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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75964 of 2016

(Arising out of Adjudication Order No. 70/CUS/CC(P)/WB/2015 dated 14.03.2016 passed by the Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Bijoy Kumar Agarwala **: Appellant**
Narayanpur, Near Vishwabharati Club,
P.O. & P.S. – Balurghat,
District: Dakshin Dinajpur, West Bengal

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 3rd Floor, 15/1, Strand Road,
Kolkata – 700 001

WITH

Customs Appeal No. 75965 of 2016

(Arising out of Adjudication Order No. 70/CUS/CC(P)/WB/2015 dated 14.03.2016 passed by the Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Krishna Pramanik **: Appellant**
Vill. – Kismatdapat,
P.O.: Trimohini, P.S.: Hilli,
District: Dakshin Dinajpur, West Bengal

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 3rd Floor, 15/1, Strand Road,
Kolkata – 700 001

WITH

Customs Appeal No. 75997 of 2016

(Arising out of Adjudication Order No. 70/CUS/CC(P)/WB/2015 dated 14.03.2016 passed by the Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Jatneswar Sarkar **: Appellant**
Vill. – Tinkonia More,
P.O. – Patiram,
District: Dakshin Dinajpur, West Bengal

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 3rd Floor, 15/1, Strand Road,
Kolkata – 700 001

AND

Customs Appeal No. 75998 of 2016

(Arising out of Adjudication Order No. 70/CUS/CC(P)/WB/2015 dated 14.03.2016 passed by the Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Sujoy Saha **: Appellant**
Vill. – Barakail,
Balurghat,
District: Dakshin Dinajpur, West Bengal

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 3rd Floor, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Arijit Chakrabarti, Advocate
[Customs Appeal Nos. 75964 & 75965 of 2016]

Shri Nilotpal Chowdhury, Advocate
[Customs Appeal Nos. 75997 & 75998 of 2016]

for the Appellant(s)

Shri Faiz Ahmed, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 75874-75877 / 2024

DATE OF HEARING: 26.04.2024

DATE OF DECISION: 09.05.2024

ORDER:[PER SHRI K. ANPAZHAKAN]

There are four appeals filed by the appellants. As all the four appeals emanate from the impugned order, they are taken up together for decision by a common order: -

(i) **Customs Appeal No. 75964 of 2016** filed by Shri Bijoy Kumar Agarwala (hereinafter referred to as 'appellant no. 1') against the confiscation of Indian currency of

Rs.46,00,000/-from his house under Section 121 of the Customs Act, 1962 and imposition of penalty of Rs.50,000/- on him under Section 112 of the Act.

(ii) **Customs Appeal No. 75965 of 2016** filed by Shri Krishna Pramanik (hereinafter referred to as 'appellant no. 2') against the imposition of penalty of Rs.10,00,000/- on him under Section 112 of the Customs Act, 1962.

(iii) **Customs Appeal No. 75997 of 2016** filed by Shri Jatneswar Sarkar (hereinafter referred to as 'appellant no. 3') against the imposition of penalty of Rs.10,00,000/- on him under Section 112 of the Customs Act, 1962.

(iv) **Customs Appeal No. 75998 of 2016** filed by Shri Sujoy Saha (hereinafter referred to as 'appellant no. 4') against the imposition of penalty of Rs.10,00,000/- under Section 112 of the Customs Act, 1962.

2. Brief facts of the case are that on 26.07.2014, at 07:30 hrs., Officers of the Directorate of Revenue Intelligence (DRI), Siliguri Regional Unit, visited the residence of the appellant no. 1 at Narayanpur, Near Vishwabharati Club, P.O. & P.S. - Balurghat, District – Dakshin Dinajpur, West Bengal in connection with the recovery of gold from two persons intercepted by the DRI, Kolkata at Burrabazar, Kolkata. The persons apprehended at Burrabazar have named the appellant no. 1 as the owner of the recovered gold and accordingly, the DRI, Siliguri has initiated follow-up action by searching the residential premises of the appellant no. 1. During the course of search, no documents related to the gold recovered from the two

persons apprehended at Burrabazar were found from the residential premises of appellant no.1. However, Indian currency of Rs.46,00,000/- in the denomination of Rs.1000/- and 500/- was found in his house by the officers of DRI, Siliguri. The appellant no. 1 stated that the said currency belonged to his brothers and/or their surviving wives, being legal heirs of the appellant's deceased father and they have kept the cash for the purpose of distribution of the same among the heirs.

