



C.M.A.(MD)No.167 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.02.2025

Delivered on : 04.03.2025

CORAM:

THE HONOURABLE DR.JUSTICE **G.JAYACHANDRAN**
and
THE HONOURABLE MS.JUSTICE **R.POORNIMA**

C.M.A.(MD)No.167 of 2019

P.Balamurugan

... Appellant

-Vs-

The Commissioner of Customs,
No.1, Williams Road,
Tiruchirapalli-620 001.

... Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1961, against the Final Order No.43169 of 2018 dated 31.12.2018 Appeal No.C/383/2012-SM on the file of the Customs, Excise, Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.B.Sathish Sundar

For Respondent : Mr.R.Nandakumar
Senior Standing Counsel

Page No. 1 of 12



C.M.A.(MD)No.167 of 2019

WEB COPY

JUDGMENT

[Judgment of the Court was made by **DR.G.JAYACHANDRAN, J.**]

The above Civil Miscellaneous Appeal is directed against the Final Order dated 31.12.2018 passed by the CESTAT, South Zone, Chennai in Appeal No.C/383/2012-SM.

2. One Kilo of gold bar with foreign marking was seized from one Rajan staying in Room No:2, SS Lodge, Karur on 09.08.2010 by the officials of the Customs Department. Harboursing the view that the seized gold was illegally smuggled into India, show cause notice was issued for confiscation proceedings. The explanation, which says that the gold bar was purchased from one S.Balamurgan of M/s Palanimurgan Jewellery, Karur on credit basis and the said Balamurgan purchased the gold bar from M/s Surana Corportion of Chennai under proper documentation and payment was made through Banking channel was cross verified and found that the description found on the gold bar seized from Rajan does not tally with the description or origin of the gold bars supplied



C.M.A.(MD)No.167 of 2019

WEB COPY

to M/s Surana Corporation by the importer M/s MMTC. Hence, the Additional Commissioner of Customs concluded that the gold bar seized were to be confiscated with penalty of Rs 1.50 lakhs. The statutory Appeal under Section 128 of the Customs Act before the Commissioner of Customs (Appeal) came to be disposed on 23.08.2012 confirming the order of confiscation and the imposition of penalty. However gave liberty to redeem the confiscated gold on payment of Rs.5,00,000/-(Rupees five lakhs only) as fine in lieu of confiscated.

3. The appellant after paying the fine of Rs.5,00,000/- (Rupees five lakhs only) in lieu of confiscation along with customs duty of Rs.2,57,960/- and the penalty of Rs.1,50,000/- preferred further appeal before CESTAT. After considering the facts, the appeal was disposed confirming the order of the Commissioner of Customs (Appeals) with modification of the penalty of Rs. 1,50,000/- reduced to Rs.50,000/-.

4. The operative portion of the Final Order which is impugned in this appeal reads as below:-

“ 6. From the discussions, conclusions herein above, we



C.M.A.(MD)No.167 of 2019

WEB COPY

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 hte appellant vis-a-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.”

5. The appellant contending that, the gold bar was not seized within the customs zone. There is no iota of evidence to suggest or hold that there had been an activity of actual smuggling of the gold bar to invoke Section 123 of the Customs Act. The appellant by statements and documents established was able to show by preponderance of probability that the gold bar seized was acquired legally in the normal course of trade. Having discharged the burden, Section 123 of the Customs Act ought not to have been invoked.



C.M.A.(MD)No.167 of 2019

WEB COPY

6. The following question of law raised by the appellant in support of his grounds of appeal:

“1. Is the Tribunal correct in confirming the order of the authorities below holding that the appellant had not discharged the burden cast on him in terms of Section 123 of the Customs Act, in relation to the gold bar under seizure?

2. Has the Tribunal fallen in error in holding that the burden under Section 123 has not been discharged especially when there is no material much less direct material to show that the gold under seizure was smuggled and taken from grey area / unknown sources?

3. Is the Tribunal correct in disbelieving the versions of the appellant regarding licit purchase of the gold bar under seizure from market especially when there are contemporaneous bills/documents to show the actual purchase and chain of transactions earlier to the same which would indicate that the gold bar under seizure was indeed a case of local purchase?

4. Has the Tribunal erred materially in overlooking



C.M.A.(MD)No.167 of 2019

WEB COPY

substantive material including statements etc. in arriving at a finding that the burden under Section 123 has not been displaced or discharge by the appellant?

5. Is the Tribunal right in distinguishing the case laws cited before it as found in para 5.3 when in those cases, it has been held by the very same Tribunal that burden under Section 123 is a light one on the person charged and the same can be discharged by the person charged by preponderance of probability of showing transactions of local purchase and sale of the gold bars in question?

6. Mere difference in the markings on the seized gold bar and that which had been imported by MMTC and allegedly sold to M/s. Surana Corporation and later to Palanimurugan Jewellery, Karur, could be a ground for invocation of Section 123 of Customs Act, 1962 and whether the Tribunal erred in taking that into account for rendering its findings in the impugned order?”

