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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 76168 of 2016

(Arising out of Order-in-Original No. CCP/NER/7/2016 dated 16.03.2016 passed by the Commissioner of Customs (Preventive) North Eastern Region Custom House, 110 M.G. Road, Shillong-793001)

Shri Dulal Krishna Paul, **: Appellant**
S/o Late Nanigopal Paul,
Royanagar, Word No.25,
P.O., P.S. & District- Karimganj, Assam-788 710

VERSUS

Commissioner of Customs (Preventive), **: Respondent**
North Eastern Region,
110, M.G. Road, Shilong

AND

Customs Appeal No. 76169 of 2016

(Arising out of Order-in-Original No. CCP/NER/7/2016 dated 16.03.2016 passed by the Commissioner of Customs (Preventive) North Eastern Region Custom House, 110 M.G. Road, Shillong-793001)

Shri Suman Chandra Paul, **: Appellant**
S/o Kalipad Paul,
Vill-Pin Nagar, P.S.-Nilambazar,
Sub-division- Karimganj,
Dist Assam-788722.

VERSUS

Commissioner of Customs (Preventive), **: Respondent**
North Eastern Region,
110, M.G. Road, Shilong

APPEARANCE:

Shri Arijit Chakrabarti, Advocate
Shri Dulal Krishna Paul & Shri Nilotpal Chowdhury, Advocate
for the Appellant

Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)

FINAL ORDER NOs.77179-77180/2024

DATE OF HEARING: 06.09.2024
DATE OF PRONOUNCEMENT:23.10.2024

Order: [PER SHRI ASHOK JINDAL]

The appellants are in appeal against the impugned order wherein a penalty of Rs.25,00,000/- has been imposed on the Appellant No. 1 (viz. Shri Dulal Krishna Paul) and a penalty of Rs.5,00,000/- has been imposed on the Appellant No. 2 (viz. Shri Suman Chandra Paul) under Section 112(b)(ii) of the Customs Act, 1962.

2. The facts of the case are as under: -

(i) Acting on a specific intelligence, the officers of the Directorate of Revenue Intelligence, Guwahati (hereinafter also referred to as the DRI officers) intercepted /scarched a car bearing registration No. MN-01W-7635 on 27.2.2015 and recovered 4 (four) packages covered with paper and light brown coloured adhesive tape containing 101(one hundred onej pieces rectangular yellow metal bars of identical size and shape believed to be Primary Gold of foreign origin from a secret cabinet at the base of the car On demand the Sri Bablu Thapa, the driver, Sri Suman Chandra Paul and Sri Bishnu Prasad the other two persons sitting in the said vehicle could not produce any document in support of possession and transportation of the said goods, however, Sri Bablu Thapa and Sri Suman Chandra Paul admitted that the said gold bars were of foreign origin and illegally brought into India and also being taken by them to Guwahati without any document. On being called by the DRI Officers, M/s Jag Mohan Soni, H.B. Road, Fancy Bazar, Guwahati-781001 a Registered Valuer, tested all the recovered yellow metal bars with their instruments and confirmed that these were bars of Primary Gold having the purity ranging from 99.5% to 99.6% collectively weighing 16769.040 grams valued at Rs. 4,49,41,028/- (Rupees four crore forty nine lakh forty one thousand and twenty eight) only in presence of Sri Bablu Thapa, Sri Suman Chandra Paul and Bishnu Prasad including the independent witnesses. The DRI officer effected seizure of the entire gold as above along with the packing material on a reasonable belief that these brought into India from Myanmar through a route not specified under Section 7 (C) of the Customs Act, 1962 and in violation of provisions of other statutory order/s for the time being in force which render the impugned gold liable for confiscation. The Car bearing No. MN-01W-7635 was knowingly used to transport the impugned gold by secreting the same in it rendering the said vehicle liable for confiscation under Section 115 of the Act ibid. Three (3) Nos, old and used mobile phones along with SIM Cards, other documents like Car's Registration Certificate and Insurance Papers were also scized as incriminating documents or things. The Seizure was effected vide case No. 08/CL/IMP/Gold/ DRI/ GAU/2014-15 dated 27.02.15 having estimated value of Rs. 4,51,41,028/- (Rupees four crore fifty one lakh forty one thousand six hundred and twenty eight) only. The seized gold bars/biscuits were deposited in the Customs Divisional Godown, Guwahati vide V.R. No. 38/14-15 dtd 28.02.2015. The samples of the said goods were also drawn and sent for examination. The test report of the said gold bars given by Jag Mohan Soni, H в. Road, Fancy Bazar, Guwahati certified that the purity of the seized gold bars was in between 995 ppt (part per thousand) to 996 ppt

