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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. 371/227-229/B/WZ/2020-RA: Date of Issue 20.06.2023

ORDER NO.1-94-1-96/2023-CUS (WZ)/ASRA/MUMBAI DATED27.06.2023 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.

(i). F.No. 371/227/B/WZ/2020-RA

Applicant No. 1 (A1) : Mrs. Harshida Bhavin Shah,)

(ii). F.No. 371/228/B/WZ/2020-RA
Applicant No. 2 (A2) : Shri. Deep Bhavin Shah,

..... Applicants.

(iii). F.No. 371/229/B/WZ/2020-RA

Applicant No. 3 (A3) : Shri, Hitesh Ashok Bagmar.

Respondent: Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Subject

: Revision Applications filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal F.Nos. MUM-CUSTM-PAX-APP-1053 to 1055 all dated 27.12.2019 issued through F.Nos. S/49-202, 203 and 204/2019 resp., passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

These three revision applications have been filed by (i). Mrs. Harshida Bhavin Shah, (ii). Shri. Deep Bhavin Shah and (iii). Shri. Hitesh Ashok Bagmar, [hereinafter all referred to as the Applicants or alternatively and more specifically referred to as Applicant No. 1 (A2), Applicant no. 2 (A2) and Applicant no. 3 (A3) resp.], against the Orders-in-Appeal F.Nos. MUM-CUSTM-PAX-APP-1053 to 1055 all dated 27.12.2019 issued through F.Nos. S/49-202, 203 and 204/2019 resp., passed by the Commissioner of Customs (Appeals), Mumbai-III.

- 2(a). Briefly stated facts of the case are that the applicant no. 1 and 2 who had both arrived from Dubai onboard Indigo Airlines Flight No. 6E-64 08.01.2018 were intercepted on 21.09.2017 by the Customs Officers of CSMI Airport, Mumbai near the exit gate after they had cleared Customs through the green channel. Personal search of the applicant no. 1 resulted in the recovery of the six crude gold bangles worn on her hand and one crude gold chain worn on her neck, totally weighing 585 grams. The personal search of applicant no. 2 led to the recovery of one crude gold chain worn on his neck and one crude gold kada worn on his hand, totally weighing 464 grams.
- 2(b). Thereafter, based on the information given by A1 and A2 that the gold jewellery / ornaments recovered from them had been handed over to them at Dubai by their friend i.e. Applicant No. 3, who too had arrived at CSMI Airport by Emirates Flight No. EK-508 dated 21.09.2017 itself was also intercepted after he had crossed the green channel. His personal search led to the recovery of one crude gold chain weighing 190 grams.
- 2(c). Government Appointed Valuer certified that the all the said crude gold ornaments / jewellery recovered from the applicants were of 24K purity. The details are as given below at Table No. 1.

Table No. 1.

SI. No.	Name.	Description, quantity & recovered from	Weight in gms	Value in Rs.	
1. A1		Six crude gold bangles were worn on her hand and one crude gold chain was worn on her neck.	585	16,36,356/-	
2.	A2	One crude gold kada worn on his hand and one crude gold chain was worn on his neck.	464	12,97,896/-	
3.	A3.	One crude gold chain worn on his neck	190	5,31,466/-	
•	TOTAL	06 bangles, 03 gold chains and 01 kada all of gold.	1239	34,65,718/-	

2(d). Thus, in all 1239 grams of gold valued at Rs. 34,65,718 were recovered from the applicants.

- 2(e). In their statements recorded under Section 108 of the Customs Act, 1962, A1 and A2 admitted that they had agreed to carry the gold jewellery for monetary consideration promised by A3; that the gold belongs to A3; that this was their first trip abroad; that on the way to Dubai they had carried currency of Rs. 9 lakhs each as instructed by A3.
- 2(f). A3 in his statement admitted that all the gold mentioned at Table No. 1 belonged to him and that A1 and A2 had carried the gold jewellery as per his instructions and that he had promised them a monetary consideration. Also, he had instructed A1 and A3 to carry Rs. 9 lakhs each on their way to Dubai; that he had submitted the bank statements of his current account against withdrawal of Rs. 18 lakhs in cash out of his own business; that he had submitted the declaration letter of his Jijaji against the loan amount of Rs. 17 lakhs in Dubai.
- 3. The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai by a common Order-In-Original i.e. OIO No. ADC/AK/ADJN/367/2018-19 dated 26.11.2018 issued through S/14-5-225/2017-18Adjn SD/INT/AIU/241/2017 AP-'B' ordered for the absolute confiscation of the impugned gold jewellery mentioned at Table 1 above, totally weighing 1239 gms and

valued at Rs. 34,65,718/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed penalties on all the 3 applicants under Section 112 (a) and (b) of the Customs Act, 1962 and Section 114(i) and (iii) of the Customs Act, 1962 for carrying Indian currency amounting to Rs. 18 lakhs as admitted by them. The details of the penalties imposed on the applicants is mentioned at colⁿ (c) and (d) of Table No. 2 below,

Table No. 2.

