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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76439 of 2014

(Arising out of Order-in-Original No.26/MP/Ayukta/2014 dated 13.08.2014 passed by Commissioner, Central Excise & Service Tax, Patna.)

Shri Krishna Kumar
(S/o shri Ramawtar Mahto, Fasiatola, Teengachhia, Katihar, Bihar.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Patna

.....Respondent

(C.R. Building, Bir Chand Patel Path, Patna-800001, Bihar.)

WITH

Excise Appeal No.76440 of 2014

(Arising out of Order-in-Original No.26/MP/Ayukta/2014 dated 13.08.2014 passed by Commissioner, Central Excise & Service Tax, Patna.)

Shri Suresh Prasad Sah
(S/o Late Gangadhar Sah, Village-Janidih, P.O. Ghogha, P.S. Kahalgaon, Distt.Bhagalpur, Bihar.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Patna

.....Respondent

(C.R. Building, Bir Chand Patel Path, Patna-800001, Bihar.)

APPEARANCE

Shri Tarun Chatterjee, Advocate, Ms. Binita Pandey, C.S. and Shri Raju Prasad Advocate for the Appellant (s)
Shri S.S.Chattopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 77347-77348/2023

DATE OF HEARING : 13 October 2023
DATE OF DECISION : 18/10/2023.

Per : K. ANPAZHAKAN :

The present appeal has been file against the Order-in Original dated 13.08.2014, passed by the Commissioner of C.Ex and Service Tax, Patna. The impugned order was the result of the proceedings initiated by the department against the Appellant Shri Krishna Kumar (Appellant1) and Shri Suresh Prasad Sah (Appellant 2) alleging inter alia that the appellant No.1 in connivance with appellant No.2 have evaded Central Excise duty to the tune of Rs.1.38 crores by means of clandestine manufacture and clearance of excisable goods namely unmanufactured tobacco in the premises situated at Fasiatola, Teengachhia, Katihar, without obtaining Central Excise Registration and without following the provisions of Central Excise law. Accordingly Show Cause Notice dated 21.06.2012 was issued to the Appellants which was adjudicated vide the impugned order dated 13.08.2014, wherein the demand amounting to Rs.14,75,833/- has been confirmed and the remaining demand of Rs.1,23,24,167/- has been dropped. A penalty of Rs.14,75,833/- was also imposed under the provisions of Rule 26 of the Central Excise Rules, 2002. Aggrieved against the impugned order, both the Appellants preferred appeal before this Tribunal.

2. Briefly stated facts of the case are that the Appellant 1 assigned a lease agreement dated 03.04.2011 and let out his godown situated at Fasiatola, Teengachhia, Katihar to Shri Mahesh Prasad, who was introduced to him by Shri Suresh Prasad Sah, for manufacture of mixture (Dalmut) in the premises. Shri Mahesh Prasad has agreed to pay a monthly rent of Rs.6,000/- per month as per Clause 12 of the lease agreement and also agreed to pay electricity bill issued in the name of the lesser for using the electricity in the premises.

3. The officers of Central Excise conducted a search at the above said premises at Fasiatola on 25.06.2011 wherein they found 8 numbers of old and used power-run fully automatic packing machines (FFS) for manufacturing of unmanufactured tobacco, bearing the brand

Hero Khaini No.11. The said brand was in the name of Shri. Gautham Kumar Kushwaha, who has his own factory in the name of M/s. Kushwaha Tobacco Factory, Katihar, for manufacturing of 'Hero Khaini No.11' brand unmanufactured tobacco. Some of the pouches found therein had the brand of 'Ankhen Brand Khaini' also.

4. Shri Suresh Prasad Sah was available in the factory at the time of search, claimed that the proprietor of the factory was Shri Gautam Kumar Kushwaha, owner of the brand Hero Khaini No.11. He could not produce Central Excise Registration Certificate or any other evidence for payment of duty in respect of excisable goods namely unmanufactured tobacco found in the said premises. Accordingly, on a reasonable belief that the goods available therein were kept for clandestine clearance, goods collectively valued at Rs.8,29,400/-, including the 8 FFS packing machines were seized in the presence of Shri Suresh Prasad Sah and two independent witnesses under section 110 of the Customs Act, 1962, made applicable to the Central Excise Act.

