OD-15

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

CUSTA/34/2024
IA NO: GA/1/2024
COMMISSIONER OF CUSTOMS (PREVENTIVE), KOLKATA
VS.
M/S. J.S. JEWELS PVT. LTD.

BEFORE :
THE HON'BLE Chief JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 10th April, 2024

Appearance :

Mr. K.K. Maiti, Adv.
Mr. Tapan Bhanja, Adv.
... for appellant

Mr. Mainak Bose, Adv.
Mr. Talay Siddique, Adv.
Mr. Neeraj Kr. Pandey, Adv.
Mr. Shakeel Mohammed Akhter, Adv.
...for respondent

The Court : This appeal filed by the revenue under Section 130 of the Customs Act, 1962 challenging the order passed by the Customs, Central Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata, dated 20th February, 2024 in Excise Appeal No. 75202 of 2024.

The revenue has raised the following substantial questions of law for consideration :-

i) Whether the Learned Tribunal has committed gross error of law by directing to release the gold when the respondent has failed to establish their ownership of the said gold and has failed to substantiate that the gold bars are not smuggled one ?

ii) Whether the Learned Tribunal is duty bound to appreciate the provisions of Section 110A of the Customs Act, 1962 before passing the order of release of gold ?

iii) Whether the Learned Tribunal is required under law to provide proper reason for release of gold to the respondent and also required to state what the wrong has been committed by the Adjudicating Authority by non-releasing the gold ?

iv) Whether the respondent has discharged their burden of proof in terms of Section 123 of the Customs Act or not ?

We have heard Mr. K.K. Maiti, learned standing Counsel appearing with Mr. Tapan Bhanja, learned Advocate for the appellant and Mr. Mainak Bose, learned Counsel appearing with Mr. Talay Siddique, learned Advocate for the respondent.

The short issue which falls for consideration in the instant case is whether the Tribunal by the impugned order was right in granting provisional release of the seized gold bars by imposing certain conditions. The case has had a chequered history and as many as three writ petitions have been filed before this

Court of which two writ petitions have been disposed of and one is pending wherein the order of seizure is the subject matter of challenge.

The respondent is stated to be a four-star exporter of jewellery from India to various foreign countries and for business purposes they purchase gold through authorized banking channels. In this regard, respondent is stated to have purchased gold from HDFC Bank and is in possession of the relevant tax invoices and delivery challans etc. issued by the HDFC Bank and also the serial number of the gold bars which have been purchased. On 11th October, 2023 during a vigil which was maintained by the Department, a vehicle was intercepted which was coming from Park Circus area towards Gariahat and there were four persons sitting inside the vehicle and upon enquiry, it was found that they were in possession of gold which was alleged to be smuggled gold. The identity of the four persons is at page 28, three and four and thereafter notice under Section 102 of the Act was issued. Ultimately, on the alleged ground that the gold is smuggled gold, they were seized. The order of seizure has been put to challenge before this Court by way of a writ petition and the same is pending. In the meantime, the respondent filed an application before the authority for unconditional release of the gold bars by representation dated 14th November, 2023. The said representation was directed to be considered by order passed by this Court in WPO No. 1928 of 2023 dated 13th December, 2023. Pursuant thereto the Commissioner of Customs has passed the order dated 25th December, 2023 rejecting the prayer for unconditional release. Thereafter in WPO No. 1897 of 2023 an interim direction was issued on 19th January, 2024 granting liberty to the respondent to make an application under Section 110A of the Act and the same was directed to be considered. This was considered and rejected by order dated 31st January, 2024 by the Commissioner of Customs. Aggrieved by the same, the respondent approached the Tribunal with the same prayer. The learned Tribunal by the impugned order allowed such prayer. There are several factual matters which are to be gone into as regards the identity of the gold which was seized on 11th October, 2023 from four persons. The photograph of the four gold bars finds placed as an annexure to the stay petition in this appeal and we find that the serial numbers have been erased. However, the gold bars show that they are of foreign origin, which according to the respondent/writ petitioner, matches with the description as contained in the tax invoice and the delivery challan issued by the HDFC Bank. The Department had been addressing HDFC Bank at various places, firstly, when the four persons were apprehended and remanded to judicial custody and pursuant to a direction issued by the learned Chief Metropolitan Magistrate, Calcutta, a report dated 24th October, 2023 was submitted to the Court wherein the HDFC Bank stated that they confirm that they have sold 4 Kgs. Gold Kilo Bar to the respondent vide invoice dated 10th October, 2023 and delivery order dated 10th October, 2023. The attested copy of the tax invoice and delivery order was appended to the report. The learned Counsel for the respondent would submit that based upon the said communication the court of the learned Chief Metropolitan Magistrate, Calcutta was pleased to enlarge the four accused on bail. Subsequently it is seen that the Department had addressed the HDFC Bank on 7th December, 2023 requesting for their conclusive comments on co-relation between the seized gold bars and the tax receipts sent by them. Reply was sent on 16th December, 2023 stating that they are able to confirm the brand namely, The Australia Perth Mint; Type of Bar : 1 Kilo Fine Gold and Purity of bar : 9999. Once again the Department has addressed HDFC Bank setting out the following four questions by communication dated 6th January, 2024.