Sl. No.	Appl. No.	Quantum of Penalty in Rs imposed u/s 112(a) & (b) of the CA, 1962.	Quantum of Penalty in Rs imposed u/s 114(i) and (iii) of the CA, 1962.	
(a).	(b).	(c).	(d).	
1.	A1	1,00,000/-	25,000/-	
2.	A2	1,00,000/-	25,000/-	
3.	A3.	1,50,000/-	40,000/-	

- 4. Aggrieved by the said order, all the three applicants filed appeals before the Appellate Authority i.e Commissioner of Customs (Appeals), Mumbai III who vide a combined & common order i.e. Orders-In-Appeal F.Nos. MUM-CUSTM-PAX-APP-1053 to 1055 all dated 27.12.2019 issued through F.Nos. S/49-202, 203 and 204/2019 resp., upheld in to-to, the OIO passed by the OAA.
- 5. Aggrieved with the above orders of the AA, all the three applicants have filed these three revision applications. It is noticed that all the averments made by A1 and A2 are similar while those filed by A3 differ slightly. The grounds of revision filed by A1 and A2 are as under;
 - 5.01. that the imported jewellery constitutes bonafide luggage and hence, are not liable to confiscation; that the jewellery had been worn by them; that they also rely on the various grounds taken by A3 in his revision application; that they should be allowed to redeem the gold jewellery even though it was not declared; that penalty under Section 112(a) and (b) of the Customs Act, 1962 was not imposable on them; that they did not carry the gold for A3 for any commercial consideration and this statement had been extracted from themwhen they were under mental trauma; that the gold had not been concealed in any manner; that penalty under Section 114 of the Customs

Act, 1962 was not imposable as they were travelling abroad for first time; that they rely on the decision of the Apex Court in the case of Hindustan Steel Ltd vs. State of Orissa [1973-2-ELT-J159-S.C]

Under the circumstances, the applicants no. 1 and 2 have prayed to the revision authority to quash and set aside_the OIA with consequential relief; quash and seta aside the penalties of Rs. 1,00,000/- each and Rs. 25,000/- each imposed on them under Section 112(a) & (b) and Section 114(i) & (iii) of the Customs Act, 1962 resp.

- 6. Aggrieved with the above order of the AA, A3 has filed a revision application and the grounds of revision are as under;
 - 6.01. that the imported jewellery imported by him along with the co-noticees constituted bonafide luggage and hence, was not liable to confiscation; that the jewellery had been worn by them; that option of redemption under Section 125 of the Customs Act, 1962 should have been given to them; that gold was not prohibited for import and hence option to redeem the same was mandatory; that even if import of gold was subject to any condition, the gold cannot be considered as prohibited goods in view of the exclusion clause in definition i.e. Section 2(33) of the Customs Act, 1962; that notification no. 50/2017-Cus dated 30.06.2017 read with Rule 3 and Rule 5 of the Baggage Rules, 2016 was incorrectly applied by AA citing that he had stayed abroad only for a few days; that notification 50/2017-Cus dated 30.06.2017 was only an exemption notification for eligible passenger and the same cannot be interpreted that non-eligible passengers, gold was prohibited; that even for prohibited goods, redemption was allowed; that the imported gold was not in commercial quantity and the same was for personal consumption; that gold had been imported for personal marriage; that he was not in the business of gold trading; that contradictory statements given by him cannot be relied upon; that seized gold was not liable to confiscation under Section 111(d) and (m); that his marriage was solemnized on 17.12.2018; that the case of Aiyakannu vs. CC(Air), Chennai [2012-281-ELT-223-Mad] has been relied upon incorrectly as 10 gold bars-totaling 1165 gms was attempted to be

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smuggled by concealing in a bag brought by a foreign passport holder; that he has relied upon the undermentioned case laws;

