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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
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Mumbai-400 005

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F.No. 380/66/B/WZ/2018-RA

/ 5466

Date of Issue

24.09.2021

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ORDER NO. 23 \ 2021-CUS (WZ)/ASRA/MUMBAI DATED 22.09.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

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Applicant : Pr. Commissioner of Customs, Mumbai.

Respondent : Shri Irfan Kadir Shaikh

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-34/18-19 dated 25.04.2018. passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This revision application has been filed by The Pr. Commissioner of Customs Mumbai (herein after referred to as the Applicant department ) against the Order in appeal No. MUM-CUSTM-PAX-APP—34/18-19 dated 25.04.2018. passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated the facts of the case are that the Respondent Shri Irfan Kadir Shaikh arrived from Dubai 07.02.2017. The officers of Customs noticing some suspicious images while X-ray screening of the respondent's baggage directed its detailed examination. The examination of the baggage resulted in the recovery of a sanitary shower which was unusually heavy. The dismantling of the sanitary shower resulted in the recovery of a crude gold plate weighing 234 gms valued at Rs. 6,21,017/- ( Rupees Six lakhs Twenty one Thousand and Seventeen).

3. The Original Adjudicating Authority vide Order-In-Original No. ADC/AK/ADJN/57/2017-18 dated 27.10.2017 ordered absolute confiscation of the impugned gold, and imposed penalty of Rs. 65,000/- ( Rupees Sixty five thousand ) under section 112 (a) and (b) of the Customs Act, 1962 on Applicant.

4. Aggrieved by the said order, the applicant filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP—34/18-19 dated 25.04.2018, set aside absolute confiscation and allowed the gold to be redeemed on payment of a redemption fine of Rs. 1,15,000/- ( Rupees One lakh Fifteen thousand ). The penalty of Rs. 65,000/- ( Rupees Sixty five thousand ) imposed under Section 112 (a) & (b) of the Customs Act, 1962 was upheld.

5. Aggrieved with the above order the Applicant department has filed this revision application interalia on the grounds that;

5.1 The crude gold plate weighing 234 grams and valued at Rs.6,21,017/- was recovered from a sanitary shower this clearly indicates

that the concealment was not only ingenious but also premeditated with clear intention of smuggling the same into India.

5.2 The passenger Shri Irfan Kadir Shaikh failed to make a true declaration of the contents of the baggage to Customs as required under Section 77 of the Customs Act, 1962 and therefore the goods under seizure are liable to confiscation under Section 111(d),(1) &(m) of the Customs Act, 1962.

5.4 The passenger while carrying the impugned gold had deliberately and knowingly opted for the green channel of customs (for passengers having goods within admissible free allowance) whereas he was supposed to go through Red Channel and declare the total value of the dutiable goods imported by him. Thus, he willfully failed to make a true declaration of the contents of his baggage to Customs as required under Section 77 of the Customs Act, 1962. and concealed the said gold in a sanitary shower thus rendering the goods as prohibited goods in terms of Section 2(33) of the Customs Act, 1962.

5.5 The passenger in his statement dated 07.02.2017 recorded under Section 108 of Customs Act, 1962 has categorically stated that he is the owner of the gold; that to avoid customs duty he has concealed the gold in a sanitary shower; that this is not a normal way to carry dutiable goods and therefore it is amply clear that the passenger has done it deliberately with a malafide intention to hoodwink the customs authorities. The Applicant submits that the impugned Appellate order has been passed without giving due consideration to the documents on record and facts of the case.

5.6 The respondent has admitted in the statement recorded under Section 108 of the Customs Act, 1962 the possession, carriage, non-declaration, concealment; that the seized gold could be recovered only after cutting open the sanitary shower and hence considering these facts and circumstances and ingenious concealment release of the seized goods is not tenable.

5.7 The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the appellant did not declare the said goods to Customs on his own and the subject goods were detected only after the efforts taken by the Customs officials. The circumstances of the case and the intention of the Appellant was not at all considered by the

Appellate Authority while giving him option to redeem the seized goods on payment of fine and penalty.

5.8 Moreover, when the original adjudicating authority has taken an informed decision of confiscating the subject goods absolutely and imposed personal penalty, the Commissioner (Appeals) should not have allowed redemption, without pointing out any legal infirmity in the order of the adjudicating authority. If the original authority has acted bonafide through a speaking order, which is not illogical or suffers from procedural impropriety, the appellate authority should not take a contrary view on the same issue as held in a plethora of judicial pronouncements.