“1. Details of specific markings on 1 KILO “FINE GOLD 9999” gold bar manufactured by “The Perth Mint, Australia” and sold by you.

2. Whether the serial number, found to be engraved on the foreign-origin gold bars are guided by law or convention ?

3. Whether you have issued any gold bar manufactured by “The Perth Mint, Australia” without any Serial Number to M/s. J S Jewels Pvt. Ltd. or any other party ? If yes, the reason behind.

4. Sample facsimile of gold bars manufactured by “The Perth Mint, Australia” issued from your end.

5. The co-relation between Serial Numbers on the 1 KILO “FINE GOLD 9999” gold bars, related tax invoices, Certificates and packing lists.”

In response thereto, HDFC Bank sent a reply to the Department dated 11th January, 2024, which is to the following effect :

“With reference to caption letter dated 06-Jan-2024, the company hereby submits the following details/documents as per your requirements.

1. We have imported the gold bars from our empaneled overseas supplier. Details of Import documents i.e. (Airway Bill, Customs Invoice, Packing list & Bill of Entry) **(attached herewith as Annexure – II)**

2. Precious metal is imported under Chapter 71 is described as that of bearing manufacturer’s or refiner’s engraved serial number and weight expressed in mertric units.
3. Bank does not provide gold bars without serial numbers.
4. We (HDFC Bank Ltd.) do not maintain any copies of the gold bars.
5. Copy of Airway Bill, Customs Invoice, packing list received from overseas supplier and challan issued by the vaulting agent. Bank is providing quantity, product description & consignment reference number in delivery order/challan and bill of entry number and bill of entry date on tax invoice. **(attached herewith as Annexure – III and our reply dated 16th Dec, 2023)**”

The case of the appellant department is that the bank has taken a specific stand that the bank does not provide gold bars without serial numbers and the seized gold does not contain the serial number and the allegation is that the serial number stands defaced.

In our view, all these factual issues were required to be gone into by the Tribunal even while ordering provisional release, more particularly when gold is a notified commodity under section 123 of the Act and if there is an allegation that seized gold is smuggled gold then onus is on the person from whom seizure was effected to prove that the gold was validly purchased within the territory of India. Unfortunately, the learned Tribunal had not endeavoured to do any such exercise while passing the impugned order except for observing that in the interest of justice the order is passed. This, in our view, would be wholly insufficient because the learned Tribunal is the last authority to record a finding of fact. Therefore, an exercise has to be done by the Tribunal considering the fact in issue. Learned Advocate appearing for the respondent would submit that the respondent had filed an application with annexures consisting of more than 450 pages. If that is so, at least distinction of those documents which were placed before the Tribunal is required. Since all these things are manifestly absent in the impugned order, we are constrained to interfere with this order. However, we do not wish to foreclose the avenues available to the respondent and while setting aside the order passed by the Tribunal, we are inclined to remand the matter back to the Tribunal for a fresh decision on merits and in accordance with law after hearing the parties and considering all documents and the application be disposed of by a speaking order.

The appeal is allowed with the above direction.

Consequently, the substantial questions of law are left open.

The stay application being GA 1/2024 stands disposed of.

Since the seizure was effected in October 2023 and the gold is still lying with the respondent no.1 and the prayer made in the application is being only for provisional release, the Tribunal is requested to give precedence to the matter and endeavour to dispose of the same as expeditiously as possible, preferably within the period 30 days from the date on which the order is communicated to the Tribunal.

The learned Advocate appearing for the respondent submits that till the learned Tribunal decides the matter, the department should not take steps to sell the seized gold. The learned standing Counsel appearing for the appellant department submitted that department would not proceed further and retain custody of the seized gold till the disposal of the application by the learned Tribunal. However, liberty is given to the department to issue show-cause notice.

(T.S. SIVAGNANAM, CJ.)

(HIRANMAY BHATTACHARYYA, J.)

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