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

Customs Appeal Nos. 76711, 76693, 76694 & 76712 of 2016

Arising out of Order-in-Original No. 20/Cus/CC(P)/WB/2016 dated 29.08.2016 passed by the Commissioner of Customs (Prev.), Kolkata.

Mr. Santosh Kumar Poddar
Mr. Amol Deshmukh
Mr. Ganesh Haridas Kadam
18 No, Hansapukur 1st Lane,
3rd Floor, Kolkata-700007.

….Appellant (s)

Vs.
Commissioner of Customs (Prev.), Kolkata.
15/1, Strand Road,
Kolkata-700001.

….Respondent (s)

Appearance:
Shri H. K. Pandey, Advocate for the Appellant (s)
Shri S. K. Naskar, A. R. for the Respondent(s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Final Order No.76957-76960/2019

Date of Hearing:- 22.10.2019

Date of Pronouncement:-…18th December 2019

PER SHRI P.K.CHOUDHARY:

The present appeals are filed against Order-in-Original No. 20/CUS/CC (P)/WB/2016 dated 29.08.2016.

2. The facts of the case are that on 29.06.2015, the Custom Officer apprehended one Shri Amol Deshmukh near P-2, Kalakar Street, Barabazar, Kolkata, at about 15.30hrs with 20 pieces of Gold Biscuits including two cut pieces with silver beads. The gold pieces were found weighing 2331.420 grams and the silver metal beads 08.720 grams collectively. Said Shri Amol Deshmukh was brought to Custom House, Kolkata where the gold and silver beads was seized under Section 110 of the Customs Act, 1962 on reasonable belief that the goods were illegally imported into India through unauthorized

route without any valid documents and are liable to confiscation under Section 111(b) & 111(d) of the Customs Act, 1962. The person was arrested and produced before the Judicial Magistrate where he was released on bail on 30.06.2015. Shri Santosh Kumar Poddar, Director of M/s. Anjani Gold Private Limited claimed ownership of the seized goods on behalf of the Company and submitted that the gold and silver beadswere part of their stock-in- trade and the gold under seizure was from the lot purchased from the State Bank of India which they had sent to Shri Ganesh Haridas Kadam for melting thereof.

3. Based on the statement of Shri Amol Deshmukh, that he was employed with Shri Ganesh Haridas Kadam ,the statement was recorded on 22.07.2015 by the Customs Officer. In his statement Shri Ganesh Haridas Kadam, stated that he was engaged in melting and refining of gold and had received the gold with silver beads from Shri Santosh Kumar Poddar, Director of M/s. Anjani Gold with a bill for melting. He handed over the goods to his staff Shri Amol Deshmukh for taking it to his melting shop and he himself went to attend some other work and in a hurry forgot to handover the bill to Shri Amol Deshmukh. He also produced a copy of the said gold bill to the Investigating Officer. During enquiry with M/s. Anjani Gold Private Limited, it was found that they had purchased gold through Customs Auction vide Tax Invoice No. OBK/PCD/13-14/26 dated 26.03.2015 issued by State Bank of India, Overseas Branch, Kolkata weighing total 19801.52 grams but the marks/inscription on two of the Twenty pieces gold biscuits was not mentioned in the said invoice.

4. With this background, Show Cause Notice was issued to Shri Amol Deshmukh, Shri Ganesh Haridas Kadam and Shri Santosh Kumar Poddar under Section 124 of the Customs Act, 1962 proposing confiscation of the seized goods under Section 111(b) & 111(d) of the Customs Act, 1962 and

imposition of penalty under Section 112(b) of the Customs Act. Penalty under Section 114AA of the Customs Act, 1962 was also proposed to be imposed on Shri Ganesh Haridas Kadam and Shri Santosh Kumar Poddar. In reply to the said Show Cause Notice, it was submitted that Shri Santosh Kumar Poddar, on being informed by Shri Ganesh Haridas Kadam, that his employee Shri Amol Deshmukh did not reach his melting shop with the gold so given by them, lodged a complaint before local Police Station. On the next day having come to know that Shri Amol Deshmukh is produced before the Judicial Magistrate, they rushed to Customs Department and lodged the claim of ownership for the seized gold along with their Books of Accounts. The other two appellants replied on the same lines.