5.9 It was held in Commissioner of Customs, Tuticorin V/s Sai Copiers [2008 (226) E.L.T. 486 (Mad.)] that any order of the lower authority could be interfered with only in circumstances in which it was demonstrated that such order was purely arbitrary, whimsical and resulting in miscarriage of justice. Further it is observed by the Hon'ble Supreme Court in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi [2003 (155) E.L.T. 423 (SC)], that in matter of quasi-judicial discretion, interference by the Appellate Authority would be justified only if the lower authority's decision was illogical or suffers from procedural impropriety.

5.10 It is submitted that the impugned Order in Original does not suffer from any such vice and therefore Commissioner (Appeals) should not have allowed redemption of the subject gold bars in the present case following the ratio of the above referred judgments.

5.11 Commissioner (Appeals) has referred to the Order of CESTAT, Chennai in the case of A. Rajkumari Vs. CC (Chennai) 2015 (321) ELT 540 (Tri.Chennai) for drawing the conclusion of release of the impugned gold bars on redemption find and also held that the Hon'ble Apex Court vide order in the case as reported in 2015 (321) ELT A 207(SC) has affirmed the said order of CESTAT, Chennai. However, the contention made regarding affirmation of CESTAT Chennai's judgment by Hon'ble Apex Court are not proper in view of the factual position that Hon'ble Apex Court dismissed the appeal by Revenue on the grounds of time barred and thus the same is not based on the merits of the case. Therefore, the Commissioner (Appeals) conclusion justifying the applicability of the said judgment to the facts to this case is improper.

5.12 It is submitted that the Hon'ble Apex Court in case of Samynathan Murugesan V. Commissioner 12010 (254) E.L.T. A15 (S.C.)), upheld the decision of Madras High Court's Judgment as reported in 2009 (247) E.L.T. 21 (Mad) of absolute confiscation of gold by the lower adjudicating authority. And also found that the passenger had attempted to smuggle gold by ingenious concealment in T.V. Set without declaring to Customs in violation of provisions under Section 11 & 77 of Customs Act, 1962. In the present case manner of concealment is ingenious and it had weighed with the adjudicating authority to order absolute confiscation.

5.13 In the instant case, since the goods which have been confiscated were being smuggled in by the passengers without declaring the same to the Customs and are of high value, the Commissioner of Customs (Appeals), Mumbai has erred in allowing the redemption of the goods.

5.14 On the grounds stated above, the Order-in-Appeal passed by the Commissioner of Customs (Appeals), CSI Airport -Zone-III, may be set aside in terms of the following prayer: (A) The impugned Order-in-Appeal may be set aside and the Order-in-Original upheld. AND/OR (B) Pass any other order as may be deemed fit and proper.

6. Personal hearings in the case was scheduled on 29.08.2019, 06.09.2019, 20/28.11.2019 and 29.08.2019. In view of the change in Revisionary authority, another opportunity of personal hearing was extended on 05.02.2021, Shri R. R. Sinha, Superintendent, attended the said hearing on behalf of the Applicant department. He reiterated the points made in the written submissions and prayed that the revision application be allowed. Sri P. Shingrani, Advocate and Shri Babu Gowthaman, consultant attended the personal hearing, they submitted written submissions and requested that the order of the Commissioner ( Appeals ) be upheld.

7. In their written submissions they interalia averred that;

7.1 In his appeal requesting to set aside the order of absolute confiscation and allow redemption under section 125 of the Customs Act, 1962 various judgments on the subject were cited in his favor and contended that the adjudicating authority had wrongly denied redemption. In the personal hearing, the Advocate referred to/submitted copies of orders passed by the

Adjudicating and Appellate authority, Customs Zone-III, Mumbai where in similar circumstances redemption of gold had been allowed.

7.2 After considering the merits of the case, the Commissioner of Customs (Appeals), Mumbai, Zone-III gave an option to redeem the goods on payment of fine of Rs 1,15,000/- and also upholding the penalty of Rs 65,000/- and on payment of applicable duty and other charges. It was submitted that in the present case, the learned Commissioner (Appeals) after carefully going through the facts and circumstances of the case and considering merits of the case. vide his order gave an option for redemption of the goods on payment of a fine.

7.3 The decision of the learned Appellate Authority appears to meet the ends of justice. No person or group of business would continue to import/smuggle goods to sell them in the domestic market with the full knowledge that there would be no profit and propose to incur loss and keep doing so for quite a long while. There may perhaps be exceptions as in the cases of habitual smugglers where such persons may temporarily suffer loss. But, Mr Irfan Kadir Shaikh does not fall in the category of a habitual offender.

