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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.78413 of 2018

(Arising out of Order-in-Appeal No.KOL/CUS(CCP)/AA/1462/2018 dated 02.08.2018 passed by Commissioner of Customs(Appeals), Kolkata.)

Shri Biswajit Chakraborty
(S/o-Late Haripada Chakraborty,
Vill & P.O.-Hakimpur, P.S.-Swarupnagar,
Dist-24 Parganas (North),
West Bengal-743273.)

...Appellant

VERSUS

Commissioner of Customs(Preventive), Kolkata
.....Respondent

(Custom House, 3rd Floor,
15/1, Strand Road, Kolkata-700001.)

APPEARANCE

Shri N.K.Choudhary, Advocate for the Appellant (s)
Shri S.Guha, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75395/2020

DATE OF HEARING : 21 January 2020
DATE OF DECISION : 02 September 2020

P.K.CHOUDHARY :

The appeal of the appellant is directed against the Order-in-Appeal No.KOI/CUS/(CCP)/AA/1462/2018 dated 02-08-2018 passed by the Commissioner of Customs (Appeals), Kolkata. By the said Order, learned Commissioner (Appeals) upheld the Order of the Adjudicating Authority. The Adjudicating Authority absolutely confiscated the gold of 473 Gms. valued at Rs.12,97,912/- under Section 111(b) and 111(d) of the Customs Act, 1962 and also confiscated old and used Mobile Phone valued at Rs.200/- and Indian currency of Rs.6,000/- under Section 111(b) and (d) of the Customs Act, 1962 and also imposed a penalty of Rs.1,25,000/- on the appellant under section 112(b) of the said Act.

2. The appellant is in appeal before this Tribunal against confiscation of Mobile Phone and Indian currency under section 111(b) & (d) of the Customs Act, 1962 and imposition of penalty of Rs.1,25,000/- since the appellant claimed that the said gold was not seized from his possession, the appellant is neither owner of the gold nor the claimant of the gold.

3. The facts of the case in brief are that the appellant is engaged in trading of electric appliances through his shop situated at Hakimpur Bazar. On 03/04/2016, the appellant was going to MEGHA TRANSPORT at Hakimpur for giving them Rs.6,000/- toward freight charges for transporting his electrical goods from Ezra Street, Kolkata to his Shop Premises at Hakimpur. On his way, ½ K.M. away from his house, at about 6.50 P.M., he was intercepted by BSF Officials. At the time of interception, no gold was recovered from the appellant. The appellant was only having a Mobile Phone and Rs.6,000/- Indian currency. The BSF Personnel told the appellant to go to the BSF Camp with them. The appellant enquired about the reasons and the BSF Personnel told him that the appellant is required to be a witness in a case and his signature is required. The appellant did not agree to go with them but he was forced and compelled to go to the BSF Camp and was kept there for the whole night. At night, the appellant learnt that BSF Personnel had recovered some gold from a packet thrown away by a Cycle Rider but BSF Personnel could not catch the said person. At night, the appellant was made to sign on a document. The appellant did not know English. The appellant also did not know how to write Bengali. He only can sign his name in Bengali. On 04/04/2016, the BSF Personnel handed him over to the Customs Officials at the

Customs Office at about 7 P.M. along with one Seizure Memo dated 03/04/2016 prepared by the BSF Personnel stating that five pieces of gold weighing 473 Gms. valued at Rs.13,27,470/-, one Mobile Phone and Indian Currency of Rs.6,000/- have been recovered and seized from the appellant. On receiving the seized gold and the appellant, the Customs Officials seized the gold again on 04/04/2016 and prepared inventory of the goods seized.

4. The Customs Officials started investigation. The statement of the appellant was recorded under Section 108 of the Customs Act, 1962 on 04-04-2016 when he stated that he came to learn about the contents of the BSF Seizure Memo on the basis of which Customs Officials were asking questions. The appellant totally denied the contents of the BSF Seizure Memo and made it clear that the BSF Officials have wrongly implicated the appellant in the gold smuggling case. His residential premises was searched on 05-04-2016 but nothing was found. The appellant’s statement was recorded on 05-04-2016 before the Customs Officials wherein he clearly stated the fact that how the BSF Personnel took him into their custody and made a false case against him. He also stated that he is not the owner of the gold and he is not in any way involved with such illegal act. Thereafter, a Show Cause Notice was issued to the appellant proposing for confiscation of gold, mobile phone and Indian currency of Rs.6,000/- under Section 111(b) & (d) of the Customs Act, 1962 and imposition of penalty under Section 112(b) of the said Act. The appellant submitted the reply to the Show Cause Notice denying and disputing the allegations contained in the Show Cause Notice, contending that the gold was never recovered from the possession of the appellant. The appellant has become victim in the hands of the BSF Personnel. The appellant wanted cross-examination of the witnesses, whose names have been mentioned in the BSF Seizure Memo. The appellant categorically stated before the Customs Officials in his statement