5. In response to Summons dated 27.06.2011, Shri Gautam Kumar Kushwaha appeared before the offices and stated that he had no connection with the factory and he did not know Shri Suresh Prasad Sah. He reiterated that he has been in the business of unmanufactured tobacco at Lalkothi Road and he has no business related to unmanufactured tobacco except the above one.

6. In his statements, the Appellant 1 submits that he has no knowledge about the illegal manufacture of branded unmanufactured tobacco in the premises leased out by him vide lease agreement dated 03.04.2011. In his further statement dated 26.09.2011also he reiterated that he has no relation with the business carried out at his rented premises. He stated that he has made a genuine lease agreement and the same can be verified from the Notary. The department verified such fact from the Notary and found that the lease agreement executed by him was genuine. He stated that the department has demanded duty from him only on the ground that the said premises is owned by him. Since, he has leased out the premises

to Shri. Mahesh Prasdas, he is not responsible for any illegal activity undertaken by Shri. Mahesh Prasad or Suresh Prasad in the said premises. Accordingly, he stated that the demand of duty from him is illegal and not sustainable.

7. Shri Suresh Prasad Sah in his statement dated 19.08.2011, stated that Shri. Mahesh Prasad was the owner of the business carried out in the premises at Fasiatola. He introduced Shri Mahesh Prasad to the Appellant 1for leasing out the premises for the purpose of carrying out the business in the said premises. He submitted that Shri Gautam Kumar Kushwaha has no connection with the goods seized from the premises. Later, on investigation Shri Mahesh Prasad was found to be non-existent. In his further statement dated 26.04.2011, Shri Suresh Prasad Sah admitted that there was no person in the name of Shri Mahesh Prasad. He has impersonated another person as Mahesh Prasad and introduced him to Shri Krishna Kumar for the purpose of executing the lease agreement of the premises. He produced the same person as Mahesh Prasad before the Notary also. In his statement dated 26.09.2011, Shri. Suresh Prasad admitted that he is the main person involved in the manufacturing activity. He purchased two FFS machines on 26.05.2011, three machines were purchased on 07.06.2011 and another three machines were purchased on 16.06.2011. Using these machines he manufactured branded unmanufactured tobacco from 12.06.2011 onwards. He did not sell any consignment and in the meantime the goods were seized on 26.06.2011. He admitted that he has committed the offense due to lack of proper knowledge of Central Excise and compounded levy scheme and expressed his willingness to pay all dues of Central Excise duty as per law.

8. The Ld.A.R reiterated the findings in the impugned order. He stated that Shri Krishna Kumar is the owner of the premises where the illegal manufacturing of unmanufactured tobacco was undertaken. Shri Mahesh Prasad, in whose name the lease agreement was taken was a non-existent person. Shri Suresh Prasad has no means for purchasing these 8 machines, as claimed by him. Accordingly, he stated that Shri

Krishna Kumar is the actual manufacturer of the said goods. Hence, the duty has been rightly demanded from him in the impugned order. Accordingly, he supported the impugned order.

9. Heard both sides and perused the appeal documents.

10. We observe that the issue to be decided in the present appeal is, who the actual manufacturer of the unmanufactured tobacco found to be manufactured illegally in the premises at Fasiatola, Teengachhia, Katihar. Shri Krishna Kumar is the owner of the said premises. As per records, he has leased out the said premises to Shri Mahesh Prasad. But, on investigation, he was found to be non-existent. Accordingly, the department demanded duty from Appellant 1, as he is the ownwer of the said premises.