7.4 While interpreting a fiscal legislation, what has to be kept in mind is the scheme of each and every legislation to levy and collect tax in accordance with the provision of the Act. This task is entrusted to the revenue. The revenue is levying tax lawfully payable by a person. Certainly revisional authorities owe a duty to review such orders and facilitate levy and collection of tax which are legitimately due to the Department. Release of confiscated goods on payment of fine and penalty is such category, which cannot be considered as loss of revenue to the exchequer. If at all it is considered as a loss to the Government exchequer (as claimed by the learned Appellant Commissioner of Customs) then there would not be a provision under the Customs Act, 1962 i.e Section 125 for release of the confiscated goods on payment of fine.

7.5 Gold is not a prohibited item for import. Therefore absolute confiscation is not warranted in this case. Gold is only 'restricted goods'. Import of gold is no longer prohibited and therefore, it is the duty on the part of the adjudicating authority, if he is of the view that it is liable for confiscation, to permit its redemption on appropriate fine. Many adjudicating authorities commit an error while differentiating between

restriction and prohibition in import. One of the main objectives of prohibition of any import into India is that import of such goods should not weaken the economic status of the country. Restriction of import does not mean prohibition to import. If any goods are restricted to import, the Government fixes some sort of barriers to import, which an importer has to overcome such barriers which means, certain procedures have to be completed to import such restricted products.

7.6 It is also clear that the fixation of the quantum of redemption fine and penalty can only be interfered if the same is fixed in an arbitrary whimsical manner resulting in miscarriage of justice. Even though there is no elaborate submission in the Revision Application regarding the quantum of fine, yet considering the background facts and the order of imposition of redemption fine of Rs 1,15,000/- it cannot be said that O-i-A suffers from any infirmity.

7.7 In the present case a question of law arises namely whether the expression "prohibition" contained in Section 111(d) of the Customs Act, 1962 includes prohibition of imports coupled with a power to permit importation under certain conditions. Section 111 (d) of the Act provides: *"The following goods brought from a place outside India shall be liable to confiscation:-- .....(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."* "Prohibited goods" is defined in Section 2 (33) of the Act. That definition reads as: *"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.* The main difference between prohibitions and restrictions is that

- prohibited goods are never allowed to enter or exit under any circumstances
- restricted goods are allowed to enter or exit the Country only in certain circumstances or under certain conditions, for example on production of a permit, certificate or letter of authority from the relevant government department, institution or body.

7.8 It was further submitted that he does not dispute his attempt to clear the impugned gold without declaring to Customs by opting green channel. Further, no other person claimed ownership of the gold and there is nothing in the impugned O-i-O to suggest that he is a professional smuggler. The Appellant Commissioner of Customs preferred the present revision application without considering the fact that in the above series of judgements relied upon by the Commissioner (Appeals) redemption of confiscated/absolutely confiscated gold had been allowed. However, the learned Petitioner Commissioner of Customs, CSMI Airport, Mumbai failed to counter those decisions of Tribunals, Courts and GOI for justification of his prayer for absolute confiscation of the goods.

7.9 The decisions in the cases of Om Prakash Bhatia and Samynathan Murugesan relied upon by the Appellant Commissioner of Customs in respect of her contention cannot be attracted to the present case. Further, there is no explanation for the observation of the Commissioner (Appeals) under para 21 of the O-i-A that more so, in similar cases redemption has been allowed by the same adjudicating authority.

7.10 The argument of Mr Irfan Kadir Shaikh is related to consistency in favour of 'formal' justice, i.e., that two cases which are the same (in relevant respects) should be treated in the same way. It would simply be inconsistent to treat them differently. In the case of precedent, this argument is said to favour following the earlier case. The only way to ensure consistency is for later decision-makers to treat the earlier decision as a precedent and to treat the parties before the court equally. Other things being equal, legal decisions should be consistent across time and/or decision-makers. A later case should only be treated differently to an earlier case when the law itself has been changed (by the legislator or the courts, including cases where the court overrules an earlier - decision in reaching a decision on the case before it).