under Section 108 of the Customs Act, 1962 that he is not the owner of the gold and the same was not seized from his possession. He is not claiming the gold nor he is the carrier of the gold. Illegal importation through unauthorised route does not arise. The proceeding has no legs to stand. No investigation was made in respect of the persons whose names were allegedly taken by the appellant as reflected in the BSF Seizure Memo. The appellant stated that he does not know any person whose names have been mentioned in the BSF Seizure Memo since he did not illegally import any gold, the question of discharging burden under Section 123 of the Customs Act, 1962 does not arise. He prayed for refund of the mobile phone and Indian currency of Rs.6,000/-. In the mean time, a Notice under Section 150 of the Customs Act, 1962 was issued to the appellant seeking his opinion if the seized gold is disposed of. The appellant vide his letter dated 08-11-2016, intimated the Additional Commissioner that he is not the owner of the seized gold. The raising of objection regarding pre-trail disposal of the gold does not arise and the appellant had no objection if the said gold is disposed by the Customs Authority. The matter was adjudicated by the Joint Commissioner of Customs (Preventive) and the Adjudicating Authority absolutely confiscated the gold and mobile phone and Indian Currency of Rs.6,000/- under Section 111(b) & (d) of the Customs Act, 1962 on the sole ground that the appellant did not make any allegation against BSF Personnel before higher authority of BSF and hence, fact of Seizure Memo cannot be false and the appellant could not produce any corroborative evidence that he was going to the transporter for making payment of Rs.6,000/-. The Indian Currency has been confiscated on the finding that "*the Indian currency note most probably was the advance sum he received for smuggling of gold ......*" He also imposed penalty on the appellant for Rs.1,25,000/- under Section 112(b) of the Customs Act, 1962. The appellant filed an appeal before the Commissioner (Appeals) challenging the legality and maintainability of the order of the Adjudicating Authority since there is no rebuttal evidence of the statements given before the Customs Authorities by the appellant. No opportunity to cross-examine the witnesses named in the BSF Seizure Memo was allowed to disprove the seizure of gold from the appellant's possession and the story narrated by the BSF Personnel in the Seizure Memo. He also contended that the penalty under Section 112(b) of the Customs Act, 1962 cannot be imposed since there is no evidence to show his involvement in respect of any goods, which is confiscable under Section 111 of the Customs Act, 1962. The learned Commissioner (Appeals), decided the case against the appellant upholding the Order of the Adjudicating Authority proceeding in the absence of the appellant by allegedly stating that the appellant failed to appear in spite of fixing the personal hearing on different dates but the appellant could not appear since he did not receive any notice of hearing. The learned Commissioner (Appeals) also held the same reason as contended by the Adjudicating Authority proceeding on the basis that the gold was recovered from the appellant and he accepted the same in his statement before the BSF Personnel, though the said recovery and the statement has been denied before the Customs Authority while recording statement under Section 108 of the Customs Act,1962 and he was not required to discharge burden under Section 123 of the Customs Act, 1962.

5. During the course of hearing of the appeal, the question was raised as to whether notice of hearing was actually given to the appellant since the learned Commissioner (Appeals), proceeded in the absence of the appellant recording that the matter was fixed for hearing on 21-11-2017, 05-12-2017 and on 12-12-2017 but the appellant failed to attend. But the appellant's case is that he did not receive any notice of hearing. The learned Authorized Representative on behalf of the Revenue produced copies of the notices and contended that the notices were sent but did not come back, which is

enough proof of giving notice. The learned Advocate for the appellant submitted that the legal position is very clear in respect of service of notice or order or summons. The proof of service is required, which cannot be assumed/presumed. The learned Advocate for the appellant further proceeded to make submissions with regard to merit of the case.

6. The learned Advocate appearing on behalf of the appellant submitted that this is a case where the appellant has been illegally implicated. There is no evidence that BSF Personnel recovered any gold from the appellant on 03-04-2016. The alleged statements and name of the persons mentioned in the BSF Seizure Memo was not within the knowledge of the appellant. He was made to sign a document at night of 03-04-2016. He did not know English, even he did not know how to write Bengali. He only knows to write his name for signature. The witnesses in the Seizure Memo of BSF were not independent witnesses. Cross-examination of witnesses has not been granted by the Adjudicating Authority. The seizure of Customs Authority on the next day in the evening is the second time seizure. The question of proving burden under Section 123 of the Customs Act, 1962 in such circumstances does not arise since the seizure by Customs was from Police/BSF Authorities. Moreover, the appellant was not required to discharge the burden since the gold was not recovered from him. He was not the owner of the gold, nor the claimant of the gold nor in any way dealt with the gold. He had expressed no objection to the Customs Authorities for pre-adjudication disposal of gold since the appellant was in no way concerned with the gold. The statement given before the Customs Authorities by the appellant repeatedly were admissible and substantive pieces of evidence where he had stated the entire thing denying recovery of the gold from him. There is no rebuttal evidence to contradict his statement before the Customs Authorities. This is not a case of illegal

