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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. 371/72/B/WZ/2021-RA *6286* : Date of Issue : 23.08.2023

ORDER NO. 60\ /2023-CUS (WZ)/ASRA/MUMBAI DATED 2\ .08.2023 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 : Mr. Pushpak Bharatbhai Shah

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

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1410/2019-20 dated 28.01.2021 [Date of issue: 11.02.2021] [F. No. S/49-1326/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

The Revision Application has been filed by Mr. Pushpak Bharatbhai Shah (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1410/2019-20 dated 28.01.2021 [Date of issue: 11.02.2021] [F. No. S/49-1326/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 13.12.2019, the officers of Air Customs, Chhatrapati Shivaji International Airport, Mumbai, intercepted the Applicant, an Indian national, who had arrived by Flight No. 6E 84 from Dubai, after he had opted to clear himself through the Customs Green Channel. The Applicant was found to be in possession of one crude chain and one crude bracelet of 24K purity, collectively weighing 233 grams and valued at Rs. 7,96,226/-.

3. The case was adjudicated after waiver of show cause notice and the Original Adjudicating Authority (OAA) i.e. Assistant/Deputy Commissioner of Customs, CSI Airport, Mumbai, vide Order-in-Original No. Air Cus/T2/49/1434/2019 'D' dated 13.12.2019 ordered the absolute confiscation of the impugned one crude chain and one crude bracelet of 24K purity, collectively weighing 233 grams and valued at Rs. 7,96,226/-, under Section 111 (d) of the Customs Act, 1962. A penalty of Rs. 15,000/- was imposed on the Applicant under Section 112 of the Customs Act, 1962.

4. Aggrieved by the Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-1410/2019-20 dated

28.01.2021 [Date of issue: 11.02.2021] [F. No. S/49-1326/2019] rejected the appeal and upheld the Order-in-Original.

5. Aggrieved with the above order of the Appellate Authority, the Applicant has filed this revision application on the following grounds:

5.01. That Notification No. 50/2017 dated 30.06.2017 is only an exemption notification and it did not stipulate anywhere that gold is a prohibited goods and the eligibility of the Applicant for concessional rate of duty given in respect of gold under the said notification is not an issue in this case as the Applicant did not claim the said exemption;

5.02. That the impact of non-availability of exemption from customs duty on account of not being eligible was only that the person would be liable to pay customs duty at tariff rate or baggage rate as the case may be;

5.03. That despite the fact that the said notification no 50/2017-Cus dated 30.06.2017 did not declare the gold as prohibited goods, it cannot be held that the imported gold became prohibited goods in the event of the concerned passenger was not eligible to import the gold;

5.04. The Applicant has relied on the following case laws in support of his contention:

- (i) Decision of the Hon'ble High Court of Madras in the case of Samynathan Murugesan [2010(254) ELT
- (ii) T.Elavarasan vs. CC (Airport), Chennai [2011(266) ELT 167(Mad)
- (iii) Shaikh Jamal Basha vs. GOI [1997(91(ELT) 277(AP)
- (iv) UOI vs. Dhanak Ramji [2003(248) ELT 128(Bom)
- (v) Sapna Sanjeev Kohlu vs. CC, Mumbai [2010(253) ELT A52(SC)

5.05. Gold is not 'prohibited goods' but only a 'restricted goods' and is not liable for absolute confiscation. Import of gold is no longer prohibited and therefore it is the duty of the adjudicating authority, if he is of the view that it is liable to confiscation, to permit its redemption on appropriate fine. That if the goods are restricted to import, the Government fixes some sort of barrier to import and the importer has to overcome such procedures which have to be completed. That restriction to import any goods is decided by the government under foreign trade policy amended from time to time.

5.06. That Gold is not a prohibited item for import and Section 125 of the Custom Act, 1962 provides that option of redemption can be given in case the seized goods are not prohibited and therefore absolute confiscation is not warranted in the instant case. Section 125 of the Customs Act, 1962 provides that the goods should be redeemed to the owner of the goods or the person from whose possession the goods were seized if the owner is not known. Further authority has discretion to order release of prohibited goods on payment of fine in lieu of confiscation. The Applicant has relied upon the undermentioned case laws;

- (i) Commr. Of Customs (Prev) vs. India Sales International [2009 (241) E.L.T. 182(Cal)].
- (ii) Yakub Ibrahim Yusf vs. CC, Mumbai [2011(263) ELT 685(Tri. Mumbai)
- (iii) Neyveli Lignite Corporation Ltd vs. UOI [2019(242) ELT 487(Mad)]

5.07. That there are a series of judgements where redemption of absolutely confiscated gold has been allowed The Applicant has relied on the following case laws:

- (i) Hargovind Das K. Joshi vs. Collector of customs [1992 (61) ELT 172(SC)]
- (ii) Universal Traders vs. Commissioner [2009 (240) E.L.T. A78 (SC)]

- (iii) Gauri Enterprises vs. CC, Pune [2002 (145) ELT (705) (Tri Bangalore)]
- (iv) CC (Airport), Mumbai vs. Alfred Menezes [2009 (242) ELT 334 (Bom)]
- (v) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
- (vi) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (vii) T. Elavarasan Vs Commissioner of Customs (Airport), Chennai [2011 (266) ELT 167 (Mad)]
- (viii) Kadar Mydin vs. Commissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]
- (ix) Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai
- (x) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]
- (xi) Halithu Ibrahim vs. CC [2002-TIOL 195 CESTAT-MAD]
- (xii) Krishnakumari vs. CC, Chennai [2008 (229) ELT 222 (Tri Chennai)]
- (xiii) S.Rajagopal vs. CC, Trichy [2007 (219) ELT 435 (Tri-Chennai)]
- (xiv) M. Arumugam vs. CC, Trichirapalli [2007 (220) ELT 311 (Tri-Chennai)]
- (xv) Union of India vs. Dhanak M. Ramji [2009 (248) E.L.T. 127 (Bom.)]
- (xvi) Peringatil Hamza vs CC (Airport), Mumbai [2014 (309) ELT 259 (Tri Mumbai)]
- (xvii) R. Mohandas vs. CC, Cochin [2016 (336) ELT 399 (Ker)]
- (xviii) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (xix) Shaik Mastani Bi vs. CC, Chennai [2017(345) E.L.T 201(Mad)]
- (xx) Bhargav Patel vs CC, Mumbai [Appeals NO C/381/10]
- (xxi) Gauri Enterprises vs. CC, Pune [2002(145) E.L.T 705 (Tri-Bang)]
- (xxii) Om Prakash Bhatia vs. Commr. Of Customs Delhi [2003(155) E.L.T.423(SC)]
- (xxiii) Etc

5.08. That the decisions relied upon by the Commissioner of Customs (Appeals) are not applicable to the case and the Commissioner (Appeals) failed

to discuss as to how the facts of the cases relied upon by him fit the factual situation of the case of the Applicant

5.09. That under the doctrine of stare decisis, a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority for judges deciding similar issues later. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind.

5.10. That while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The applicant has relied upon the following case laws in support of their contention:

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) ELT 135 (SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) ELT 113 (SC)].
- (iii) CC (Port), Chennai vs. Toyota Kirloskar [2007 (213) ELT 4 (SC)]
- (iv) Sri Kumar Agency vs. CCE Bangalore [(2008(232)ELT 577(SC)]

5.11. That there should be consistency in favour of 'formal' justice i.e that two cases are the med (in relevant respects) should be treated in the same way and it would be inconsistent to treat them differently;

5.12. That concerns of consistency provide some justification for treating earlier decisions as sources of law rather than approaching each question anew when it arises again;

5.13. That if the earlier decision was wrong, then the persons subject to it may have been treated or less favourable than they should have been treated and if they were treated more favourable then clearly that should have been corrected;

5.14. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court hears and precedent is a legal principle or rule that is created by a court decision and is binding on or persuasive for a court or tribunal when deciding subsequent cases with similar issues or facts;

5.15. That as regards allowing redemption of the seized goods, Section 125 of the Customs Act, 1962 provides the option of redemption can be given in the case of seized goods are not prohibited and gold is not a prohibited item and can be imported and such imports are subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs station and make payment at the rate prescribed. Reliance has been placed on the following case laws:

- (i) Shaik Jamal Basha vs. Government of India [1992(91) ELT 277(AP)]
- (ii) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (iii) Mohammed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)]

5.16. That the Applicant has relied upon the following case laws in support of the contention that when goods are not eligible for import as per the import policy, re-export of such goods is permitted on payment of penalty and redemption fine. The Applicant has relied on the following case laws in support of their contention:

- i) CC vs. Elephanta Oil [2003(152) ELT 257 (SC)]

- ii) Collector vs. N Patel [1992 (62) ELT 674 (GO1)]
- iii) Kusumbhai Dahyabhai Patel vs. CC (P) [1995 (79) ELT 292 (CEGAT)]
- iv) K&K Gems vs. CC [1998(100) ELT 70 (CEGAT)]

5.17. in the instant case the Commissioner (Appeals) should have examined the judgements/decisions relied upon by the appellant, facts of the cases, legal issues involved in the cases, arguments raised and cases cited by the parties, legal reasoning that is relevant to resolve those issues, judicial opinions given by the Courts, ruling of the court on questions of law, the result of the case: the court's order, and which party was successful and the applicability of ratio of the said judgements in the case being dealt:

- (i) Decision of the Hon'ble Supreme Court in the case of Bombay Dyeing and Manufacturing Company Ltd vs. BEAG
- (ii) Decision of the Hon'ble Supreme Court in the case of Islamic Academy of Education vs State of Maharashtra
- (iii) CIT vs. Sun Engineering Works (P) Ltd
- (iv) Madhav Rao Scindia vs. Union of India

5.18 That as held in the case of Commissioner of Customs vs. Atul Automation Pvt Ltd, wherein the Hon'ble Supreme Court clearly distinguished between what is prohibited and what is restricted and held that restricted goods can be redeemed on payment of fine, in the instant case gold should not be considered as prohibited goods and order of absolute confiscation is not sustainable

5.19. That the Applicant claims ownership of the goods under absolute confiscation and the gold was purchased by him for the personal use of his family members and claims redemption of the gold on reasonable fine and penalty;

Under the circumstances, the Applicant prayed that the gold jewellery under absolute confiscation may be released for re-export and drop further proceedings.

6. Personal hearing in the case was scheduled for 11.07.2023. Shri Prakash Shingrani, Advocate appeared for the personal hearing on the scheduled date on behalf of the Applicant. He submitted that the Applicant brought small quantity of gold for personal use. He further submitted that Applicant is a NRI and resides in the UAE. He requested to allow the release on nominal fine and penalty for re-export.

7. The Government has gone through the facts of the case and observes that the Applicant had brought one crude chain and one crude bracelet of 24K purity, collectively weighing 233 grams and valued at Rs. 7,96,226/- and had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that he was carrying dutiable goods. However, after opting to clear through the green channel of Customs and on being intercepted, one crude chain and one crude bracelet of 24K purity, collectively weighing 233 grams and valued at Rs. 7,96,226/-, was recovered from the Applicant and revealed his intention not to declare the said gold and thereby evade payment of Customs Duty. The confiscation of the gold was therefore justified and thus the Applicant had rendered himself liable for penal action.

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, 1962.

9. 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 Applicant thus liable for penalty.

11. 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, 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.

12. 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.”

13.1. 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 Shaik 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.
- e) The Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a matter of Sri Lankans wearing 1594 gms of gold jewellery upheld the Order no. 165 – 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for restoration of OIO wherein the adjudicating authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

13.2. Government, observing the ratios of the above judicial pronouncements, arrives at the conclusion that decision to grant the option of redemption would be appropriate in the facts and circumstances of the instant case.

14. In view of the foregoing paras, the Government finds that as the Applicant had not declared one crude chain and one crude bracelet of 24K purity, collectively weighing 233 grams and valued at Rs. 7,96,226/- at the time of arrival, the confiscation of the same was justified. However, Applicant is a NRI and resides in UAE and the quantum of gold under import is small and is not of commercial quantity. The impugned gold recovered from the Applicant was not concealed in an ingenious manner. There are no allegations that the Applicant is a habitual offender and was involved in similar offence earlier or there is nothing on record to prove that the Applicant was part of an organized smuggling syndicate.

15. Government finds that this is a case of non-declaration of gold jewellery. The absolute confiscation of the impugned gold jewellery leading to dispossession of the Applicant of the same in the instant case is therefore harsh and not reasonable. In view of the aforesaid facts and considering that the Applicant is a Non Resident Indian, option to re-export the impugned gold jewellery on payment of redemption fine should have been allowed. Considering the above facts, Government is inclined to modify the absolute confiscation and allow the impugned crude chain and one crude bracelet of 24K purity, collectively weighing 233 grams to be re-exported on payment of a redemption fine.

16. Applicant has also pleaded for setting aside the penalty imposed on him. The market value of the gold in this case is Rs. 7,96,226/-. From the facts of the case as discussed above, Government finds that the penalty of Rs.

15,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 is commensurate to the omissions and commissions of the Applicant.

17. In view of the above, the Government modifies the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1410/2019-20 dated 28.01.2021 [Date of issue: 11.02.2021] [F. No. S/49-1326/2019] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and allows the Applicant to redeem the impugned crude chain and one crude bracelet of 24K purity, collectively weighing 233 grams and valued at Rs. 7,96,226/-, for re-export, on payment of a redemption fine of Rs. 1,40,000/- (Rupees One Lakh Forty Thousand only). The penalty of Rs. 15,000/- imposed on the Applicant under Section 112 of the Customs Act, 1962 by the OAA and upheld by the AA is sustained.

18. The Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 601/2023-CUS (WZ)/ASRA/MUMBAI DATED 21.08.2023

To,

1. Mr. Pushpak Bharatbhai Shah. 101/3, Adeshwar Krupa Apartments. Shantidevi Road, Navsari, Gujarat 396 445
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.