(ii) In his statement given on 27.2.2015, Sri Bablu Thapa inter-alia stated that he started from Imphal for Guwahati on 26.2.2015 morning with two other persons viz Sri Suman Paul of Karimganj, Assam and Sri Bishnu Prasad Kharel of Senapatı. Manipur, who was a relative of him and accompanied him as he was having some personal work at Guwahati. He admitted the fact that the gold bars/biscuits were secreted in the vehicle and also shown the place where the gold bars/biscuits were secreted. He also admitted that on demand, he could not produce any documents since these gold bars/biscuits were of foreign origin and brought to Imphal from Myanmar through Moreh. On being asked, he stated that these gold bars/biscuits were marked with inscriptions showing foreign origin and these markings were removed subsequently by melting. It was known to him because the persons who delivered the said gold to him uttered these facts In spite of knowing the fact that these gold were of foreign origin, he brought the said gold by concealing it in the said vehicle as he was in need of money. At the time of purchasing the said vehicle, he took some loans which he was to repay. First time, when he brought 16 kgs. of gold of the same owner, he earned a lot. Similarly, in this occasion also, he was carrying 101 pieces of gold bars/biscuits of foreign origin but was intercepted due to bad luck. On being asked about the involvement of Sri Suman Paul and Sri Bishnu Prasad Kharel in the instant case, he stated that Sri Suman Paul is the agent of the owner but Sri Bishnu Prasad Kharel is totally innocent. On being asked about the details viz. who, where and when handed over the said gold to him, he stated that one Nepali speaking person Kamal, was the owner of the said gold who owned a Jewellery shop at Khongnangkarak, Imphal. That, on 26.2.2015 at 09.00 Hrs., he took the gold from him and came down to his rented house at Mantripukhuri, Imphal where Sri Suman Paul was waiting. As per the plan, the gold were then secreted in the vehicle and took Sri Bishnu Prasad Kharel on the way while coming. On being asked by the

DRI Officers to furnish the details of Sri Kamal, he stated that 4 to 5 months back, Sri Kamal travelled to Moreh by his vehicle and on the way, Kamal told him whether he could transport gold from either Moreh or Imphal to Guwahati for monetary consideration to which he agreed Accordingly, Kamal introduced him to Sri Suman Paul and, as stated above, they brought gold to Guwahati, however, he did not know to whom and where the said gold were delivered by Sri Suman Paul That, this time also, he did not know to whom and where the said gold bars/biscuits were supposed to be delivered by Sri Suman Paul. He further stated that he used to talk to Suman Paul from his mobile phone number 8413004561 to 81330 48743 of Sri Suman Paul. He also stated that, the mobile phone number 8413004561 was not issued in his name and that he purchased the same from Imphal.

