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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 76205 of 2017

(Arising out of Adjudication Order No. 46/CUS/CC(P)/WB/2016 dated 31.03.2017 passed by the Commissioner of Customs (Preventive), West Bengal, Kolkata, Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Gagan Karel, Proprietor, **: Appellant**
M/s. Siddhi Diamond
Shop No. 12, 4th Floor,
4, Adi Banstala Lane, Burra Bazar,
Kolkata – 700 007

VERSUS

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

APPEARANCE:

Shri Arijit Chakraborty, Advocate for the Appellant

Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO. 75104 / 2025

DATE OF HEARING: 20.01.2025

DATE OF DECISION: 23.01.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the Adjudication Order No. 46/CUS/CC(P)/WB/2016 dated 31.03.2017 wherein the Ld. Commissioner of Customs (Preventive), Kolkata has imposed a penalty of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) under Section 112(a) and 112(b) of the Customs Act, 1962 on Shri Gagan Karel (hereinafter referred to as the "Appellant") for his alleged act of abetting the smuggling of gold and his indulgence in dealing with smuggled gold.

2. The facts of the case are that 58 pieces of gold biscuits and bars and about half a piece of biscuit having a total weight of 10.54855kgs. collectively valued at Rs.2,85,86,569/- was seized from Shri Pawan Prasad and Smt. Monika Yadav on 16.06.2015.

2.1. In his statement, Shri Pawan Prasad has stated that on earlier four occasions, he had delivered a portion of the gold carried by him to one Shri Gagan Karel (Appellant). It was also stated that a portion of the gold seized on 16.06.2015 from Shri Pawan Prasad and Smt. Monika Yadav was also to be delivered to Shri Gagan Karel.

2.2. Accordingly, it has been alleged that Shri Gagan Karel was involved in the smuggling of the said gold and penalty under Section 112(a) and (b) of the Customs Act has been imposed on him.

3. The Appellant submits that he has been implicated in the offence only by the co-accused viz. Shri Pawan Prasad and Smt. Monika Yadav in their statements. Accordingly, he submits that he had sought an opportunity for cross-examining them before the ld. adjudicating authority and the cross-examination was fixed on 19.12.2016; however, on 19.12.2016, neither Shri Pawan Prasad nor Smt. Monika Yadav appeared; however, the ld. adjudicating authority proceeded to decide the matter without giving another opportunity of cross-examination. The Appellant submits that in the impugned order, the ld. adjudicating authority has relied upon the statements recorded from Shri Pawan Prasad and Smt. Monika Yadav and came to an adverse conclusion against the Appellant. The Appellant submits that it is a settled position of law that no statement can be relied upon against an Appellant without affording an opportunity

to cross-examine and/or verify such statement by the Appellant; in the present case, it is on record that Shri Pawan Prasad and Smt. Monika Yadav had participated in the adjudication proceedings and in these circumstances, an opportunity of cross-examination must have been given to the Appellant. The Appellant also submits that it is on record that only one opportunity of cross-examination was granted, on 19.12.2016, and thereafter, the impugned order was passed on 31.03.2017 without giving another opportunity of cross-examination to the Appellant. Thus, the Appellant contends that the statements recorded from Shri. Pawan Prasad and Ms. Monica Yadav cannot be relied upon to arrive at any adverse conclusion against him. Thus, the appellant submits that imposition of penalty on him on the basis of the statements given by the co-accused viz. Shri Pawan Prasad and Smt. Monika Yadav is not sustainable.

3.1. The Appellant also contends that there is no other corroborative evidence on record in support of the allegations, except the statements of the apprehended persons in this case; in such a situation, the opportunity to cross-examine must have been given to the Appellant. The Appellant submits that in the impugned order, it is alleged that he (Appellant) has purchased smuggled gold from Shri Pawan Prasad on earlier occasions; it is also alleged that the Appellant is an intended buyer of smuggled gold in the present case also. The Appellant submits in this regard that it is an admitted position that the Appellant has not purchased any part of the smuggled gold in the present case; hence, no penalty can be imposed on the Appellant as he has not purchased any gold in this case.