7. The learned counsel for the appellant submitted that the order of confiscation suffer fundamental illegality and the order of the CESTAT in spite of



C.M.A.(MD)No.167 of 2019

WEB COPY

clear explanation about the source of the seized gold bar holding that the appellant failed to discharge the burden in terms of Section 123 of the Customs Act is perverse. He reiterated that, the appellant had purchased the gold bar in question in the normal course of business under proper bill and absolutely no material to show that the gold bar in question was smuggled at a point anterior to its purchase. He also relied upon the following judgements in support of his argument:-

- 1) Union of India –vs- Imtiaz Iqbal Pothiawala [2019(365) ELT (Bom.)]**
- 2) P.N.Krishnalal and others –vs- Govt of Kerala and Others [(1995) Supp. (2) SCC 197].**

8. Per contra, the learned Senior Standing Counsel for the Department contended that, there is no question of law involved in this appeal against the final fact finding tribunal. The case of smuggling of gold bar with foreign marking well established by the department on the face of the contraband seized from C.Rajan staying in a lodge at Karur. At the time of seizure, he did not produce any document to show it is a licit possession. He only pointed the

Page No. 7 of 12



C.M.A.(MD)No.167 of 2019

WEB COPY

appellant as the vendor of the gold bar and further contended it was given to him on credit basis. In turn, on enquiry with the appellant he pointed M/s Surana Corporation, Chennai as the supplier. The bill produced by the appellant and the purchase bills of the supplier at the relevant point of time did not tally. The gold bar seized from C.Rajan carry marking “COMMERCEZ BANK 1 KILO GOLD 995.0 AH MLTER ASSAYER SWIZERLAND A 21011”. The purchase bills of the supplier M/s Surana Corporation during the relevant point of time does not disclose that the importer M/s MMTC who supplied M/s Surana Corporation not supplied gold from Swizerland origin. The discrepancies in the marking found on the seized gold viz-a-viz markings on the gold bars imported by M/s MMTC from whom M/s Surana Corporation claims to have purchased and sold to Balamurugan is a clear proof of smuggling. The false explanation strengthen the case of the department further and it cannot be a probable explanation to reverse the burden of presumption.

9. Chapter 14 of the Customs Act deals with confiscation of goods and conveyance and imposition of penalties. Before proceeding with confiscation of goods, the Officer of Customs not below the rank of an Assistant



C.M.A.(MD)No.167 of 2019

WEB COPY

Commissioner of Customs shall cause notice informing the grounds on which he proposed to confiscate the goods or to impose penalty after affording reasonable opportunity, goods improperly imported can be confiscated under Section 111 and penalty can be imposed under Section 112 of the Customs Act. Gold with foreign marking is a dutiable goods which requires valid import document under law. After seizure of one kilo of gold bar with foreign marking on 09.08.2010 on specific information before causing notice under Section 124 of the Customs Act, the Additional Commissioner of Customs had conducted enquiry with the persons concerned, recorded their statement and arrived at *prima facie* satisfaction the persons concerned controvene the provision of Section 111 of the Customs Act. Hence, when a foreign original liable to be confiscated under Section 111(d) of the Customs Act and all the persons concerned are also liable for penal action under Sections 112 and 135 of the Customs Act. The contention of the department is that the possessor(C.Rajan) of the seized gold bar and Balamurugan, the person who alleged to have sold the gold bar to Rajan on credit basis on rely upon the bills issued by M/s Surana Corporation, Chennai. The statement of M/s Surana Corporation Limited and their purchase documents reveals that M/s Surana Corporation importing gold from (1)NATAXIZ (2) Bank of Novascotia

Page No. 9 of 12



C.M.A.(MD)No.167 of 2019

WEB COPY

(3)Standard Bank through M/s.MMTC Ltd., whereas gold bar seized have the marking of Commerz Bank, Switzerland. Further enquiry with M/s Surana Corporation in respect of the said discrepancies, certain documents were produced by M/s Surana Corporation. None of these documents correlate the gold bar with marking of Commerz Bank seized from Rajan with the invoices and bill of entry packing list furnished by M/s Surana Corporation. Hence, it is apparent that when the statute under Section 123 cost burden the possessor of the goods reasonably believed to be a smuggled goods to distract the burden. In this case, the appellant had miserably failed to distract the said burden. The order in original as well as the order in appeal had disclosed this fact in detail. It has been concluded that the gold bar seized does not supported by valid import documents either at the time of seizure or later.

10. The CESTAT which is the final fact finding authority has confirmed the order in appeal with modification of penalty assigning reason. This Court finds no perversity or error of application of mind or appreciation of material facts by CESTAT.



C.M.A.(MD)No.167 of 2019

WEB COPY

11. In fine, this Civil Miscellaneous Appeal stands dismissed confirming the order of the CESTAT passed in Final Order No.43169 of 2018, Appeal No.C/383/2012-SM dated 31.12.2018. There shall be no orders as to costs.

[G.J, J.] [R.P., J.]
04.03.2025

NCC : Yes / No
Index : Yes / No
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