

SPEED POST



F.No. 375/28/B/2018-RA  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066

Date of Issue...05/2/21

Order No. 29/21-Cus dated 03-02-2021 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject : Revision Application filed, under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No.CC(A)Cus/D-I/Air/22/2018 dated 19.01.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037

Applicant : Mr. Syed Siffath Raja

Respondent : Commissioner of Customs (Airport & General), New Delhi

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**ORDER**

A Revision Application No. 375/28/B/2018-RA dated 09.04.2018 has been filed by Mr. Syed Siffath Raja, (hereinafter referred to as the applicant) against the Order-in-Appeal No. CC(A)Cus/D-I/Air/22/2018 dated 19.01.2018 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, Delhi-110037. Commissioner (Appeals) has upheld the order of the Additional Commissioner of Customs, IGI Airport, Terminal-3, New Delhi bearing no. 86/Adj./2015 dated 19.08.2015, wherein two gold bars, which were concealed in his underwear that he was wearing, collectively weighing 1517.90 grams and valued at Rs. 38,14,300/-, have been confiscated. The adjudicating authority has imposed a penalty of Rs.7,62,000/- under Section 112 & 114AA of the Customs Act, 1962 on the applicant, which has been maintained in appeal.

2. The brief facts of the case are that the applicant arrived on 04.02.2014 at IGI Airport from Bangkok and was intercepted near the exit gate after he had crossed the Customs Green Channel. After search of his person and of his baggage two pieces of gold bars, which were concealed in his underwear, were recovered from his possession. The gold bars, weighing 1517.90 grams, were appraised at Rs. 38,14,300/- by the Jewellery Appraiser at IGI airport. Applicant in his statement dated 04.02.2014 admitted the concealment and recovery of gold bars from his possession. He stated that he had attempted to smuggle the gold bars with profit motive.

3. The revision application has been filed canvassing that the gold is not a prohibited item and hence may be released on payment of redemption fine and penalty. The veracity of the panchanama evidencing seizure of gold has also been challenged on

various grounds. Further, the applicant has contended that in terms of Section 102 of the Custom Act, 1962, even if he had consented otherwise the search still ought to have been conducted before Gazetted Officer.

4. Personal hearing was granted on 06.01.2020, 22.01.2020, 14.01.2021 and 02.02.2021 . Sh. R.P. Bairwah, Superintendent, appeared on behalf of the department on 02.02.2021. He supported the order of the lower authorities and prayed that the revision application filed by the applicant should be rejected. None appeared on behalf of the applicant on all the above mentioned dates and no request for further adjournment has been received. Hence, the case is being taken up for decision.

5. On examination of the relevant case records, the Commissioner (Appeals)'s order and the Revision application, it is evident that the impugned gold articles were recovered from the applicant. He did not declare the same under Section 77 of Customs Act, 1962 to the customs authorities at the airport. In the Customs Declaration slip, the applicant has left Column 6 (Total value of dutiable goods imported) blank. Further, the applicant has admitted the fact of non-declaration in his statement tendered under Section 108 of Customs Act, 1962.

6. At the outset, the applicant has challenged the veracity of panchanama evidencing the seizure, on several grounds. However, the Government observes from the order of the original authority that, at no stage, did the applicant ask for cross examination of panchas to impugn the panchanama and to establish his averments. In absence thereof, the contentions such as "It is not known whether the two panchas

were well conversant with English" are nothing but surmises. Hence, the present contention of the applicant is unacceptable.

7.1 Another contention of the applicant is that in terms of section 102 of the Customs Act, 1962, he ought to have been searched in the presence of a Magistrate or a Gazetted Officer. In this case, though the applicant " had given his concurrence for carrying out the search by a custom officer, it does not that the Officer could depart from the legal procedure of carrying out the search in the presence of a Gazetted Officer." Therefore, the search is illegal.

