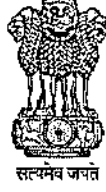


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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/320&321/B/WZ/2018-RA | 1090

Date of Issue : 21.02.23

ORDER NO. ²⁴⁴ 245 /2023-CUS (WZ)/ASRA/MUMBAI DATED 23.02.2023
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.

Applicant No.1 : Shri Dinesh Chetandas Parsnani.

Applicant No.2 : Shri Kailash J. Makhija.

Respondents : Pr. Commissioner of Customs, CSMI, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
MUM-CUSTM-PAX-APP-632 & 633/2018-19 dated
11.10.2018 issued on 22.10.2018 through F.No. S/49-
364&365/2016-17 passed by the Commissioner of
Customs (Appeals), Mumbai -III.

ORDER

These Revision Applications have been filed by the Shri Dinesh Chetandas Parsnani (hereinafter referred to as Applicant 1) and Shri Kailash J. Makhija (hereinafter referred to as Applicant 2) against the Orders-in-Appeal No. MUM-CUSTM-PAX-APP-632 & 633/2018-19 dated 11.10.2018 issued on 22.10.2018 through F.No. S/49-364 & 365/2016-17 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that the officers of AIU on 18.11.2014 detected suspicious movements of one International passenger, named Mr. Dinesh Chetandas Parsnani (Applicant No. 1) who had earlier arrived by Flight No. AI 331 from Bangkok and was seen interacting with another passenger, Mr. Kailash J. Makhija (Applicant No. 2) who had domestic boarding card. On reasonable belief that the international passenger and domestic passenger may indulge in some smuggling activities, the officer called the panchas and intercepted them as soon as Applicant 1 handed over one red and white coloured packet to Applicant 2 in the transit area near Prayer room of Terminal T2. During examination of the red and white packet led to the recovery of seven bundles wrapped with black cellophane tape and upon cutting open the seven bundles the officers recovered 14 cut pieces of gold, weighing 2600 gms valued at Rs. 60,83,532/-. The Applicants admitted to their roles, knowledge, possession, carriage, non-declaration and recovery of the impugned gold. The same were seized by the Officers in the reasonable belief that the same were smuggled into India in a clandestine manner and in contravention of the provisions of the Customs Act, 1962.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner of Customs, CSMI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/91/2016-17 dated 15.06.2016 ordered for

the absolute confiscation of the 14 cut pieces of gold, weighing 2600 gms valued at Rs. 60,83,532/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a personal penalty of Rs. 6,00,000/- was imposed on Applicant 1 and Rs. 3,00,000/- was imposed on Applicant 2 under Section 112 (a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the Applicants filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai -III who vide Orders-In-Appeal No. MUM-CUSTOM-PAX-APP-632&633/2018-19 dated dated 11.10.2018 issued on 22.10.2018 through F.No. S/49-364 & 365/2016-17 upheld the OAA's Order and dismissed the appeal filed by the applicants.

5. Aggrieved with the above order, the Applicant has filed this revision application on the same grounds as it was filed before the Commissioner Appeals which is reproduced pointwise below;

5.01. that the applicants were falsely implicated in the case; they retracted the panchnama and their statements given by them before the Investigation Agency;

5.02. that the statements of the petitioner after their arrest incriminating them in the offence of smuggling cannot be considered as corroboration in material particulars and therefore should not have been relied upon against the petitioners.

5.03 that goods used for packing not seized and no proposal for confiscation was made. Therefore confiscation of gold is invalid.

5.04 That the OAA and AA failed to appreciate the facts of the case. The Applicants were well within the Customs area when they were intercepted, therefore allegation that they opted to clear customs area without declaration is false

- 5.05 That failure to carry any documentary proof ie invoice and credit note for the purchase of gold cannot be ground for ordering absolute confiscation.
- 5.06 That the Applicant 1 was eligible for redemption of gold and is not liable for confiscation.
- 5.07 That Applicant 1 is entitled to redemption of gold on payment of applicable duty and personal penalty imposed on them may be set aside as smuggling against them is not proved
- 5.08 The applicants have relied on several judgments in support of their appeal

6. Personal hearing in the case was scheduled for 14.11.2022. Shri Prakash Singharani, Advocate appeared for the hearing and submitted that Gold is not prohibited under Customs Act. He submitted that quantity is not huge. He requested to redeem the gold on reasonable fine and penalty.

7.1 The Government has gone through the facts of the case. The Applicants were intercepted when the Applicant 1(International passenger) was handing over the packet to the Applicant 2 (domestic passenger). The Applicants had no intention to declare the gold and pay Customs Duty. The considerable quantity of the gold bars were discovered only when the Applicants had been intercepted and were thoroughly checked. The Applicants had not declared the gold bars as required under section 77 of the Customs Act, 1962. The confiscation of the gold is therefore, justified and the Applicants have rendered themselves liable for penal action.