3. The Officers had not accepted the contention of appellant no.1 and believed that the said Indian currency was the sale proceeds of the smuggled gold and accordingly, seized the Indian currency under Section 110 of the Customs Act, 1962.

4. In his Statement dated 26.07.2014, the appellant no. 1 has *inter alia* stated that the Indian currency recovered from his residence has no connection with the recovery of the gold at Kolkata; he has requested the officers of DRI, Kolkata and Siliguri to return their currency vide his letter dated 13.08.2014.

4.1. In his Statement dated 17.08.2004, Shri Bikash Kumar Agarwala (brother of the appellant no. 1 herein) also stated that the currency belonged to the family and it was kept for distribution among them. In support of this contention, he submitted bank statements, income tax return, insurance documents, etc.

5. Upon completion of the investigation, a Show Cause Notice dated 22.01.2015 was issued to the appellants proposing confiscation of the eight pieces of gold weighting 2.625 kilograms recovered from

Shri Jatneswar Sarkar and Shri Sujoy Saha at Burrabazar (appellant nos. 3 and 4 respectively) on 26.07.2014.The Notice also proposed confiscation of the Indian currency worth Rs.46,00,000/- recovered from the residence of appellant no. 1 and proposed imposition of penalty on each of the appellants mentioned above.

5.1. The Notice was adjudicated by the Ld. Commissioner vide the impugned order dated 14.03.2016 wherein the Ld. Commissioner has ordered confiscation of the gold and the Indian currency worth Rs.46,00,000/- recovered from the house of appellant no. 1; a penalty of Rs.50,00,000/- was imposed on the appellant no. 1 under Section 112 of the Customs Act, 1962. Penalty of Rs.10,00,000/- each was imposed on each of the appellant nos. 2, 3 and 4 under Section 112 of the Act.

6. Aggrieved against the confiscation of the Indian currency and imposition of penalties, the appellants have filed the present appeals.

7. The appellant no. 1 submits that: -

(a) He has nothing to do with the seizure of the gold weighing 2.625 kgs. at Burrabazar on 26.07.2014. The Indian currency of Rs.46,00,000/- was their family property and kept for distribution among the legal heirs. This was affirmed by his brother Shri Bikash Kumar Agarwala also in his Statement dated 17.08.2014.

(b) He has produced all the documents before the investigation authorities in support of his claim to return the Indian currency seized from his residence.

(c) In his Statement dated 14.01.2015, Shri Narayan Agarwal,Chartered Accountant of the appellant no. 1, also stated that the currency was kept for distribution among the family members.

(d) The investigating officers presumed that the Indian currency was the sale proceeds of the smuggled gold. However, there is no evidence submitted by the officers to substantiate their claim that the currency in question was the sale proceeds of the smuggled gold.

(e) The appellant referred to an Order dated 08.10.2007 issued by the Superintendent of Customs, Balurghat, releasing 18 pieces of gold biscuits of foreign origin weighing 2099.52 grams involving his deceased father which was kept with their mother until her demise and submitted that the currency was the sale proceeds of that gold which was released by the Department and kept for distribution among the family members.

(f) He further submits that the ld. adjudicating authority has not given any finding as to how the seized cash was the sale proceeds of smuggled gold.

(g) At paragraph 41, 42, 43 and 55 of the impugned order, the authority records his finding that "it logically transpires that the cash seized was the sale proceeds of the smuggled gold". The presumption of the ld. adjudicating authority has no validity in the eye of law and the logical conclusion arrived at by the ld. adjudicating authority cannot be a reason for confiscation of the Indian currency under Section 121 of the Customs Act, 1962.