11. Shri Suresh Prasad introduced Shri. Mahesh Prasad to Appellant 1, before executing the lease agreement. Later, when Mahesh Prasad was found to be non existent, he changed his statement and submitted that he has impersonated another person as Mahesh Prasad and introduced him to Shri Krishna Kumar for the purpose of executing the lease agreement of the premises. He produced the same person as Mahesh Prasad before the Notary also. Shri. Suresh Prasad has changed his statement many times. Initially he stated that the proprietor of the factory was Shri Goutam Kumar Kushwaha. He changed his stand and stated that Shri. Mahesh Prasad was the owner of the business carried out in the premises at Fasiatola. Later, in his statement dated 26.09.2011, Shri. Suresh Prasad admitted that he is the main person involved in the manufacturing activity and claimed that he purchased the machines and manufactured the goods in the said premises. The investigation by the department has established that he has no financial means to purchase the 8 FFS packing machines and the raw material available in the said premises. Since Shri. Suresh Prasad has changed his statement so many times, we observe that his statement has no evidentiary value. From the documents available, it is clearly established that the lease agreement was a bogus one. Shri Suresh Prasad has impersonated another person and introduced him as Shri

Mahesh Prasad before the Notary. Mahesh Prasad is non existent. There is no evidence that Shri. Gautam Kushwaha was in any way connected with the manufacturing activity. Thus, we find that the department has considered Appellant 1, the owner of the premises as the manufacturer of the goods found in the said premises.

12. Regarding the evidence available on record to implicate Shri Krishna Kumar as the manufacturer, we find that the only ground on which he has been concluded as the manufacturer was that he is the owner of the premises from where the goods were seized. We observe that Appellant 1 has made a genuine lease agreement and leased out the property on a monthly rent of Rs.6000/. The department has verified the genuineness of the lease agreement from the Notary and found that the lease agreement executed by him was genuine. In his statements Appellant 1 has claimed that he is not at all involved in the illegal manufacture and clandestine clearance. We find that there is no material evidence available on record to establish that he is directly involved in the manufacturing activities. There is no evidence that the machines were purchased in his name. There is no evidence that he has purchased raw materials from the market using cash .The goods has not been physically cleared to any customers. In the absence of any such evidence, we hold that Appellant 1 cannot be held as the manufacturer of the goods found in the premises rented out by him.

13. On the day of search, officers have seized certain materials which were found in the said premises. However, the owner of the goods or the actual person who has undertaken the manufacture of the said goods has not been established with corroborative evidence. It is only on a presumption basis that the officers have implicated Shri Krishna Kumar as the manufacturer as he is the owner of the said premises. Except the ownership of the premises, there is no evidence available on record to establish that Shri Krishna Kumar is the actual manufacturer of the said goods. In view of the above, we hold that the evidence available on record does not indicate that Shri Krishna Kumar is the manufacturer. Accordingly, we set aside the impugned order

demanding duty from the Appellant 1, Shri Krishna Kumar. Since, the demand of duty on him is not sustainable, no penalty imposable on him. Accordingly, the penalty imposed on Appellant 1 is set aside. In the impugned order, the order related to confiscation of the goods and allowing the goods to be released on redemption fine is upheld.

14. Shri Suresh Prasad Sah, Appellant 2 has admitted that he is involved in the illegal manufacture and clearance of unmanufactured tobacco. Since he has changed his statement so many times, we observe that his statement has no evidentiary value. However, we find that there is no demand in the notice against Shri Suresh Prasad Sah. We observe that his involvement in the clandestine manufacture and clearance is very well established by his own admission. He is also involved in introducing a non-existence person Shri Mahesh Prasad before the Notary for executing the lease agreement. Accordingly, we hold that he is liable for penalty under section 26 of the Central Excise Rules 2002. Accordingly, we uphold the penalty imposed on Shri Suresh Prasad Sah.

15. In view of the above finding we set aside duty demanded from the Appellant 1, Shri. Krishna Kumar and the penalty imposed on him. We confirm the penalty imposed on Shri Suresh Prasad Sah. The confiscation and allowing the goods to be released on redemption fine in the impugned order is upheld. The Appeals are disposed on the above terms.

(Order pronounced in the open court on 18/10/2023.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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