IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Customs Appeal No.75175 of 2017
(on behalf of Appellant)

(Arising out of Order-in-Original No.27/CUS/CC(P)/WB/2016 dated 01.11.2016 passed by Commissioner of Customs (Prev.), Kolkata)

Sri Harish Chandra Prasad
(49/5/H/189, Karl Marks Sarani, PS-Khidirpur, Kolkata-700023)

Appellant

VERSUS

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

Respondent

WITH

Customs Appeal No.75176 of 2017
(on behalf of Appellant)

(Arising out of Order-in-Original No.27/CUS/CC(P)/WB/2016 dated 01.11.2016 passed by Commissioner of Customs (Prev.), Kolkata)

Sri Manoj Kumar Shah
(49/5/H/187, Karl Marks Sarani, PS-Khidirpur, Kolkata-700023)

Appellant

VERSUS

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

Respondent

AND

Customs Appeal No.75177 of 2017
(on behalf of Appellant)

(Arising out of Order-in-Original No.27/CUS/CC(P)/WB/2016 dated 01.11.2016 passed by Commissioner of Customs (Prev.), Kolkata)

Sri Omprakash Shah
(49/5/H/187, Karl Marks Sarani, PS-Khidirpur, Kolkata-700023)

Appellant

VERSUS

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

Respondent

***Customs* Appeal No.75175,75176,75177 of 2017**

APPERANCE :

Shri Arijit Chakraborty, Advocate for the Appellant
Shri Tariq Sulaiman, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.76193-76195/2024

DATE OF HEARING : 06 .05.2024

DATE OF PRONOUNCEMENT : **27.06.2024**

Per Ashok Jindal :

The appellants are in appeals challenging penalties imposed on them.

2. The facts of the case are as under :

That the appellants were apprehended by the Police Personnel of Nabadwip Police Station on 29.04.2015 at around 00.15 hrs. as the appellants in their private vehicle being SCALA DCI RX2 bearing Registration No. WB 92/0707 were looking for hotel at Nabadwip, District: Nadia. The appellants were taken into Nabadwip Police Station and were put inside lock-up and after 2-3 hrs. they were informed that there is recovery of 26 kgs. of gold bars from a laptop bag kept at the said vehicle and accordingly, the appellants were arrested in Nabadwip P.S. Case No. 187/15 dated 29.04.2015 alleging their offences u/s 413/414/379/411/34 of IPC and were produced before the Ld. Judicial Magistrate, 1st. Court, Nabadwip on 29.04.2015 when they were remanded to Police custody. Vide subsequent Order dated 6.5.2015, the said Judicial Magistrate directed the Police to hand over all seized goods and reported to the Customs Authority of Krishnanagar, Nadia and thereafter, Customs Authority booked a Seizure Case No. 01/IMP/CL/ Police/ KCD/2015 dated 22.05.2015.

2.1 Statements were recorded from the appellants by the Customs Authority at judicial custody as well as after their bail when appellant, Sri Manoj Kumar Shah submitted that he is nephew of Sri Om Prakash Shah and they are travelling in the car on 28.04.2015 for the purpose of visit to Mayapur ISCON and he has no knowledge about alleged recovery of any gold. The appellant, Sri Harish Chandra Prasad submitted that he is the driver of Sri Om Prakash Shah and was driving the said vehicle on 28.04.2015 when after visiting Ranaghat he inadvertently reached Nabadwip instead of Mayapur at the night and he had no knowledge about the alleged recovery of gold. The accused Sri Om Prakash Shah submitted that at the request of his friend, Samu, he collected the laptop bag from a person at Ranaghat to hand over the same to Samu at Kolkata after his return and the cash Indian currency amounting to Rs. 1,60,000/- was given to him by Samu for payment to the said unknown person at Ranaghat but at the time of giving the laptop bag, the said unknown person refused to take such money and for that reason, the said amount remained with him. Rest cash INR were his own money for expense at Mayapur. He submitted that he had no knowledge about any gold in the laptop bag.