7.1. Accordingly, he prayed for release of the Indian currency.

7.2. He also submits that he has nothing to do with the gold seized at Burrabazar, Kolkata on 26.07.2014; the apprehended persons namely, Shri Jatneswar Sarkar and Shri Sujoy Saha (appellant nos. 3 and 4 respectively) have implicated the appellant no. 1 as the owner of the gold; other than that, there is no evidence to implicate the appellant no. 1 in the seizure of the gold seized at Burrabazar, Kolkata. Shri Amit Kumar Agarwalla, nephew of the first appellant was having a shop at the 3rd Floor of 129, Cotton Street, Kolkata and the apprehended persons stated that they were to deliver the gold at the second floor of the same building. They further named one 'Shri Krishna Sarkar' to be the person who handed over the gold. Accordingly, it is submitted that there is no evidence gathered by the investigating officers to implicate the appellant no. 1 with the gold confiscated at Burrabazar. Accordingly, he submits that the penalty imposed on him under Section 112 of the Act is not sustainable.

8. Shri Krishna Pramanik, appellant no. 2, submits that the apprehended persons have named one 'Krishna Sarkar' as the person who handed over the gold to them. However, the investigating authorities have arbitrarily concluded that the appellant no. 2 viz. Shri Krishna Pramanik is the person who handed over the gold, without any verification. The appellant no. 2 submits that he has been falsely implicated and penalized in the instant case. As there is no evidence available on record to implicate him in the seizure of

the said gold, he submits that the penalty imposed against him under Section 112 of the Act is not sustainable.

9. Shri Jatneswar Sarkar, appellant no. 3, has contended that he was carrying the gold from Balurghat to Kolkata which is within the territory of India; there is no evidence available on record to conclude that the said gold was contraband, smuggled without payment of Customs duties; the seized gold has no connection with him as he has not played any role in the illegal importation of the seized gold; the ld. adjudicating authority in the impugned order has arbitrarily concluded that he has associated with the illegal importation of the seized gold; he reached Kolkata by train viz. Radhikapur Express from Kaliaganj Station and hence, there is no evidence to indicate that he was involved in the alleged illegal importation of the seized gold; even otherwise, gold is not a prohibited item and thus penalty imposed is arbitrary and very high and not commensurate with the charges levelled against him. Accordingly, he prayed for setting aside the penalty imposed on him.

10. Shri Sujoy Saha, appellant no. 4, submits that the penalty has been imposed on him under Section 112(a) and (b) of the Customs Act, 1962, but as per Section 112(b), the appellant should have prior knowledge or reason to believe that the gold he was carrying was liable for confiscation. In the instant case, he was found to be carrying the gold within the territory of India and there is no reason to believe that the said gold was liable for confiscation. Accordingly, he submits that no penalty is imposable on him under Section 112(a) and (b) of the Customs Act, 1962.

10.1. It has been alleged that he was involved in the transportation of the contraband gold from outside India through an unauthorized route. In this regard, appellant no. 4 submits that he was travelling from Balurghat to Kolkata by train and he has not carried the gold through any unauthorized route as alleged in the impugned order. Accordingly, he submits that he has not played any role in the illegal importation of the seized gold; hence, the penalty imposed on him under Section 112(a) and (b) of the Act is not sustainable.

11. The Ld. Authorized Representative for the Revenue submits that the officers seized the gold at Burrabazar from the appellant nos. 3 and 4, who were not having any valid document regarding the licit importation of the said gold at the time of seizure. Accordingly, he submits that the gold is liable for confiscation and the appellant nos. 3 and 4 are liable for penalty as they were involved in transportation of the illegally imported gold.

11.1. Further, it is his submission that the appellant no. 3 has implicated the appellant no. 1 as the owner of the said gold. The Indian currency seized from his house is the sale proceeds of the gold illegally imported. He submits that the appellant nos. 1 and 2 are involved in the illegal importation of the seized gold and hence, the Indian currency seized is liable for confiscation. Accordingly, he supported the impugned order.