(iii) In his statement given on 27.2.2015, Sri Suman Chandra Paul inter-aba stated that he was engaged in the trade of transporting of gold. That, on 24.2.2015, he left Karimganj for Imphal via Guwahati by bus and on 25.2.2015, he left for Dimapur from Guwahati by Shatabdi Express and after reaching there, he left for Imphal from Dimapur by bus and stayed there in a hotel at night. That, on 26.2.2015, he left for Kanglatongbi, Imphal after receiving the phone call of Bablu Thapa That, after reaching there, he along with Sri Bablu Thapa and Sri Bishnu Prasad Kharel, a relative of Bablu Thapa, left for Guwahati by Bablu Thapa's Maruti Ecco car bearing registration No. MN-01W-7635. That, he knew that the said gold were brought into India from Myanmar through Moreh border which he came to know from Sri Bablu Thapa and one Sri Dulal Krishna Paul of village- Roynagar, Karimganj. On being asked about Sri Dulal Krishna Paul, he stated that he is a distant relative of Sri Dulal Krishna Paul and went to Imphal to bring the said contraband gold as per his direction. He further stated that four months back, he brought 16 (sixteen) Kgs. of gold by the same vehicle from Imphal. that he came into the contact of Sri Bablu Thapa through Sri Dulal Krishna Paul and got his mobile phone number. For that, he used mobile phone No. 81330 48743 while contacting Bablu Thapa through Mobile number 84130 04561, used by Sri Bablu Thapa. He further stated that the number used by him was not in his name On being asked, he stated that he did not know to whom the said gold were to be delivered to. Sri Dulal Krishna Paul used to call him in his mobile phone number and accordingly the persons were supposed to come to take delivery of the said goods. That, on last occasion, when he brought the gold to Guwahati, the person who took delivery of the goods called him on his mobile number as soon as he got down from the Bus in Khanapara. That, one vehicle arrived at the spot and took him to ISBT, Guwahati and drop him there and left but before that they took the gold from him. All these activities took place under the direction of Sri Dulal Krishna Paul This time also, he was supposed to deliver the gold in similar manner and after delivery, he would have lelt for Karimganj from ISBT, Guwahatu but the same could not be executed as he was intercepted by the DRI authorities. He further stated that he did not know the persons to whom he delivered the gold in the last occasion. He admitted his guilt and stated that he did such acts for earning money. About the other person barring Bablu Thapa, he stated that he did not know Srn Bishnu Prasad Kharel and never seen him before, but later came to know that he is a relative of Si Bablu Thapa and was coming to Guwahati for meeting his sister. That, Sri Kharel did not have any connection with the said gold and moreover, he did not know about the said gold. He further stated that he only knew that Sri Bablu Thapa is the owner of the vehicle no. MN 01W 7635.

(iv) In his statement given on 27.2.2015, Sri Bishnu Prasad Kharel inter-alia stated that he had a Pan Shop in Senapati Bazar, Manipur and Sri Bablu Thapa was his brother-in-law. That, on 25.2.2015, he went to Sri Bablu Thapa's house to seek his advice about an issue wherein her sister Lakhmi got married to a Muslim boy named Rahul and fled away to Guwahati. Bablu Thapa told him that he was going to Guwahati with his vehicle and agreed to help him to locate where about of Rahul and Lakhmi, so he decided to accompany Bablu. The other person in the vehicle boarded from Kanglatongbi and he did not know him. He never knew that gold were secreted in the vehicle. He came to know about that when DRI Officers intercepted the vehicle and later on saw it when the same were recovered by the DRI Officers.

(v) Sri Bablu Thapa, and Sri Suman Chandra Paul were arrested and produced. before the Hon'ble Chief Judicial Magistrate along with sample drawn, Inventory of Goods seized, Panchnama and a report who after perusing the records was pleased to remand them to 14 days judicial custody vide order dated 13.3.2015.

(vi) Sri Dulal Krishna Paul did not appear before the investigation for subscribing statement etc., on 20.04.2015 however, he appeared on 5.5.2015 and inter-aha stated that Sri Suman Paul is his nephew and eldest son of Kalıpada Paul, his elder brother. He further stated that he came to know from hearsay that Sn Suman Paul was in Central Jail, Guwahati in connection with transportation of illegal gold. He stated that Sri Suman Paul did not have a good relationship with him as well as with his parents and stayed with his family here and there Further, he also stated that his brother Kalipada Paul stayed separately and they were not in touch for the last few years. On being asked about the statement dated 27.2.15 of Sri Suman Paul given before the investigation stating that the impugned gold belonged to him (Dulal Krishna Paul) and everything concerning the seined gold took place under his direction and being engaged by him, Sri Dulal Krishna Paul stated that he has no relationship with the impugned gold bars and that Sri Suman Paul lied in this regard. That, he, being, a very small businessman did not have the financial capacity to deal with such huge amount of gold. He denied to have known any person by the name of Bablu Thapa.