7.2. The relevant sections of the Customs Act are reproduced below:

Section 2(33)

“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”

Section 125

Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

7.3. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it is liable for confiscation under Section 111(d) of the Customs Act. It is undisputed that Section (l) and (m) are also applicable in this case as the respondent had

adopted an innovative method and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.

8.1. 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”.

8.2. 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 respondents thus, liable for penalty.

9. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of the goods on redemption fine. Hon'ble Supreme Court in case of M/s. Raj Grow Impex [*CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021*] has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken.

10. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. In case of prohibited goods, such as, the gold in the instant case, the Adjudicating Authority may allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety

standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large.

10. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Courts and other forums which have been categorical in the view that grant of the option of redemption under Section 125 of the Customs Act, 1962 can be exercised in the interest of justice. Government places reliance on some of the judgements as under:

- a) In the case of Commissioner of Customs, Aliganj, Lucknow vs. Rajesh Jhamatmal Bhat, [2022(382) E.L.T. 345 (All)], the Lucknow Bench of the Hon'ble High Court of Allahabad, has held at Para 22 that "Customs Excise & Service Tax Appellate Tribunal Allahabad has not committed any error in upholding the order dated 27.08.2018 passed by the Commissioner (Appeals) holding that Gold is not a prohibited item and, therefore, it should be offered for redemption in terms of Section 125 of the Act."
- b) The Hon'ble High Court of Judicature at Madras, in the judgment in the case of Shik Mastani Bi vs. Principal Commissioner of Customs, Chennai-I [2017(345) E.L.T. 201 (Mad)] upheld the order of the Appellate Authority allowing re-export of gold on payment of redemption fine.
- c) The Hon'ble High Court of Kerala at Ernakulam in the case of R. Mohandas vs. Commissioner of Cochin [2016(336) E.L.T, 399 (Ker.)] has observed at Para 8 that "The intention of Section 125 is that, after adjudication, the Customs Authority is bound to release the goods to any such person from whom such custody has been seized..."
- d) Also, in the case of Union of India vs Dhanak M Ramji [2010(252) E.L.T. A 102(S.C)], the Hon'ble Apex Court vide its judgement dated 08.03.2010

upheld the decision of the Hon'ble High Court of Judicature at Bombay [2009(248) E.L.T. 127 (Bom)], and approved redemption of absolutely confiscated goods to the passenger.

12. Government, notes that the impugned gold was not ingeniously concealed, they were kept in the Hand bags inside Air sickness bag. A case that the Applicants were habitual offenders had not been made out. Basic contention is that the gold had been handed over by Applicant 1 who was in transit i.e. an International flight to Applicant 2 who was travelling in the domestic sector. Government finds that later on, Applicant no. 1 had claimed ownership of gold and investigations did not controvert this fact. Also, considering the issue of parity and fairness as mentioned above, Government finds that this is a case of non-declaration of gold. Considering the afore-stated facts, various judgements submitted by applicant, absolute confiscation is not warranted and allowing redemption of gold on fine would be judicious and reasonable. Observing the ratios of the judicial pronouncements cited above, Government arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case. Therefore, the Government maintains confiscation of gold bars but allows the impugned gold bars to be redeemed on payment of a redemption fine.

13. The Applicants have requested to set aside the penalties imposed on them. Government finds that the penalty of Rs. 6,00,000/- imposed on Applicant 1 in respect of the gold valued at Rs.60,85,532/- and the Penalty of Rs.3,00,000/- imposed on Applicant 2 are harsh and not commensurate with the omissions and commissions committed and the same are required to be slightly reduced.

14. In view of the above, the Government modifies the OIA passed by the AA as below:

- i) Allows Applicant 1 to redeem, the absolutely confiscated 14 cut pieces of gold, weighing 2600 gms valued at Rs. 60,83,532/- on payment of a redemption fine of Rs.12,00,000/- (Rupees Twelve lakh only);
- ii) Penalty of Rs. 6,00,000/- imposed on Applicant 1 under Section 112(a) and (b) of the Customs Act, 1962 is reduced to Rs.4,50,000/- (Rupees Four Lakh Fifty Thousand only).
- iii) Penalty of Rs 3,00,000/- imposed on Applicant 2 is reduced to Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only).

15. Accordingly, Revision Applications are decided on the above terms.


(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 244-245/2023-CUS (WZ) /ASRA/MUMBAI DATED 20.02.2023.

To,

1. Shri. Dinesh Chetandas Parsnani, 702, Marutiramraj Apartments, Near Chopra Court, Opp: Premsagar Apartment, Ulhas nagar, Thane-421003;
2. Shri. Kailash J. Makhija, Block no. A-735 Room No. 1470, Arvind Colony, Ulhasnagar, Thane-421005;
3. Pr. Commissioner of Customs, Terminal - 2, Level-2, Sahar, Andheri West, Mumbai - 400 059.

Copy To,

1. Shri. Prakash K. Shingrani, 12/334, Vivek, New MIG Colony, Bandra West, Mumbai : 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.