2.2 After extension of time limit a Show Cause Notice dated 1.3.2016 was issued to the appellants by the Customs Authority u/s 124 of the Customs Act, 1962 proposing confiscation of seized gold u/s 111(b) & (d) of the Customs Act, 1962; confiscation of private vehicle u/s 115 of the Customs Act, 1962; confiscation of Indian cash currency u/s 111(d) of the Customs Act, 1962; imposition of penalty u/s 112 of the Customs Act, 1962; & prosecution of appellant, Sri Om Prakash Shah u/s 135 of the Customs Act, 1962. However, no copy of any relied upon documents to the said SCN was provided alongwith the SCN to the appellants.

2.3 That no notice of personal hearing was ever received by the appellants and suddenly, the appellants received an Adjudication Order dated 01.11.2016 whereby penalties of Rs.20 Lac, Rs.20 Lac and Rs.75 Lac were imposed upon the appellants, Sri Harish Chandra Prasad, Sri Manoj Kumar Shah & Sri Om Prakash Shah respectively u/s 112(b) of the Customs Act, 1962. The private vehicle already released provisionally was also ordered to be confiscated, but allowed to be redeemed against find of Rs.1,20,000/-. Though there was cash security of Rs.1,20,000/- at the time of release of the said car, the Ld. Commissioner ordered for encashment of Bank Guarantee of Rs.1,20,000/- inadvertently. Cash INR totalling to Rs.1,73,615/- was ordered to be confiscated u/s 111(d) of the Customs Act, 1962. He also ordered for launching of prosecution against the appellant, Sri Om Prakash Shah u/s 135 of the Customs Act, 1962.

2.4 Against the said order, the appellants are before us.

3. The ld.Counsel for the appellants submits that the impugned order has been passed in violation of principles of natural justice as no copy of relied upon documents was provided to the appellant and no notice or personal hearing was served upon the appellants. He also submits that the impugned order has been passed arbitrarily without giving reasonable opportunity of personal hearing, which is breach of natural

justice. Therefore, the impugned order is liable to be set aside qua imposing penalty on the appellant.

3.1 He further submits that the in the impugned order, the ld.Commissioner erroneously held that the burden of proof with respect to the seized gold lies upon the appellants in terms of Section 123 of the Customs Act, 1962 inasmuch as in the present case, admittedly, the gold was initially seized by the Police Personnel of Nabadwip Police Station on 29.04.2015 and subsequently, in terms of the order of the Judicial Magistrate , the same was handed over to the Customs, when the seizure case dated 22.05.2015 was booked and as such circumstances, the provisions of Section 123 of the Customs Act, 1962, does not apply in this case as the goods was not received from the appellants by the Customs Officers. It is his submission that it is settled position of law that in such circumstances, the burden of proof is on the Revenue to substantiate the alleged smuggled nature of the seized gold and unless such burden is discharged, no penalty can be imposed on the appellants. To support his contention, he relies on the decision of the Hon'ble Apex Court in the case of Gian Chand and Others Vs. State of Punjab reported in 1983 (13) ELT 1365 (SC). He also relies on the decision of the Hon'ble Punjab and Haryana High Court in the case of Assistant Collector Vs. Daljit Singh and Others reported in 1992 (58) ELT 54 (P & H).

3.2 He further submitted that the order of confiscation of seized cash Indian Currency under Section 111 of the Customs Act, 1962 is mis-carriage of justice inasmuch as the Indian Currency cannot be considered as illegally imported into the country even by any stretch of imagination and hence, the order of confiscation is liable to be quashed.

3.3 He also submits that the confiscation of the private car is also bad in law. He, therefore, prayed that no penalty can be imposed on the appellants.

4. The ld.A.R. for the Revenue submits that the goods in question has been recovered from the vehicle in which the appellants were travelled, but the same have been handed over to the Customs, which has been absolutely confiscated. In that circumstances, the penalties on the appellants were rightly imposed as they failed to show the licit manner for procurement of gold and Indian Currency.