- (a). Roshini Mathurdas Kothadia vs. CC, Hyderabad [2019-369-ELT-1784-Tri-Hyd.]; Absolute confiscation of 500 gms of gold biscuits set aside;
- (b). CC & CECX vs. Mohd. Ashraf Armar [2019-369-ELT-1654-Tri-Mum.]; 1200.95 gms of gold concealed in socks allowed to be redeemed.
- (c). Ashok Kumar Verma [2019-369-ELT-1677-GOI];
- (d). Mohd. Hussain Ayub Chilwan [2017-358-ELT-1275-Commr. Appl.-Mumbai-III]
- (e). CC, Lucknow vs. Mohd. Nayab & Imtiyaz Idris [2016-SCC-Online CESTAT-4736];
- (f). Yakub Ibrahim Yusuf vs. CC, Mumbai [2011-263-ELT-685-Tri-Mumbai]; the case involved 25 kgs of gold intercepted on arrival in Mumbai from London apparently on behalf of his NRI relatives for earning profit;
- (g). Sapna Sanjeev Kohli vs. CC, Mumbai [2009-240-ELT-207-Bom.];
- 6.02. Penalty not imposable under Section 112(a) and (b) of Customs Act, 1962;
- 6.03. Penalty under Section 114 of the Customs Act, 1962 was not proposed in the SCN for A3; that penalty cannot be imposed as the same had not been proposed in the SCN; penalty cannot be imposed in a mechanical manner;
- 6.04. that penalty imposed is harsh.

Under the circumstances, the applicant no. 3 has prayed to the revision authority to quash and set aside the OIA with consequential relief; grant redemption of the gold jewellery and to reduce the penalty.

7. Personal hearings in the case of all the applicants were scheduled for 11.05.2023, 18.05.2023. Shri. Prashant Patankar, Advocate appeared on 18.05.2023 on behalf of all the 3 applicants and reiterated earlier submissions. He submitted that gold jewellery was brought for personal use for marriage. He further submitted that there was no concealment and applicants are not habitual offenders. He requested to allow option to redeem the jewellery on nominal RF and penalty.

- 8. Government has gone through the facts of the case, including SCN, case laws etc submitted by the applicants. The Government notes that the Applicants had opted for the green channel and were intercepted after they had crossed the green channel and attempted to carry the gold jewellery / ornaments without declaring the same to Customs. The applicants had admitted that they had not declared the gold with a view to evade the Customs duty. The applicants had stayed abroad for only a few days and were not eligible to bring gold. A declaration as required under Section 77 of the Customs Act, 1962 was not submitted and therefore, the confiscation of the gold was justified.
- 8.1. 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.

- 8.2. 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 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 applicant had adopted innovative method and it was not included in the declaration. Therefore, the gold was also liable for confiscation under these Sections.
- 9.1. 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".
- 9.2. 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

- 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, gold, 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. Thus, adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine but he is not bound to so release the goods.
- 11. 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.
- 12. Government further observes that there are a catena of judgements, over a period of time, of the Hon'ble Apex / High 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 deserving cases 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. A102(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.
- In the instant case, it is noted that quantity of gold found individually with the 13. applicants was not large or commercial, it was in the form of jewellery / ornaments, the impugned gold jewellery / ornaments had been worn by the applicants i.e. it was found on their person. The gold was not found concealed in an ingenious manner. A case that the applicants are habitual offenders had not been made out. There are a catena of judgements where the ownership of the gold has been allowed to persons from whom possession such gold had been recovered. Government finds that this is a case of non-declaration of gold rather than brazen smuggling. Government finds that all these facts have not been properly considered by the lower authorities while absolutely confiscating the impugned gold jewellery / ornaments i.e. 01 nos of gold kadas, 03 nos of gold chains and 06 nos of gold bangles, totally weighing 1239 grams and valued at Rs. 34,65,718/- recovered from the three applicants. Also, 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 is inclined to maintain the confiscation of the said gold jewellery / ornaments but allow the impugned gold jewellery / ornaments i.e. 01 nos of gold kadas, 03 nos of gold chains and 06 nos of gold bangles, to be redeemed on payment of a redemption fine.
- 14.1. Government finds that the penalty as mentioned at colⁿ no (c) of Table 02 above, imposed on the applicants under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed. Though A1

and A2 have claimed that they were first time travellers, Government finds that the penalty imposed on A1& A2 are commensurate with the omissions and commissions committed by them. Similarly, penalty imposed under Section 112(a) and (b) of the Customs Act, 1962 on A3 is reasonable. Therefore, Government is inclined to uphold the same on A1, A2 and A3.