importation of gold but a case of harassment of the appellant at the instance of BSF Personnel. The Customs Authorities also did not make any effort to investigate and/or to record statement of seizing BSF Personnel or witnesses named in the Seizure Memo of BSF. Since the involvement of the appellant in the alleged illegal importation of gold has not been proved on the face of the record, the question of confiscation of Mobile Phone and Indian Currency and imposition of penalty cannot be maintainable in law. The appellant has nothing to do with the confiscation of the gold and the Department was at liberty to deal with the same in any manner they deemed fit and proper. The Order passed by the learned Commissioner (Appeals) is not maintainable in law since the factum of recovery of gold from the appellant has not been proved. The alleged statement as mentioned in the BSF Seizure Memo was not given by him, he was only made to sign on a document at night of 03-04-2016 by the BSF Personnel. He was not aware of the contents of the said Seizure Memo of BSF. Undisputedly, everything has been repeatedly denied before the Customs Authority. The learned Commissioner has also recorded that the appellant has placed many case laws and prayed for setting aside the order of the Adjudicating Authority but the learned Commissioner (Appeals) did not deal with any of the decisions.

7. The learned Authorized Representative for the Revenue submitted that the contents of the Seizure Memo of BSF Authorities cannot be doubted. The appellant did not make any complaint before the higher authorities of BSF. The denial of recovery of gold from the appellant’s possession and denial of the contents of the Seizure Memo during investigation by the Customs Authorities by giving statements under Section 108 of the Customs Act, 1962 is merely an afterthought. The learned Commissioner (Appeals) has rightly upheld the Order of the Adjudication Authority.

8. Heard both sides and perused the appeal records.

9. I find that the authorities below proceeded on the basis of assumption of recovery of gold from the possession of the appellant. The appellant wanted cross-examination of the witnesses named in the BSF Seizure Memo, which has not been granted. The factum of recovery as has been mentioned in the BSF Seizure Memo and the statement of the appellant contained in the said Memo has been disputed by the appellant. Before the Customs Authority while giving statement under Section 108 of the Customs Act, 1962, the appellant in his statements dated 04-04-2016 and 05-04-2016 repeatedly stated that he is not involved in any illegal smuggling activity. He did not know any person whose names are appearing in the BSF Seizure Memo. He came to learn in the BSF Camp that the actual carrier of the gold fled away after throwing away a packet, which was recovered by the BSF Personnel and on the way the appellant was caught and has been implicated. He also stated that he is not the owner of the gold. He cannot write. He only can make his signature. He was forcefully taken to the BSF Camp and has been booked in a smuggling case. There is no rebuttal evidence of his statement given before the Customs Authorities. The statement under Section 108 of the Customs Act, 1962 undisputedly is a substantive piece of evidence, which goes in favour of the appellant. This is further corroborated by the communication from the appellant to the Additional Commissioner that he had no objection in the pre-trail disposal of the gold since he was not the owner of the gold nor the claimant of the gold and the Customs Authorities can dispose the gold in any manner they deemed fit and proper. The learned Commissioner (Appeals) also chose not to deal with the decisions submitted by the appellant in respect of admissibility of statement under Section 108 of the Customs Act, 1962 being a substantive piece of evidence. I find that recovery of the gold from the appellant has not been proved and hence, he was not

required to discharge the burden under Section 123 of the Customs Act, 1962. As there is no claimant of the gold, the confiscation of gold handed over by the BSF Personnel to the Customs Authority is justified. Regarding seizure and confiscation of Mobile Phone and Indian currency, I find that since the illegal importation of gold by the appellant has not been proved, the confiscation of the said old and used Mobile Phone valued at Rs.200/- and Indian currency of Rs.6,000/- cannot be made. Adjudicating Authority proceeded on the basis of probability that the Indian currency may be the advance received for smuggling of gold. The learned Commissioner did not give any finding on this point but upheld the confiscation. Reliance on the decisions by the learned Commissioner (Appeals) in the cases reported in - 2002 (149) ELT 571 (Tri.) and 2007 (219)ELT 638 (Tri.-Kol.) have no manner of application to the facts and circumstances of the appellant's case. I do not find any merit in the Order passed by the learned Commissioner (Appeals). The impugned Order is set aside and the appeal of the appellant is allowed with consequential relief, if any.

(Order pronounced in the open court on 02 September 2020.)

SD/

(P.K.CHOUDHARY)

MEMBER (JUDICIAL)

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