12. Heard both sides and perused the appeal documents.

13. We observe that there was no seizure of any gold from the appellant no. 1 or 2. The appellant no.

1 was implicated as the owner of the gold by Shri Jatneswar Sarkar and Shri Sujoy Saha (appellants 3 and 4 herein) from whose possession DRI, Kolkata has seized the gold weighting 2.625 kgs. The Indian currency of Rs.46,00,000/- has been seized on the ground that this was the sale proceeds of the smuggled gold. We observe that the investigation has not brought in any evidence on record to show that the appellant no. 1 was involved in the smuggling of the gold and that the Indian currency was the sale proceeds of the gold smuggled in by the appellant no. 1.On the contrary, the appellant no. 1 has submitted that they have received an Order from the Department vide Order dated 08.10.2007 releasing 18 pieces of gold by the Superintendent of Customs, Balurghat and the Indian currency seized was the sale proceeds of this gold, which was kept for distribution among his family members after the demise of his mother. We find that the investigation has failed to bring in any evidence to counter this claim made by the appellant no. 1. Thus, we observe that there is no evidence available on the record to show that the Indian currency seized was the sale proceeds of the gold smuggled by appellant no. 1. Accordingly, we hold that the seizure of the Indian currency amounting to Rs.46,00,000/- is not sustainable.

13.1.We observe that this view has been taken by the Tribunal in the case of *Ramachandra v. Collector of Customs [1992 (60) E.L.T. 277 (Tribunal)]*, wherein it has been held that the Indian currency cannot be held as sale proceeds of smuggled gold and the same is not liable for confiscation. The relevant part of the decision is reproduced below: -

"4. At the outset it is pertinent to note that no gold was seized either from the appellant or Shri Satram Das or Shri Bhaghu Sindhi. Therefore, it is not understood as to how the currency seized from the appellant can be said to represent the sale proceeds of smuggled gold. The appellant was produced before the Chief Judicial Magistrate, Economic Affairs, Jaipur on 12-1-1987. On 10-1-1987 itself a telegram was sent to the Assistant Collector of Customs, Udaipur by the son of the appellant wherein he had stated that his father was forcibly taken to the Customs Office. Another telegram was sent on 11-1-1987 to the same effect, as the appellant was not released by them. After release on 15-1-1987 the appellant got himself examined by a Government Doctor who furnished a certificate certifying the presence of injuries like bruises on the right upper lip, left wrist and swellings and dislocation of tooth. The Doctor has certified that one of the injuries is of a grievous nature. On 20-1-1987 the appellant wrote to the Assistant Collector retracting his statement of 10-1-1987. None of this has been discussed in the impugned order which merely brushes aside the defence of the appellant for the reason that he did not complain of forcible detention and extorted statement at the earliest opportunity viz. when he was produced before the Magistrate by the Customs Officers. In addition the opportunity to cross-examine Shri Satram Das and Shri Bhaghu Sindhi and the panch witnesses has been denied to the appellant.

5. It is also seen that the charges under the Gold (Control) Act has been dropped against all the persons to whom show cause notice has been issued and the charges under the Customs Act has been dropped against the other two. It would appear that the penalty of Rs. 50,000/- on the appellant has been imposed for breach of Section 121 of the Customs Act. Before violation of Section 121 is established the following ingredients must be satisfied:

(i) there must be a sale. .

(ii) the sale must be of smuggled goods.

(iii) the sale must be by a person having knowledge or reason to believe that the goods were of smuggled origin.

(iv) the seller and purchaser and the quantity of gold must be established by the Customs authorities.

6. In this case, however, none of the requisites of Section 121 have been fulfilled - no sale has been established, identity of the buyer and seller has not been established. As a consequence, the currency cannot be considered to represent the sale proceeds of the contraband goods and, therefore, no violation of Section 121 has been made out. Since the charge under Section 121 of the Customs Act has not been proved against the appellant the currency notes cannot be retained by the Department and have to be returned to the appellant. Imposition of penalty is also not legal and proper in the absence of proof of violation of any provisions of the Customs Act."

13.2. The same view has been held in the case of *Sudesh Kumar Mittoo v. Collector of Cus. & C.Ex., Jaipur* [*2001 (136) E.L.T. 100 (Tri. – Del.)]* wherein it was held as under: -

> *"8. …*
>
> .
>
> *As regards the confiscation of Rs. 25,000/- Indian currency, it is not possible to say that this currency was as a result of transaction of smuggled gold biscuits. Gold biscuits have been sold by the jewellers to Shri Sudesh Kumar. The cash pertained to him and this cash was not out of smuggled gold. Therefore, confiscation of Indian currency is set aside. It is also seen that the Collector has not given detailed reasoning for confiscation of Indian currency in terms of reply given by Shri Sudesh Kumar. Therefore, confiscation of Indian currency is set aside.*
>
> *…"*

13.3. In view of the above, we hold that the confiscation of Indian currency of Rs.46,00,000/- under Section 121 of Customs Act, 1962 is not sustainable. Accordingly, we set aside the confiscation of the Indian currency in the impugned order.