5. Heard both sides and considered the submissions.

6. We find that the claims of the appellants are that one laptop bag was received by them from a person at Ranaghat to hand over the same to Samu at Kolkata. Samu has given Rs.1,60,000/- to the appellant to hand over money to the person who will hand over the laptop bag, but at the time of giving the laptop bags, neither the seized goods belongs to them nor the Indian currency recovered. Therefore, the appellants are seeking immunity from the appellants imposed on the appellants in the facts and circumstances of the case.

7. In that circumstances, we are going to decide whether the present facts and circumstances of the case the penalties can be imposed on the appellants or not ?

8. We find that in these cases, the seizure was done by the Police and later on, it was handed over to the Customs on the direction of the Judicial Magistrate for handing over the seized goods to Customs

Authorities at Ranaghat, Nadia. Therefore, the question arises when the seizure case has been done by the Police and the Police handed over the said goods to the Customs, in that circumstances, the provisions of Section 123 of the Customs Act, 1962 are applicable or not?

9. We find that the said issue has been examined by the Hon'ble Apex Court in *the* case of Gian Chand and Others (supra) , which was followed by this Tribunal in the case of Mahesh B.Mali Vs. Commissioner of Central Excise, Pune reported in 2012 (286) ELT 375 (Tri.-Mumbai), wherein this Tribunal has observed as under :

> *"**7.1** ……………………….. The next issue for consideration is inasmuch as the gold has not been seized from the possession of the appellant but was handed over by the Police to the Customs authorities, whether onus to prove that the gold in question is not smuggled is on the appellant or not. The Constitution Bench of the Hon'ble Apex Court in the case of Gian Chand & Others v. State of Punjab, reported in 1983 (13) E.L.T. 1365 (S.C.) held that "if the goods are seized by the police and delivered to the Customs authorities under Section 180 of the Sea Customs Act, 1878, It is not seizure by the Customs within the meaning of Section 178A of the Sea Customs Act, 1878. This is because when the police officer seized the goods under some other law, such as. Code of Criminal Procedure, the accused lost possession of the goods which then vested in the police and when that possession was transferred to Customs authorities under Section 180 ibid, there was no fresh seizure under the Sea Customs Act, 1878. The provisions of Sea Customs Act and the Customs Act, 1962 are identical with respect to the seizure and the onus of proof in the instant case. From the records it is evident that it is the police who seized the goods on 6-11-2009 and thereafter they were*

handed over to the Customs authorities by the police on the request of the Customs authorities. In other words, the Customs authorities did not seize the goods from the appellants; therefore, the provisions of Section 123 which casts the onus on the appellants to prove that the goods are not smuggled is not applicable, inasmuch as no seizure has been made from the appellant by the Customs. The same view has held by the Hon'ble High Court of Bombay in the case of Prithviraj Pokhraj Jain (cited supra) and by this Tribunal in a number of cases such as Nirmala Mitra [2001 (138) E.L.T. 1037 (Tri.-Kol.)], E. Eshwara Reddy, Naveed Ahmed Khan, etc. Therefore, the burden and onus of proof to establish the fact that the goods are smuggled lies on the Revenue and not on the appellants, in terms of the judgment cited above and we hold accordingly."

10. As the provision of Section 123 of the Customs Act, 1962, are not applicable for seizure of goods and Indian Currency in this case. The Revenue has failed to discharge the burden to prove that the gold in question is smuggled one and currency seized is sale proceeds of the smuggled gold, therefore, the gold and seized currency are liable for confiscation.

11. In that circumstances, we hold that no penalty can be imposed on the appellants. Accordingly, the penalties imposed on the appellants are set aside.

12. Consequently, the appeals filed by the appellants qua seeking immunity from imposition of penalties, are allowed.

13. In view of the above observations, the appeals are disposed off.

(Pronounced in the open court on **27.06.2024**)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)

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