- 14.2. Penalty has been imposed on the applicants under Section 114(i) and (iii) of the Customs Act, 1962 on the grounds that they had admitted to having carried the currency during their trip abroad, Government notes that A3 has made an averment that such charge has not been proposed against him in the SCN issued to him. Government has perused the SCN and finds that charge under Section 114(i) and (iii) of the Customs Act, 1962 has not been proposed against A3, though he had given an account of the financial details of the nearly Rs. 35 Lakhs during the investigations. In the absence of any such charge under Section 114(i) and (iii) of the Customs Act, 1962 in the SCN, Government finds that the penalty imposed on A3 under the said section is not sustainable and hence, Government is inclined to drop the same. Since, A3 during the investigations had admitted that he had arranged for the money required to purchase the gold abroad and accounted for the same during the investigations, the penalty imposed on A1 and A2 is not sustainable especially as A3 though admittedly had arranged for the money has not been charged for the offence. Hence, Government is inclined to drop the penalty imposed on A1 and A2 under Sections 114(i) and (iii) of the Customs Act, 1962.
- 15. In view of the above, the Government modifies the Orders-in Appeal F. nos. MUM-CUSTM-PAX-APP-1053 to 1055 all dated 27.12.2019 issued through F.Nos. S/49-202, 203 and 204/2019 resp., as under;
 - (i). Government sets aside the impugned order of the Appellate Authority in respect of the impugned gold jewellery / ornaments imported by the 3 applicants as mentioned at Table-01, above and the same is allowed to be redeemed by the

applicants on payment of a redemption fine as mentioned at column no. 'f' of Table 03, below.

- (ii). As discussed above, the Government is not inclined to interfere in the penalty imposed on the applicants under Section 112(a) and (b) of the Customs Act, 1962 and finds the same is commensurate with the omissions and commissions committed.
- (ii). As discussed above, the penalty imposed on the 3 applicants under Section 114(i) and (iii) of the Customs as mentioned at Table No. 2 above, is set aside.

TABLE No. 3.

Redemption fine imposed as per col. T below,

Sr.	Name	Quantity of gold	Value in Rs.	Penalty	Redemption fine
No.		jewellery /		imposed u/s	imposed / levied in
		ornaments	-	112 of C.A.	Rs.
		seized (in gms).		1962 in Rs.	
(a)	(b)	(c)	(d)	(e)	(f)
1	Mrs. Harshida Bhavin Shah [A1]	585	16,36,356/-	1,00,000/-	Rs. 3,50,000/-
2	Shri. Deep Bhavin Shah [A2],	464	12,97,896/-	1,00,000/-	Rs. 2,50,000/-
3	Shri. Hitesh Ashok Bagmar [A3],	190	5,31,466/-	1,50,000/-	Rs.1,05,000/-
	Total	1239	34,65,718/-		Rs. 7,05,000/-

16. The 3 Revision Applications are disposed of on the above terms.

(SHRAWAN KUMAR)

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

ORDER No 494-496/2023-CUS (WZ) /ASRA/MUMBAI DATED 2 .06.2023

To,

1. Mrs. Harshida Bhavin Shah, 4, Jai Apartments, Shivam Nagar, Hirawadi Road, Panchvati, Nashik Dist., Maharashtra, Pin: 422 003.,

- 2. Shri. Deep Bhavin Shah, 4, Jai Apartments, Shivam Nagar, Hirawadi Road, Panchvati, Nashik Dist., Maharashtra, Pin: 422 003., and
- 3. Shri. Hitesh Ashok Bagmar, Vakratund Bungalow, Vijay Nagar, Dindori Tal Nashik Dist., Maharashtra, Pin 422 022.

F.No. 371/227-229/B/WZ/2020-RA

4. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Level – II, Terminal – 2, Sahar, Andheri East, Mumbai – 400 059.

Copy to:

- 5. Patankar Legal Combine, Office No. 1, Neel Atharva, Opp. Durga Mata Temple, Telephone Exchange Road, Old Panvel, Navi Mumbai, Pin: 410 206.
- 6. Sr. P.S. to AS (RA), Mumbai.
- 7. File Copy.
- 8. Notice Board.