7.2 Section 102 reads as under: -

*"102. Persons to be searched may require to be taken before gazetted officer of customs or magistrate.*

- 1) When any officer of customs is about to search any person under the provisions of section 100 or section 101, the officer of the customs shall, if such person so requires take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.*
- 2) If such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or magistrate.*
- 3) The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search,*

*forthwith discharge the person but otherwise shall direct that search be made.*

*4) Before making a search under the provisions of section 100 or section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses.*

*5) No female shall be searched by any one excepting a female."*

7.3 On a plain reading, it is clear that mandate of Section 102 is that, before the search, a suspect person has a right to require to take him to the nearest gazetted officer of customs or magistrate. If such a requisition is made, the customs officer has to take the suspect person before the gazetted officer or the magistrate and thereafter the proceedings shall be as per the directions of the gazetted officer or the magistrate. There is nothing in the provisions of Section 102 to, even remotely, suggest that even when the suspect person has declined the offer for search before a gazetted officer or magistrate, he should still be produced before a gazetted officer or magistrate or that the offer itself should be made in the presence of a gazetted officer or magistrate. Such an interpretation would amount to reading something into the provisions of Section 102, that the legislature has not provided for.

7.4 It is settled law that the statute must ordinarily be literally construed. In *Tata Consultancy Services vs. State of Andhra Pradesh* {2004 (178) ELT 22 (SC)}, the

Hon'ble Supreme Court has held that "67 A statute ordinarily must be literally construed. Such a literal construction would not be denied only because the consequence to comply the same may lead to penalty." Further, in the case of Union of India vs. Dharmendra Textile Processors {2008 (231) ELT 3 (SC)}, the Apex Court has held that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous.

7.5 Case laws relied upon by the applicant are with reference to Section 50 of the NDPS Act, 1985 and broadly hold that the provision to inform the suspect of his right to be searched in the presence of a gazetted officer or magistrate is mandatory. The search conducted in absence of the suspect having been informed of this right has been held to be illegal. In the present case, admittedly, the applicant was duly informed of his right which he declined to exercise. Therefore, the case laws cited do not support the case of the applicant.

7.6 In view of the above, the Government finds that the contentions of the applicant with reference to Section 102 are not sustainable.

8. The question of law raised by the applicant is that the import of gold is not 'prohibited'. The law on this issue is settled by the judgment of Hon'ble Supreme Court in the case of Sheikh Mohd. Omer vs Collection of Customs, Calcutta & Ors {1971 AIR 293}. Hon'ble Supreme Court held that for the purpose of Section 111(d) of the Customs Act, 1962, the term "Any prohibition" means every prohibition. In other words all types of prohibition. Restriction is one type of prohibition". The Additional

Commissioner, in para 3.3 to para 3.8 of the O-I-O dated 19.08.2015, has brought out that the Gold is not allowed to be imported freely in baggage. It is permitted to be imported by a passenger subject to fulfillment of certain conditions. In the case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155)ELT423(SC)}, the Hon'ble Supreme Court has held that "if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods". The original authority has correctly brought out that in this case the conditions subject to which gold could have been legally imported have not been fulfilled. Thus, following the law laid down by the Apex Court, there is no doubt that the subject goods are 'prohibited goods'.

8. The original adjudicating authority has denied the release of impugned goods on redemption fine under Section 125 of Customs Act, 1962. The Government observes that the option to release seized goods on redemption fine, in respect of "prohibited goods", is discretionary, as held by the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi {1998 (104) E.L.T. 306 (S.C.)} . In the present case, the original authority has refused to grant redemption as the applicant attempted to smuggle the goods by concealment, with intent to evade Customs Duty by walking through the Green Channel and not declaring the goods. In the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344)ELT1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex Court, has held that "non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly

erroneous and it causes for judicial interference.' Further, "when discretion is exercised under Section 125 of the Customs Act, 1962, ----- the twin test to be satisfied is "relevance and reason"." It is observed that the original authority has in the instant case after appropriate consideration passed a reasoned order refusing to allow redemption in the background of attempted smuggling. Thus, applying the ratio of P. Sinnasamy (Supra), the discretion exercised by the original authority does not merit interference.

10. In view of the above, the Government upholds the impugned Order-in-Appeal. The revision application is rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

1. Mr. Syed Siffath Raja, R/o All channel Streek IK Main Road, Gowribidanuru Alipur Chikballapur, Karnataka 5612013



Order No. 29/21-Cus dated 03-02-2021

Copy to:

1. Commissioner of Customs (Airport & General), IGI Airport Terminal-3, New Delhi-110037
2. Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi
3. Additional Commissioner of Customs, IGI Airport, New Custom House, New Delhi
4. PA to AS(RA)
5. Guard File.

*for Spare Copy.*

ATTESTED,

*N Devi*

(Nirmala Devi)

Section Officer (Revision Application)