7.11 In this regard, case is to be decided in view of the judgment of Hon'ble High Court of Madras dated 1-4-2008 in writ appeal Nos. 1488, 1502 & 1562 of 2007 in the case of Neyveli Lignite Corporation Ltd. v. UOI - 2009 (242) E.L.T. 487 (Mad.) wherein it was held "Redemption fine - Prohibited goods, discretion - Section 125 of Customs Act. 1962 - If goods are not prohibited then adjudicating officer shall give to the owner of goods option



to pay redemption fine in lieu of confiscation as officer thinks fit. It is only when it is prohibited goods that the officer has discretion and it is open to him not to give the option to pay fine in lieu of confiscation. " Government observes that such discretion is to be exercised judiciously. In the instant case, the passenger is neither a habitual offender nor carrying the said goods for somebody else.

In view of the above submissions, there is no merit in the revision petition filed by the Commissioner of Customs and it may be dismissed.

8. The Government has gone through the facts of the case, The officers of Customs noticing some suspicious images while X-ray screening of the respondent's baggage directed its detailed examination. The examination of the baggage resulted in the recovery of a sanitary shower which was unusually heavy. The dismantling of the sanitary shower resulted in the recovery of a crude gold plate weighing 234 gms valued at Rs. 6,21,017/-. The facts regarding the interception and subsequent detection are not in dispute. The respondent did not file any declaration as required under section 77 of the Customs Act, 1962. The confiscation of the gold plate is therefore justified and the Applicant has rendered herself liable for penal action.

9. The original adjudicating authority in its order dated 27.10.2017 ordered absolute confiscation of the impugned gold as the Applicant is not an eligible passenger to import gold and the seized rectangular gold plate was concealed in a sanitary shower so as to hoodwink the Customs officers. The Respondent has contended that gold is not a prohibited item. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), relying on the judgment of the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) E.L.T. 423 (S.C.), has held that "*if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. .... Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods.*

*If conditions are not fulfilled, it may amount to prohibited goods.*” It is thus clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition, “prohibited goods”.

10. Further, in para 47 of the said case the Hon’ble High Court has observed *”Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....”*. Thus failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold “prohibited” and therefore liable for confiscation and the Applicants thus liable for penalty.

11. The Honble Apex Court in the case of Sheikh Mohd. Omer V/s Collector of Customs, Calcutta and others, reported in 1983 (13) ELT 1439 ( S.C. ) has also held that, “ ..... *any goods which are imported or attempted to be imported contrary to “any prohibition imposed by any law for the time being in force in this country” is liable to be confiscated. “Any prohibition” referred to in that section applies to every type of “prohibition”. That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression “any prohibition” in Section 111(d) of the Customs Act, 1962 includes restrictions.*”. Therefore this contention of the applicants is also not based on correct appreciation of laws held by the Apex court and High Courts.

12. The Appellate authority has in its order dated 25.04.2018 “.....*But the most important thing to be noted is that neither the larger bench of Tribunal in its Order dated 01.12.2000 nor the Hon'ble Apex court in its judgment dated 07.07.2003 in Appeal (civil) 4060 of 2001 in case of Omprakash Bhatia 2003 (155) ELT 423 (SC) gave any findings to the effect that such cases warrant absolute confiscation for violating any condition of import or export nor limited the scope of section 125 Customs Act, 1962 for allowing redemption of offending goods.*” Using the above excerpts from the above Apex Court judgement the Appellate authority has concluded that *“Therefore the judgment of Omprakash Bhatia (supra) passed by Honorable Supreme Court does not alter the scope of section 125 of Customs Act,*

1962 in any manner and the position remains the same that in case of 'prohibited goods' redemption may be allowed but in case of 'other goods' redemption shall be given to the owner or to the person from whose possession such goods have been seized." In addressing this contention supra the Government notes that The Honble Supreme Court in the same judgment of *Omprakash Bhatia* notes ".....that in matter of quasi-judicial discretion, interference by the Appellate Authority would be justified only if the lower authority's decision was illogical or suffers from procedural impropriety." The Appellate authority has quoted the Apex Court to buttress the argument, that the lower authority's decision was illogical and suffers from procedural impropriety without explicitly pointing out the defect in the impugned Order-in-Original.