(vii) In the course of follow-up investigation, shop cum residential premises of Kamal Kamal Basnet Prop. of M/s Krishna Jewellery, located at Chingmairong, Khongnang Karak, Imphal were searched on 25.03.2015. In course of search, the officers recovered 4 (four) pieces of primary gold totally weighing 176.30 gms from the jewellery, at Chingmeirong Station Road. At the time of search one Smt Jhuma Basnet w/o Sri Kamal Basnet was in the jewellery shop who claimed to be the proprietor of the said M/s Krishna Jewellery. On demand she could not produce any documents in support of the said gold neither any document supporting the licit procurement, importation of the said yellow metal believed to be primary gold. The officer therefore, seized the said gold valued at Rs. 4,58,380/- (Rupees four lakh fifty eight thousand three hundred eightyj only vide case No. 01/CL/IMP/DRI/IMP/2015 dated 25.3.2015 under Panchnama. The samples of the said gold were sent to the Assam Hallmarking Centre, Guwahati who confirmed that the purity of the seized gold was between 995.9 ppt (part per thousand) to 997.3 ppt. Smt. Jhuma Basnet, however, in her statement given on 25.3.15 stated that one person called Rashid and some of her customer gave the said gold but her contention was not supported by any document. Shri Kamal Basnet s/o (L) Bhim Bahadur Basnet in his statement given on 26.3.15 subscribed that he runs the jewellery shop M/s Krishna Jewellery. He too could not give any details of the persons from whom they purchased the gold recovered from their jewellery. He denied to have known any person Suman Chandra Paul or Bablu Thapa. He stated that, the mobile SIM No. 8131861507 used by him was not registered in his name as he purchased the same from PCO.Sri Suman Chandra Paul and Sri Bablu Thapa were again summoned to appear before the investigation on 21.5.2015, 26.6.2015 and 22.7.2015 for further examination. But they did not appear on the given dates in spite of the fact that Sri Suman Paul had received the summon.

Role of the Appellant No. 1:

(e) Sri Dulal Krishna Paul has been named as the owner of the impugned gold by above said Sri Suman Chandra Paul who is his nephew. Sri Dulal Krishna Paul's family is in the trade of gold and silver jewellery and they have a jewellery shop in the name and style of P.P. Jewellers at Karimganj. Being in the trade of gold and Sri Suman Chandra Paul being kin by blood, there is no reason as to why Sri Suman Paul should name him as the owner of the impugned gold and that he was engaged by said Sri Dulal Krishna Paul himself. As such it appears that said Sri Dulal Krishna Paul together with Sri Kamal Basnet, Bablu Thapa and Sri Suman Chandra Paul have hatched criminal conspiracy and accordingly brought into India, the impugned gold from Myanmar through an unauthorized route in violation of provisions of the Customs Act and other statutory order/s for the time being in force and referred to hereinabove. Sri Dulal Krishna Paul, therefore appears to be liable to penalty under Section 112 (a) and (b) of the Customs Act and punishable in terms of Sec. 135 of the Act ibid as well as under the provisions of PMLA Act, 2002.

Role of the Appellant No. 2:

(b) It appears that said Shri Suman Chandra Paul acquired, possessed and transported the impugned gold from Imphal to Guwahati together with above said Sri Bablu Thapa with conscious knowledge that these were brought illegally from Myanmar through Moreh, a border township of Manipur which he admitted in his voluntary statement dated 27.02.2015. His statement has corroborated with the statement of said Sri Bablu Thapa and they undertook the journey with the impugned gold secreting the same in the vehicle bearing Regn No MN OIW 7635 and these seized from their possession. It appears that Shri Paul along with Thapa have simply acted as a carrier of the seized gold, behind which Sri Kamal Basnet Sri Dulal Krishna Paul were mastermind who are believed to be the owners of the seized gold brought llegally into India in violation of the provisions of the Customs Act, 1962 read with other allied statutory provisions for the time being force. Shri Suman Chandra Paul happens to be the nephew of said Sri Dulal Krishna Paul who engaged him for transporting the impugned gold. Sri Suman Chandra Paul in his own admission has stated that on previous occasion also they transported 16 kgs. of smuggled gold adopting the same modus operandi and the same vehicle. Therefore, said Sri Suman Chandra Paul appears to be liable for penal action under Section 112(a) & 112(b) of Customs Act, 1962 and punishable under Section 135 of the Act ibid as well as under PMLA Act, 2002. The offence committed by him is cognizable & non-bailable under Section 104 (6) of the Customs Act, 1962.

3. After adjudication, penalties of Rs.25,00,000/- and Rs.5,00,000/- were imposed on the Appellant Nos. 1 and 2 respectively vide the impugned order.