5. Learned Commissioner, adjudicating the case found it quite surprising and unacceptable that M/s. Anjani Gold Private Limited had handed over gold more than Rs. 60 lakh to Shri Ganesh Haridas Kadam without any written agreement and without verifying the antecedents/papers/authorization or enlistment of the melting shop on the basis of verbal reference of a person of Rourkella. He also observed that the Company M/s. Anjani Gold Private Limited purchased gold weighing 198015.52 grams on 26.03.2015 from the Custom authorities through the State Bank of India vide Tax Invoice No. OBK/PCD/13-14/26 dated 26.03.2015. On 29.06.2015, but two gold biscuits under seizure had marking not matching with the subject auction. Also the date of auction was 26.03.2015, but the seizure was effected on 29.06.2015 after a lapse of more than three months and Learned Commissioner found no rhyme or reason in withholding the said purchased gold for such unusual long time considering their quantum and frequency of trade of Gold Bullion and accordingly he found that the burden of proof on the part of the appellants under Section 123 of the Customs Act had not been discharged. Further, he

found that Shri Santosh Kumar Poddar was also involved in another case of smuggling bearing No. 16/IMP/CL/GOLD/CUS/DPU/BCD/13-14 dated 19.11.2013 and as such he is a habitual offender. Accordingly, order for absolute confiscation of the entire seized gold under Section 111(b) & 111(d) of the Customs Act was passed and penalty of Rs. 5,00,000/- (Rupees Five Lakhs) on Shri Amol Deshmukh, Rs. 6,00,000/- (Rupees Six Lakhs) on Shri Ganesh Haridas Kadam and Rs.6,00,000/- (Rupees Six Lakhs) on Shri Santosh Kumar Poddar under Section 112(b) of the Customs Act, 1962 was imposed. Also penalty of Rs.50,00,000/- (Rupees Fifty Lakhs) on Shri Santosh Kumar Poddar, under Section 114AA of the Customs Act, 1962 was imposed. All the three persons are in appeal against the impugned Order- in-Original.

6. Learned Advocate appearing on behalf of the appellants submitted that the impugned order is passed on assumption and presumption. It is a fact on record that M/s. Anjani Gold Private Limited is engaged in Bullion Trade. They had purchased gold in Customs auction through State Bank of India which is duly recorded in their Books of Accounts and the seized gold is also accounted for in their Books of Accounts. That two of the gold pieces had some marking inscription not mentioned in the Tax Invoice issued by the State Bank of India is not correct factually in as much as the subject invoice did not have any piece-wise identification mark mentioned therein. He further submitted that melting/re-melting of gold to obtain desired purity is very common in gold business. There is no rule prescribed for movement of gold for such purpose nor there is any restriction for melting/refining of gold under the Customs Act or rules made there under. He also submitted that the revenue has proceeded against the Director of the Company without

implicating the company itself. Learned A.R. appearing on behalf of the department reiterated the findings of the Ld. Adjudicating Officer.

7. Heard both sides and perused the appeal records.

8. We find that the adjudicating authority has taken the view that the claim of lawful acquisition of the subject gold by M/s. Anjani Gold Private Limited, dealing with in Gold Bullion for years and handing over gold of such high value to a person without any written agreement is surprising and unacceptable. Non-mentioning of marks brand as found on two gold biscuits in the Tax Invoice and holding the subject gold for about three months in a stock was observed as deceitful attempt to salvage the seized gold. Learned Commissioner in passing the impugned order did not find that the burden of proof as envisaged under Section 123 of the Customs Act, 1962 had been discharged by the appellant. We also find it appropriate to observe the judicial principle laid down in the case of Rasilaben H. Rathod reported in 2008 (226) ELT 641 (Tri-Ahmd) wherein it has been held that " *Gold-restriction therefor-Except normal records to show sale and purchase, no elaborate records required to be maintained after repeal of Gold (Control) Act, 1968-No rule or regulation mandating maintenance of records for purchase of gold-law not requires mentioning of brand or mark of foreign marked gold on sale documents"*

9. We find that the appellant is the Director of a Company admittedly dealing with gold bullion. It is also on record that apprehension of Shri Amol Deshmukh with the subject gold was not brought to the notice of the claimant before he was produced to the Judicial Magistrate under arrest. On perusal of the statements recorded by the Revenue, it reveals that at no point of time ownership of the gold was agitated. The seized gold was duly recorded in the Books of Accounts of M/s. Anjani Gold Private Limited which was admittedly computerized. The purchase invoice issued by State Bank of

India showing that 198015.52 grams in Customs auction is also not disputed by the Revenue. Thus, we are of the view that the obligation under Section 123 of the Customs Act, 1962 has been discharged by the claimant of the gold. We also find that the revenue has not been able to adduce any evidence to prove that the subject gold has been illegally imported by the appellants and the order of confiscation under Section 111(b) and under Section 111(d) of Customs Act is not sustainable as imposition of penalty under Section 112 is consequential to confiscation of goods under the Customs Act.

10. Moreover, imposition of penalty on the Director of a Company without making the Company a party to the proceeding is not justifiable and accordingly set aside. More so, when the confiscation of the seized goods is set aside, penalization thereof is not maintainable upon the appellants herein.

11. In view of the above discussions, the impugned order is set aside and the appeals are allowed with consequential relief to the appellants. Appeal No. C/76712/2016 is dismissed as infructuous.

(Pronounced in the Open Court on…18th December 2019…)

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

Sd/-
(Bijay Kumar)
Member (Technical

T.K.