13. Similarly, the Appellate Authority states " *I find that in case of Samynathan Murugesan (supra) there is no distinction made by the Hon'ble High court in the manner of carrying the offending goods which could have an impact on the scope of section 125 of Customs Act, 1962. Otherwise also under section 125 of Customs Act, 1962 the criteria of allowing redemption is not dependent on the manner of carrying the offending goods by the Importer and there are no conditions attached to the discretion of allowing redemption which could have an overriding effect while interpreting the scope of section 125 of Customs Act, 1962. In other words the Hon'ble Madras High Court (supra) has not upheld the decision of Commissioner of absolute confiscation. due to any specific manner of carrying the gold i.e. ingenious concealment or otherwise. More so, in similar cases redemption has been allowed by the same adjudicating authority.*" In extending the argument further, the Appellate Authority contends that concealment of the impugned gold should not be an issue while interpreting the scope of section 125 of Customs Act, 1962. Government however opines that the manner in which the gold was concealed i.e. in the sanitary shower, reveals the intention to evade duty and smuggle the gold into India. Further, the passenger opted for the green channel. Had the passenger not been intercepted he would have made good with 234 grams of gold. The circumstances of the case and the intention of the Appellant was not at all considered by the Appellate Authority while giving him the option to redeem the seized goods on payment of fine and penalty.

14. The Appellate order finally concludes, ".....*I find that the adjudicating authority ignored the fact that the passenger had claimed the ownership of gold at the very first instance. He also explained the circumstances in which he*

*purchased and brought gold from abroad and there is no discussion in the order about his pleas.....". It is a matter of record that the ownership of the gold has not been disputed, and ownership of the impugned gold alone cannot be a factor for allowing redemption of the gold.*

15. The Advocates of the Respondents have put forth a number of cases in their favour and have argued at length that the precedence of these cases have to be followed by the judicial authorities. Government, has also placed reliance on case laws which have justified absolute confiscation especially in cases of ingenious concealments. In para 10 the Original Adjudicating Authority quotes "*It is observed that the issue regarding redemption of confiscated gold has been considered and decided by various courts, Adjudicating Authorities, Tribunals and the JA (RA), Government of India. Considering the facts as discussed above, I am of the view that it is essential requirement that factual matrix and circumstance of each case should be examined carefully for taking a decision regarding redemption. It is also pertinent that while taking this decision due consideration has to be given to previous orders/ judgements having similar or identical factual matrix and circumstances*". The above para indicates that the Original Adjudicating Authority was fully aware that the precedence of decision by higher judiciary cited by the Respondent's Advocates, in the manner of granting redemption. In para 12 of the Order, the Order states "*I find that the seized gold was brought concealed in a sanitary shower and hence the malafide intentions of the passenger was apparent. Therefore, I distinguish this case from the cases cited by the learned Advocate. Hence, I do not consider it a case for redemption of the seized gold under Section 125 of the Customs Act, 1962*". The above para clearly indicates that the fact of ingenious concealment of the gold weighed in favour of the Original Adjudicating Authority not allowing redemption of the gold.

16. Government therefore opines that the issue in the case is the manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case the manner of concealment being clever and ingenious is a fit case for absolute confiscation as a deterrent to passengers misusing the facility of green channel. Thus, taking into account the facts on record and the gravity of offence, the Adjudicating Authority had rightly ordered the absolute confiscation of gold. In the instant case, the passenger did not declare the said

gold to Customs on his own and the subject gold was detected only after he was intercepted and his baggage examined by the Customs Officers. In support of this contention, the judgement of the Hon'ble Delhi High Court in the case of Jain Exports v/s Union of India 1987(29) ELT 753 is relevant wherein the Hon'ble High Court has observed that, "*the resort to Section 125 of the C.A 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports*". The redemption of the gold will encourage such concealment as, the passenger gets possession of the gold either way, i.e. when the gold is not detected by the Customs Authority the passenger gets away with smuggling and if it is caught he has the option of redeeming the gold. Therefore, such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The impugned gold therefore merits absolute confiscation. The order of the Appellate Authority is therefore liable to be set aside.

17. In view of the above the Government sets aside the Order of the Appellate Authority. The order of the Original Adjudicating Authority is upheld.

*Shrawan*  
22/9/21

( SHRAWAN KUMAR )  
Principal Commissioner & ex-officio  
Additional Secretary to Government of India

ORDER No 231/2021-CUS (WZ) /ASRA/

DATED 22.09.2021

To,

1. The Commissioner of Customs, CSI Airport, Mumbai.
2. Shri. Irfan Kadir Shaikh, At post Atgaon, Near Railway Station, Bazar Peth, Taluka Shahapur, Thane - 421301.

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3. Shri P. K. Shingrani- Advocate, 12/334, New MIG Colony, Bandra (E) , Mumbai - 51.
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5. Guard File. ,
6. Spare Copy.