3.1. Aggrieved from the said order, the appellants are before me.

4. The Ld. Counsel appearing on behalf of the appellants submits that in the present case, the Statement of Shri Suman Chandra Paul was recorded under Section 107 of the Customs Act, 1962 which has no evidentiary value in law;. That from RUD to the SCN it would be evident that such statement dated 27.02.2015 of Shri Suman Chandra Paul was recorded u/s 107 of the Customs Act, 1962 which has got no evidentiary value in law. Section 107 of the Customs Act, 1962 authorizes any Officer of Customs, empowered in this behalf by General or Special Order from the Principal Commissioner of Customs or Commissioner of Customs, to examine any person during the course of enquiry in connection with the smuggling of any goods. As such, for conducting examination u/s 107 of the Customs Act, 1962, there is requirement of General or Special Order from the Principal Commissioner of Customs or Commissioner of Customs in favour of the said Officer of Customs. Therefore, it is his contention that the statement recorded under Section 107 of the Act cannot be relied upon, as held by the Tribunal, New Delhi in the case of *Commissioner of Customs (Preventive), Lucknow v. Sheo Shankar Jaiswal [2010 (261) E.L.T. 187 (Tri. – Del.)].* Accordingly, he prays that the penalties on the Appellants are not imposable.

4.1. The Ld. Counsel for the appellants also submits that the penalty on Shri Dulal Krishna Paul has been imposed based on the statement of Shri Suman Chandra Paul (Appellant No. 2) recorded under Section 107 of the Customs Act, 1962. As the statement of Shri Suman Chandra Paul (Appellant No. 2) recorded under Section 107 of the Act is not an admissible piece of evidence, he contended that there is no evidence against the Appellant to impose penalty and thus the penalty imposed on the Appellant namely, Shri Dulal Krishna Paul is not imposable.

5. On the other hand, the Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

6. Heard the parties.

7. I find that in this case, the statement of Shri Suman Chandra Paul, one of the Appellants, has been heavily relied upon by the ld. adjudicating authority in the impugned order to impose penalty on both the Appellants. Admittedly, the statement of Shri Suman Chandra Paul was recorded under Section 107 of the Customs Act, 1962 which is not an admissible piece of evidence as held by the Tribunal in the case of *Sheo Shankar Jaiswal (supra)* wherein it was observed as under: -

> *"3. I have carefully considered the submissions from both the sides and perused the records. The truck loaded with sugar had initially been seized by the police on 8-6-07 and thereafter the same was handed over to the customs. The Department's case that the sugar was going to be smuggled to Nepal based only on the statement of truck driver Sh. Abdul Khaliq recorded on the spot. However, from the Additional Commissioner's order in Para 12 of the order and the Commissioner (Appeals)'s observation, it is seen that the driver's statement had been recorded in the presence of the police officers. In my view on this very ground itself the statement loses its evidence value under the provisions of Section 26 of the Indian Evidence Act. Moreover, it is also seen that the statement of the driver had been*

> *recorded under Section 107 of the Customs Act and in terms of the judgment of the Hon'ble Gujarat High Court in the case of UOI v. Abdulkadar Abdulgani Hasmani (supra), statement recorded under Section 107 of the Customs Act, 1962 would be admissible as evidence only if the same has been recorded by an officer duly empowered in this behalf by a general or special order of the customs while in this case, there is no such evidence showing that this statement of the driver had been recorded by an officer duly authorized by the Commissioner The presence of injuries found on the driver during his medical examination on 9-6-07 also indicates that the statement of the driver had been recorded under duress. Moreover other than the statement of the driver, there is no corroborative evidence indicating that the sugar loaded in the truck was going to the smuggled into Nepal. In view of these circumstances, I hold that there is no infirmity in the impugned order. The Revenue's appeals are dismissed."*

7.1. Admittedly, in this case, the statement of Shri Suman Chandra Paul is not recorded on the authorization given by any officer of Customs in this behalf, by General or Special Order from the Principal Commissioner of Customs or Commissioner of Customs, to examine any person during the course of enquiry in connection with the smuggling of any goods. Therefore, the statement recorded from Shri Suman Chandra Paul is not an admissible evidence to implicate the Appellants in this case.

8. Therefore, the penalties imposed on both the Appellants are set aside.

9. In the result, the appeals are allowed.

(Order Pronounced in Open Court on **23.10.2024**)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

rkp