3.2. The Appellant further submits that under Section 112 of the Customs Act, 1962 penalty can be imposed only when a person commits an act which renders the goods liable for confiscation; in the present case, the gold recovered from Shri Pawan Prasad and Smt. Monika Yadav has been ordered to be confiscated under Section 111 of the Customs Act vide the impugned order dated 31.03.2017. There is no other order of confiscation of any other goods under Section 111 ibid, in the present case. The Appellant contends that penalty can be imposed under Section 112 of the Act only in respect of the person from whom the gold has been seized and confiscated subsequently; admittedly, no gold has been seized from the Appellant in the instant case and accordingly, the provisions of Section112 cannot be invoked against the Appellant for imposing penalty.

3.3. In view of the above, the Appellant prayed for setting aside the penalty imposed on him.

4. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

5. Heard both sides and perused the appeal records.

6. We find that 58 pieces of gold biscuits and bars and about half a piece of biscuit having a total weight of 10.54855 kgs. collectively valued at Rs.2,85,86,569/- was seized from Shri Pawan Prasad and Smt. Monika Yadav on 16.06.2015. It is alleged that a part of the smuggled gold was supposed to be sold to Shri Gagan Karel, as per the statement recorded from Shri Pawan Prasad. We observe that except the statement dated 16.06.2015 of Shri Pawan

Prasad, there is no other evidence available on record to implicate the Appellant in the alleged offence. Since the statements of Shri Pawan Prasad and Smt. Monika Yadav are the only evidences against the Appellant, an opportunity for cross-examining them should have been granted to the Appellant, to verify the claims made by the said persons in their respective statements. In the present case, the ld. adjudicating authority has given only one opportunity of cross-examination of Shri Pawan Prasad and Smt. Monika Yadav on 19.12.2016 and on the said date, both of them had not appeared. The ld. adjudicating authority has not given any further opportunity to cross-examine them and passed the impugned order by relying upon the statements recorded earlier. It is a settled position of law that in such circumstances, when statements recorded from the co-accused are the only evidence to implicate another person in that offence, the said statements cannot be relied upon against the person (the appellant in this case) without giving an opportunity for cross-examining the persons who have given the statements implicating the Appellant. In the present case, it is a fact on record that Shri Pawan Prasad and Smt. Monika Yadav had participated in the adjudication proceedings and therefore, another opportunity must have been given by the ld. adjudicating authority to examine them before relying upon their statements to impose penalty on the Appellant. Thus, we hold that the statements of Shri Pawan Prasad and Smt. Monika Yadav cannot be relied upon against the Appellant, without any other corroborative evidence to support the allegations.

7. We have gone through the findings recorded by the ld. adjudicating authority in the impugned order regarding the role played by the Appellant in the alleged offence. From the findings of the ld. adjudicating authority, we observe that except the statements of Shri Pawan Prasad and Smt. Monika Yadav, there is no other corroborative evidence to establish the role of the Appellant in the alleged offence.

8. Section 112 of the Customs Act, 1962, which deals with penalty for improper importation of goods, is reproduced below:-

> *"SECTION 112. Penalty for improper importation of goods, etc. — Any person, -*
>
> *(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or*
>
> *(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,*
>
> *shall be liable, -*
>
>> *(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;*
>>
>> *(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :*
>>
>> *Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]*

> *(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;*
>
> *(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;*
>
> *(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest."*

8.1. From the Section 112 of the Customs Act, 1962 reproduced above, we observe that penalty can be imposed under this section only when a person commits an act which renders the goods liable for confiscation. In the present case, we observe that the gold recovered from Shri Pawan Prasad and Smt. Monika Yadav has been ordered to be confiscated under Section 111 of the Customs Act vide the impugned order dated 31.03.2017 and penalty has been imposed on them for the role played by them in the offence. There is no other evidence available on record to implicate the appellant in the alleged offence. Thus, in the present case, we observe that the elements as mentioned in Section 112 of the Act are not available to impose penalty on the appellant. Hence, we hold the provisions of Section 112(a) and 112(b) cannot be invoked to impose penalty on the appellant. Consequently, we hold that the penalty imposed on the Appellant by invoking the provisions of Section 112(a) and (b) of the Act is not sustainable and hence we set aside the same.

9. In view of the above discussion, we set aside the penalty imposed on the Appellant and allow the appeal filed by the Appellant.

(Order pronounced in the open court on **23.01.2025**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

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

Sdd