refrained from imposing any penalty under Section 114AA of the Customs Act, 1962, holding that he could not find any conclusive evidence put forward by the investigation to hold that the documents furnished by the appellant during investigation were false or fabricated.

On the question of discharging his onus under Section 123 of the Customs Act, 1962, he recorded as follows :

> *"Shri Madhukar Sonaba Bhagat has tried to discharge his onus in respect of Section 123 of the Customs Act, 1962 by submitting claim petition along with the purchase bills of M/s Vickey Jewellery Works Pvt. Ltd. & M/s Vickey Jewel Creation Pvt. Ltd. which when verified during investigation was found to be genuine. Furthermore, the claimant furnished the total stock position of gold which apparently matches with the quantum of seizure of gold effected. But all these appears to be an afterthought on the part of the notice as there has been a mis-match of the statements recorded from different personnel of M/s S.P.Bullions Pvt. Ltd. as discussed supra. In view, I hold that Shri Madhukar Sonaba Bhagat has failed to discharge his onus in respect of Section 123 of the Customs Act, 1962."*

5. The ld. Counsel for the appellant, would submit that in the first place, it was not correct for the Officers to have seized gold without having any reasonable belief that it was of foreign origin. What was seized, were not gold biscuits with foreign markings, but merely cut pieces of gold. He would argue that when the Department alleges

smuggling, it is for him to prove that the gold in question have been smuggled. It is true that under Section 123 of the Customs, 1962, where the gold is seized in the reasonable belief that it is smuggled, burden of proving that it is smuggled, shall be on person from whose possession the gold has been seized, but in this case, the reasonable belief that the gold was smuggled is missing. There is no indication in any of the documents that there were foreign markings on the gold that was seized. The entire demand should fail on this ground alone. Once the question of gold smuggling is not proved, the seizure of any Currency holding it out to be proceeds of smuggling under Section 121 also does not sustain.

6. He would further argue that although the gold was seized without reasonable belief, the appellant has discharged his onus by producing various documents and giving details of his transactions with various other Companies. In the impugned order, the Ld.Commissioner, himself, confirms that there is no evidence that any of these documents were fabricated. He further draws attention to the Bench to the fact that the Department searched the premises of various customers and had found nothing incriminating as has been recorded in the Order-in-Original itself. Therefore, nothing survives in this case. There is no evidence that the documents produced by the appellants were false or fabricated. During investigation, these documents were found to be genuine as has been recorded by the Ld.Commissioner in the impugned order.

7. In view of the above, he would submit that the first place, the seizure was done without reasonable belief as is required under Section 123 of the Customs Act, 1962. However, the appellant has produced all necessary documents subsequently to show the genuineness of the gold in possession and the documents were verified by the Department and found to be true.

8. He would argue that the Ld.Commssioner has, after recording of the above facts, erred in ordering confiscation of the gold only stating that the documents, which were submitted, were an afterthought.

Merely because, the appellant was not able to produce the required Register and documents at the time of search itself because they were not readily available at that time and place, it cannot be presumed that the documents were fabricated as an afterthought and though that the gold was smuggled. Therefore, their appeal may be allowed and the impugned order may be set aside.

9. The Ld.D.R. for the Revenue, reiterated the findings of the impugned order and argued that the confiscation of the gold and imposition of the penalty are sustainable.

10. We have considered the arguments on both sides and perused the records.

11. The allegation is that the appellant has smuggled gold, which is liable for confiscation under Section 111 of the Customs Act, 1962. The gold was not seized while it was being smuggled either at the Port or at the Airport. It was seized from his shop in the City. In such cases, Section 123 of the Customs Act, 1962, provides in respect of the gold and some other notified goods, if the seizure was under reasonable belief, that they are smuggled, the onus of proving that they are not rests upon the person from whom the goods were seized. The first question is whether there was reasonable belief. In this case, we find that the seizure was based on the information that they had received and that the documents pertaining to the gold, were not found in shop at the time of seizure. There is nothing on record to suggest that the pieces which were seized had any foreign markings. Under these circumstances, we find that there was no reasonable belief for the seizure. Further, we find that the appellant had produced various documents to show how he came in the possession of gold and these documents, on investigation, were found to be genuine. It is for this reason that the Ld.Commissioner has refrained from imposing any penalty upon the appellant under Section 114AA of the Customs Act, 1962. Under the circumstances, we find that not only was there no reasonable belief for seizure of the gold and the Currency in the first place, but also that the appellant has satisfactorily explained that the

gold and currency which were in his possession. The confiscation of gold and the currency and imposition of penalty upon the appellant under Section 112 of the Customs Act, 1962, are, therefore, not sustainable and the impugned order needs to be set aside and we do so.

12. The impugned order is set aside and the appeal is allowed.

(Operative part of the orders was pronounced in the open court)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(P.V.SUBBA RAO)
Member (Technical)

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