13.4. Regarding the imposition of penalty on appellant no.1, we observe that there is no evidence on record to show that appellant no.1 was involved in the smuggling of the gold into the country without payment of Customs duty. Appellant no.1 has been implicated by the two persons apprehended by the DRI, Kolkata. However, the search of the premises of the appellant no. 1 has not yielded any evidence in connection with the seizure of the said gold. Thus, we find that there is no evidence brought in by the investigation to implicate the appellant no.1 with the seized gold. In view of the above, we hold that the penalty imposed on the appellant no. 1 under Section 112 of the Customs Act, 1962 is not sustainable and accordingly, the same is set aside.

14. Regarding the penalty imposed on Shri Krishna Pramanik (appellant no. 2), we observe that the apprehended persons have named one 'Krishna Sarkar' as the person who handed over the gold to them. However, we do not find any evidence available on record to show that the said 'Krishna Sarkar' and 'Krishna Pramanik' are one and the same. The appellant no. 2 has been implicated in aiding transportation of the smuggled gold, but there is no evidence to substantiate this allegation. In view of the same, we hold that the penalty imposed on the appellant no. 2 is not sustainable.

15. With regard to penalties imposed on the appellant nos. 3 and 4, it is observed that they were apprehended by the officers of DRI, Kolkata when the gold weighing 2.625 Kgs was in their possession. They were not having any document to establish the licit import of the gold. Thus, there is 'reason to believe' that the gold was smuggled in nature and the involvement of the appellants no. 3 and 4 in the transportation of the smuggled gold without any valid document is established.

15.1. In their submissions, the appellants contended that the penalty imposed on them is very high and is not commensurate with the offence, if any, committed by them. In this regard, they cited the decision in the case of *Gopal Saha v. Union of India [2016 (336) E.L.T. 230 (Cal.)]* wherein it has been observed that only prohibited goods are to be taken into account for the purpose of imposition of penalty.

15.2. We observe that the goods in question are not 'prohibited goods' warranting severe penalty. The goods are 'restricted items' for which a lesser penalty would meet the ends of justice. We find that the appellants have heavily relied on the decision of the Hon'ble High Court in the case of *Gopal Saha (supra).* However, from the facts of the said case, it is not coming out as to whether in the said case the gold in question had been absolutely confiscated or not and whether the appellants had satisfied the provisions of Section 123 of the Customs Act or not.

15.3. We observe that in the case of *Sunny Kakkar v. Principal Commissioner of Customs (Prev.), New Delhi [Final Order No. 50108 of 2023 dated 06.02.2023 in Customs Appeal No. 52094 of 2018 – CESTAT, New Delhi],* the Tribunal found that the gold in question had been confiscated and the said fact had not been denied by the appellant. In this case also, the appellants have not disputed the absolute confiscation of the goods. Hence, relying on the said decision, we hold that the penalties imposed on the appellants herein cannot be equated with that in the case of *Gopal Saha (supra).*

16. We find that the penalties are imposable on the appellant nos. 3 and 4, but the same are on the higher side. Therefore, we reduce the penalties imposed on these appellants to Rs.5,00,000/- (Rupees Five Lakhs only) each.

17. In view of the above, we pass the following order: -

(i) The impugned order confiscating the Indian currency of Rs.46,00,000/- is set aside and we order release of the Indian currency so confiscated.

(ii) The penalty imposed on the appellant nos. 1 and 2 are set aside.

(iii) The penalty imposed on the appellant nos. 3 and 4 is reduced to Rs.5,00,000/- each.

18. In the result, the appeals filed by all the four appellants are disposed of on the above terms.

(Order pronounced in the open court on **09.05.2024**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd