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

REGIONAL BENCH – COURT NO. 2

Customs Appeal No. 75343 of 2021

(Arising out of Order-In-Appeal No. Kol/Cus(Prev)/WB/AKR/96/2021 dated 27.01.2021 Passed by Commissioner of Customs (Appeals)3rd Floor Custom House, 15/1, Strand Road, Kolkata-700001)

M/s. Birendra Kumar Gupta, : **Appellant**
S/o- Shri Ramprit Sahu,
N.S.Road, Opposite to City Life Building,
Jaigaon, Alipurduar West Bengal-736182

VERSUS

Commissioner of Customs (Prev.) : **Respondent**
CC(P), W.B., Customs House,
15/1, Strand Road, Kolkata-700001

APPEARANCE:

Shri Arijit Chakraborty, Advocate for the Appellant

Shri S. Chakraborty, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO.77899/2025

DATE OF HEARING / DECISION:18.12.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

Shri Birendra Kumar Gupta (herein after referred as the appellant) is a resident of Alipurduar-Jaigaon, Dist., West Bengal. The appellant was imposed a penalty of Rs.7,00,000/- in the Order-in-Original No.40/ADC(P)/CUS/WB/19-20 dated 28.8.19 passed by the Ld. Addl. Commissioner of Customs (Prev.), CC(P), West Bengal, Kolkata. On appeal, the Ld. Commissioner (Appeals) upheld the penalty imposed in the impugned Order-in-Appeal No.KOL/ CUS (PREV)/ WB/AKR/96/2021 dated 27.01.2021. Aggrieved against the imposition of penalty on him, the appellant has filed this appeal.

2. The facts of the case are that the appellant was issued with Summons dated 29.6.18 and 27.8.18 by the Senior Intelligence Officer, DRI, Siliguri Regional Unit in connection to Seizure Case No.03/CL/IMP/DRI/SLG/18-19 dated 24.5.18 requiring his appearance before the DRI authority. On 05.09.2018, the statement of the appellant was recorded. During the course of investigation, the appellant was informed about the seizure case wherein allegedly one kg gold was recovered from Shri Krishna Kumar Gupta on 24.5.18 by DRI officers. It was alleged that the said Shri.Krishna Kumar Gupta had named the appellant in connection with the seized gold. The appellant, during his statement, had categorically stated that he knows Krishna Kumar Gupta since both of them are involved in Chhat Puja Committee of Jaigaon but he has neither any knowledge or involvement with respect to the alleged seizure case.

3. After completion of investigation, a Show Cause Notice was issued vide DRI F. No.03/CL/IMP/DRI/SLG/2018-19/746 dated 15.11.18 to the appellant, amongst others, alleging, inter alia, that the recovered seized gold is smuggled in nature and thus, liable for confiscation under the Customs Act, 1962 and the appellant is liable for penalty under Section 112(a) and/or 112(b) of the Customs Act, 1962. It is alleged in the said Show Cause Notice that the appellant appears to be the most important person involved in this smuggling of the impugned gold bar of foreign origin and had actively colluded with other members of the syndicate and tried to mislead the investigating agency. The entire allegation has been made on the basis of the alleged statement of Krishna Kumar Gupta and a telephone call of 14 seconds between them, just half an hour before interception of Krishna Kumar Gupta. Reference has also been made to two earlier cases involving the present appellant. On adjudication, a penalty of Rs.7,00,000/- was imposed on the appellant under Section 112(a) & 112(b) of the

Customs Act, 1962, which has been upheld in the impugned order by the Ld. Commissioner (Appeals).

4. The appellant submits that vide his letter dated 25.03.19, submitted on 03.04.19 before the Ld. Adjudicating authority, he had categorically stated that the entire case against him is based upon the statement dated 24.05.18 of Krishna Kumar Gupta. The appellant prayed for opportunity of cross-examination of Shri. Krishna Kumar Gupta, which was accorded by the adjudicating authority. On 8.8.19 through the subsequent personal hearing, cross-examination of Krishna Kumar Gupta was held before the Ld. Adjudicating authority and Shri Krishna Kumar Gupta had vehemently denied his alleged statement dated 24.5.18 as improper and untrue. It is duly recorded at para 30.0 and 30.1 of the Adjudication Order dated 28.08.2019 that Shri Krishna Kumar Gupta had denied any recovery of gold from his possession and he had also denied the alleged confessional statements recorded from him earlier.

5. The appellant submits that in the impugned order the Ld. Appellate Authority has observed that since on two earlier occasions penalty has been imposed upon the appellant in two different cases, the same proves that the appellant is a habitual offender. It was also held that although the appellant had appealed against such orders and cases are pending at CESTAT, it does not lessen the gravity of offences committed by him and accordingly, on the basis of the confessional statement of Shri Krishna Kumar Gupta and a telephonic call half an hour before the interception, between the appellant the said Shri Krishna Kumar Gupta, the appeal of the appellant has been rejected. If the outcome of the cross-examination is taken into account, there cannot be any imposition of penalty upon the appellant in the present case. Accordingly, he prayed for setting aside the impugned order.

6. The Ld. A.R. submits that the appellant is a habitual offender and implicated in smuggling cases earlier. Accordingly, he submits that penalty has been rightly imposed on him.

7. Heard both sides and perused the appeal documents.

8. We observe that the entire case has been built against the appellant on the basis of the statement dated 24.05.18 of Krishna Kumar Gupta. We observe that one kg of gold was recovered from Shri Krishna Kumar Gupta on 24.5.18 by DRI officers and Shri Krishna Kumar Gupta has stated that the appellant as the important person connected with the smuggling of gold in that case. We observe that apart from the statement of Shri Krishna Kumar Gupta there was no other evidence to implicate the appellant in the present case. We observe that the appellant had categorically stated that he was known to said Shri Krishna Kumar Gupta since both of them were working together at Chhat Puja Committee at Phuentshelling. Shri Krishna Kumar Gupta had also corroborated such fact during the course of cross-examination. In such circumstance, we observe that no adverse conclusion can be arrived at against the appellant on the basis of the sole confessional statement of the co-accused which had been retracted and also denied to be voluntary during cross-examination.

8.1. In the impugned order, it has also been alleged that there was a telephonic call between the appellant and Shri Krishna Kumar Gupta about half an hour before the time of interception of Shri Krishna Kumar Gupta. We observe that such a telephone call cannot be the basis for the assumption that the appellant was involved in the alleged act of smuggling of gold. It is an admitted position that the appellant and Shri Krishna Kumar Gupta were known to each other and there is nothing irregular or illegal in exchange of call between two known persons. Accordingly, we hold that on the basis of such telephonic call, it cannot be assumed that the appellant was involved in any act of smuggling.

8.2. In the impugned order, it has also been alleged that the appellant had been imposed penalty in two different cases on earlier occasions. The appellant submitted that he has preferred two appeals before the Tribunal in both the cases challenging the imposition of penalty on him. It is his submission that until and unless such imposition of penalties reached a finality, it is cannot be concluded that the appellant is a habitual offender. In this regard, we agree with the submission of the appellant. Imposition of penalty on earlier occasions, which is pending before the Tribunal cannot be a reason to conclude that the appellant is a habitual offender and is involved in the smuggling activity in this case.

9. We observe that the appellant has been imposed penalty under Section 112 of the Customs Act, 1962. We observe that there is no circumstance in the present case where the provision of Section 112 ibid can be applied against the appellant. Evidence available on record does not indicate that the appellant has played any role in the alleged offence which rendered the impugned goods liable for confiscation under the Customs Act, 1962. We observe that the Ld. Adjudicating authority had imposed penalty upon the appellant under Section 112(a) & 112(b) of the Customs Act, 1962 together. We observe that Clause (a) & Clause (b) of section 112 provides for imposition of penalty under completely different circumstances and both the provisions cannot be applied together. We also observe that the appellant had not dealt with the goods under seizure with a prior knowledge or reason to believe that the goods are liable for confiscation. Accordingly, we hold that penalty under Section 112 of the Customs Act, 1962 is not imposable upon the appellant and hence we set aside the penalty imposed on the appellant.

10. In view of the above discussions, we set aside the penalty imposed on the appellant and allow his appeal, with consequential relief, if any, as per law.

(Operative part of the order was pronounced in open court)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP