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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
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F.No. 371/425, 426 & 427/B/WZ/2022-RA | 7792 : Date of Issue : 08.11.23

ORDER NO. 923-
825/2023-CUS (WZ)/ASRA/MUMBAI DATED 06.11.2023
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.

F.No. 371/425, 426 & 427/B/WZ/2022-RA

Applicant No. 1 (A1). : (i). Shri. Khalid Abdul Rehman,
Applicant No. 2 (A2). : (ii). Shri. Mohammed Salim Abdul Karim,
Applicant No. 3 (A3). : (iii). Shri. Vasant Kaka Kadam

.....**APPLICANTS**

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal Nos.
MUM-CUSTOM-PAX-APP-563 to 565/2022-23 dated
29.06.2022 issued on 30.06.2022 through F.No. S/49-
1892, 1893 & 1776/2021 passed by the Commissioner
of Customs (Appeals), Mumbai - III.

ORDER

These three revision applications have been filed by (i). Shri. Khalid Abdul Rehman, (ii). Shri. Mohammed Salim Abdul Karim and (iii). Shri. Vasant Kaka Kadam (hereinafter referred to as the Applicants or alternately and more specifically as Applicant no. 1 [A1], Applicant no. 2 [A2] and Applicant no. 3 [A3] resp.) against the Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-563 to 565/2022-23 dated 29.06.2022 issued on 30.06.2022 through F.No. S/49-1892, 1893 & 1776/2021 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 26.11.2018, Applicant No. 1 and 2, were intercepted by Customs Officers at CSMI Airport, Mumbai upon their arrival from Kuwait by Jazeera Flight No. J9-401 / 25.11.2018, after they had cleared themselves through the green channel. Examination of the hand / checked-in baggage carried by A1 led to the recovery of two FM gold bars of 1 kilogram each having a purity of 995.0 and sl. nos. GR110436 and GR110458, resp. The gold bars had been found wrapped in plain white papers and cleverly hidden in purple coloured trolley bag. On being asked about the ownership of the two gold bars, A1 revealed that one gold bar belonged to him and the other belonged to A2. Thereafter, A2 confirmed that he was the owner of one of the gold bars recovered from the baggage of A1. The said two bars were assayed through a Government Approved Valuer who certified that the same were of gold with purity of 23.86 karats, both of 1 Kg each i.e. totally weighing 2000 grams, valued at Rs. 56,18,098/-. Mobile phones found in the possession of A1 and A2 were also taken over for further investigations.

2(b). During the course of preliminary enquiries and investigations, surveillance at inline baggage section, the behaviour of one on-duty Officer of the uniform batch viz, A3 was found to be suspicious and therefore, he was brought to the CCTV room for enquiries. Also, the behaviour of two loaders

viz, Shri. Nitesh Narayan Ture and Shri. Mayur Manohar Sutrave who were near the entrance of the toilet near Belt no. 9, were found suspicious and they too were detained.

2(c). During the preliminary investigations, A1 and A2 revealed that they were to smuggle the gold without the payment of Customs duty taking the help and advice of a Customs Officer, viz A3 who in turn would direct the loaders to do the job. Thereafter, A3, and the loaders viz, Shri. Nitesh Narayan Ture and Shri. Mayur Manohar Sutrave were asked to co-operate in the investigations.

2(d). It was alleged that Shri. Mayur Manohar Sutrave (referred here forward as MMS) was an employee of Uttam Udaan Organisation which was engaged in providing various services at CSMIA; that at the relevant time, he was working as a Loader at CSMIA and any other task assigned to him; that on 25/26.11.2018, he was on duty at the In-line Baggage Scanning Area (IBSA) in the shift from 10pm to 6 am; that he used to receive instructions from A3 regarding taking over the stuff carried by passengers coming from abroad on which Customs duty was evaded and handing over the same to them outside the CSMIA;

2(e). It was alleged that Shri. Nitesh Narayan Ture (referred here forward as NNT) was also an employee of Uttam Udaan Organisation; that at the relevant time, he was working as Baggage Marker and any other task assigned to him; that on 26.11.2018 i.e. on the day of the incident, his duty was near the Baggage Screening Machine (BSM) in the shift from 6 a.m to 2 p.m; that around 06:15 a.m, he had received a call from MMS that some passengers were waiting since 3.00 a.m for handing over one parcel to be further handed over outside the airport to the same person after clearing from Customs.

2(f). It was alleged that A3 was an Air Customs Superintendent (ACS) of the Uniform Batch-A at CSMIA since 2018 and was posted in arrival as well as in the In-line Baggage Screening Section (IBSS); that on 25/26.11.2018, he was on duty at the IBSA in arrival hall of CSMIA in the shift from 08.00 p.m to 08.00 a.m; that he would give instructions to MMS to receive the baggage of the passengers and hand it over to them outside the airport; that he would be touch with the passengers whose goods were to be cleared after evading Customs and then hand it over to them outside the airport for a monetary consideration; that the modus was to instruct the loaders about the passengers and the goods to be taken over from them near or inside the toilet and these loaders would clear the goods and evade Customs and hand over the same to the passengers outside the airport.

2(g). Confrontation was carried out by the investigating agency and A1, A2, had recognised / identified both A3 and MMS who also in-turn identified them ie. A1 & A2.

2(h). In his statement recorded under Section 108 of the Customs Act, 1962, NNT besides his afore-stated work profile had stated that on 26.11.2018, his shift was from 06.00 am to 02.00 pm and that around 06.15 am, MMS had told him that a passenger was waiting from 3.00 a.m who would hand over a parcel to be handed over to him (same passenger) outside the airport to which he (NNT) had replied in the negative and had told MMS that he will not do the work; that MMS had told him that the instruction to take the parcel from the passenger was given by A3; that he i.e. NNT had neither received anything or cleared anything.

2(i). In his statement recorded under Section 108 of the Customs Act, 1962, MMS besides his afore-stated work profile had stated that on 26.11.2018, his shift had started at 10.00 p.m till 03.00 p.m; that between 2.30 and 3 a.m he

had received a call from A3 who inquired whether he had received any call, to which he had replied in the negative; that again at 4 a.m he had received similar call from A3 and informed him that no call had been received; that earlier on 24.11.2018, A3 had informed him that some person would call him in 2-3 days and would hand over a packet; that in the night of 25.11.2018, he had received a call from an unknown no and he was informed that some persons were following him; that he had got scared; that at 5.50 a.m he was preparing to go home; that he neither received any call nor had cleared anything.

2(j). The residence of A1 was searched on 26.11.2018 and certain documents such as (a) Airport entry pass dated 01.02.2017, (b). SCN no. 311/2014 dated 19.09.2014 pertaining to F.No. SD/INT/AIU/200/2014AP'A', (c). OIO no. S/14-5-269/2014-15 dated 31.03.2015 of F.No. SD/INT/AIU/200/2014AP'A', (d). copy of panchanama, air tickets, hotel register, court papers of case no. 180/CW of 2014 dated 29.09.2014, Cr. Revision Application no. 650/2014, laminated passport and visa of Mr. Carsten Lund; copy of RA no. 113/2014 dated 3.4.2014, bail application, summons, retraction etc were all recovered.

2(k). In his statement recorded under Section 108 of the Customs Act, 1962, A1 admitted to possession, carriage, knowledge, non-declaration and recovery of the two gold bars each of one kilo, that A2 had handed his two checked-in baggage and one hand bag in arrival section after collecting it from conveyer belt; that A2 was his cousin; that he claimed ownership of only one gold bar; that the money for one gold bar had been arranged by himself; that this was his first time he had carried gold which was for making jewellery and for the future of his kids; that on the issue of the documents found at his residence during the search he stated that the same had been handed over to him by unknown persons on behalf of Mr. Carsten Lund for safe keeping;

2(l). In his statement recorded under Section 108 of the Customs Act, 1962, A2 admitted that he was the owner of only one gold bar; that he had given his gold bar to A1 to keep in the purple bag; that he had arranged money for the purchase of the gold bar; that this was the first time that he had carried gold; that he was in touch with A3 who had provided the contact no of MMS to him; that he was in touch with MMS for clearing the gold; the money for one gold bar had been arranged by himself;

2(m). The residential premises of A3 was searched on 26.11.2018 and Indian currency of Rs. 5,10,500/- was taken over and seized under the reasonable belief that the same were part of sale proceeds of goods smuggled by passengers without payment of Customs duty and connivance by him.

2(n). In his statement recorded under Section 108 of the Customs Act, 1962 on various occasions, A3 stated that he was not aware of A2, however, if photograph was shown, he could recognise him; that thereafter, he had recognised the photograph and stated that he knew him; that when A2 had come to CSMIA, he contacted him telephonically that he was bringing gold or TV; that then he arranged his clearance through employees of Uttam Udaan; that when the passenger had landed, A2e would call him and accordingly, he arranged through employees of Uttam Udaan; that it was decided that MMS would collect the gold in the washroom of arrival and clear the same for due considerations in cash or kind; that he had been offered two bottles of liquor and few miscellaneous items in lieu of clearing and helping the passenger; that he had facilitated the passenger two or three times in the past; that he did not recognise A1; that out of the total seized Indian currency, Rs. 1,95,000/- had been given by his mother-in-law; that Rs. 2,00,000/- had been given by his brother-in-law to his wife; that the remaining amount of Rs. 1,15,000/- was the personal savings of his wife.

2(o). A1, A2 and A3 had all filed retractions of their statements which had been rebutted by the investigating agency.

2(p). A1 and A2 during the course of investigations had produced invoices in support of purchase / ownership of the two gold bars; that they had resident visa of foreign countries;

2(q). Examination of the documents recovered from the residence premises of A1 was carried out which revealed that previously a case of gold smuggling had been registered against a Danish national viz Mr. Carsten Lund who in his statement had stated that he knew A1; that A1 had instructed him to carry the gold and earn money; that on previous occasions he had carried gold into India and handed it over to one person on the instructions of A1.

2(r). It was alleged that a case bearing F.No. SD/INT/AIU/189/2017-AP'A' pertaining to smuggling of gold weighing 510 grams valued at Rs. 13,53,032/- without declaration and payment of Customs duty was found registered against A2 .

2(s). Call Data Records (CDRs) of the mobile nos indicated that the applicants had made frequent calls to each other in the period from 01.09.2018 to 26.11.2018.

2(t). The Advance Passenger Information System (APIS) indicated that A2 had travelled frequently from May, 2015 and nearly seven times during his previous arrivals, it was found that A3 was on duty at the airport.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No.

ADC/VDJ/ADJN/81/2021-22 dated 28.06.2021 issued on 29.06.2021 through F.No. S/14-5-80/2019-20/Adjn (SD/INT/AIU/515/2018-AP'B'); ordered for the (i). absolute confiscation of the seized two gold bars of 1 kgs each, totally weighing 2000 grams and valued at ₹ 56,18,098/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and (ii). confiscation of the seized Indian currency amounting to Rs. 5,10,500/- recovered from A3 under Section 121 of the Customs Act, 1962. Further, penalties as under were imposed, (i). a personal penalty of Rs. 2,00,000/- was imposed on A1 under Section 112(a) and (b) of the Customs Act, 1962; (ii). a personal penalty of Rs. 2,00,000/- was imposed on A2 under Section 112(a) and (b) of the Customs Act, 1962; (iii). a personal penalty of Rs. 1,00,000/- was imposed on A3 under Section 112(b) of the Customs Act, 1962; and (iv). a personal penalty of Rs. 50,000/- was imposed on MMS under Section 112(b) of the Customs Act, 1962;

4. Aggrieved by the said order, applicants filed appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide her Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-563 to 565/2022-23 dated 29.06.2022 issued on 30.06.2022 through F.No. S/49-1892, 1893 & 1776/2021, upheld the absolute confiscation of the two FM gold bars, totally weighing 2000 grams and the penalties imposed on the applicants. However, the Indian currency of Rs. 5,10,500/- recovered and seized from the residence of A3 was ordered to be released.

5. Aggrieved with the above order, A1 and A1 have filed separate revision applications before the revisionary authority. The revision applications filed by A1 and A2 are similar save that in the grounds of revision A1 has sought re-export of the gold bars while A2 has prayed for release of the gold bars on payment of duty, fine etc. However, in the final prayer, both A1 and A2 have

prayed for release of the gold bars. The grounds of revision filed by A1 and A2 are as under;

- 5.01. that the impugned Order-in-Appeal passed by the Appellate Authority was arbitrary and passed without application of mind, without giving any thought to the facts of the case, the legal position applicable in the facts and circumstances of the case; that Appellate Authority had not only made factual errors while passing the impugned order-in -appeal but had completely ignored the legal position in the facts and circumstances of the case; that the OIA was bad in law.
- 5.02. that as per the procedure every passenger having dutiable goods is required to approach the proper officer at the counter and make the declaration; that in the instant case, he was not allowed to approach the proper Officer clearing the baggage and make declaration; that he had been unlawfully taken from the toilet to the AIU office and the gold seized illegally; that this fact had not been appreciated by the AA; that after retraction he had been called on 15.02.2019 and was forced to sign his earlier statement dated 26.11.2018;
- 5.03. that there was no misdeclaration of value or any other material particulars in the case of the impugned gold bars to invoke under Section 111(l) or 111(m) of the Customs Act, 1962.
- 5.04. that the impugned goods were only restricted goods and not prohibited goods; that CCTV footage was not provided; that he had been apprehended before the Customs counter;
- 5.05. that there is no prohibition to import gold; the AA could not find any motive for non-declaration; that hence, penalty cannot be imposed; that he had claimed ownership of the gold; that there was no concealment of gold; that since gold was not prohibited, absolute confiscation was harsh and AA ought to have taken a lenient view and granted redemption under Section 125 of Customs Act, 1962.
- 5.06. that government had liberalized the import of gold; that since the impugned goods were restricted goods and not prohibited goods, the respondent was duty bound to give the option of payment of fine in lieu of confiscation of impugned restricted goods as per Sub Section (1) of Section 125 of the Customs Act, 1962;
- 5.07. that they rely on the following case law;
 - (a). In Hargovind Das K.Joshivs Collector of Customs 1992(61)ELT 172(SC) the Hon'ble Apex Court remanded the case to the Collector for exercising the option of redemption under Section 125 of the Customs Act, 1962.

(b). In Universal Traders vs Commissioner -2009(240) ELT.A78(SC) also the Apex Court allowed redemption of exported goods being not prohibited.

(c). In case of Shaik Jamal Basha vs Government of India 1997 (91)ELT.277 (AP) the Hon'ble High Court held that Gold is allowed for import on payment of duty and therefore Gold in the form other than ornaments imported unauthorised can be redeemed.

(d). In VP Hameed vs Collector of Customs Mumbai 1994 (73)ELT 425 (Tri) was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of the Customs Act, 1962 or for any other reason.

(e). In Kadar Mydin vs Commissioner of Customs(Preventive) West Bengal 2011 9136) ELT 758, it was held that in view of liberalised gold policy of the Government, absolute confiscation was unwarranted.

(f). Apex Court in case of Sri Kumar Agency vs CCE, Bangalore 2008(232) ELT577 (SC), Escorts Ltd. vs CCE, Delhi-II 2004(173)ELT113 (SC) and CCE, Calcutta VS Alnoori Tobacco Products 2004 (170) ELT 135(SC) had stressed upon the concept of 'circumstantial flexibility", and held that one additional or different fact may make a world difference between conclusion in two cases and therefore disposal of cases by blindly placing reliance on a decision was not proper.

5.08. that he was the owner of the goods and claimed ownership before Adjudicating Authority and also the investigation had not proved otherwise; that goods should be released to the person who claimed ownership of goods on imposition of duty, moderate fine and penalty and has placed reliance on following judgements:

(a). Commissioner of Customs, Kandla v/s Deluxe Exports (2001 (137) ELT 1336 (Tri-Mumbai).

(b) Commissioner of Customs (PREV.), West Bengal v/s Kader Mydeen (2001 (136) E.LT. 758 (Tri. Kolkata))

(c). Union of India v/s Dhanak M. Ramji (2010 (252) ELT A102 (SC)

(d) SHAIK JAMAL BASHA v/s GOVERNMENT OF INDIA 1997 (91) E.LT. 277 (A.P.)

5.09. that the penalty cannot be imposed under section 112(a) and (b) of the Customs Act, 1962;

5.10. that the following case laws are relevant on the issue of imposition of penalty and ought to be considered for setting aside the same.,

(a). Apex court in the case of Pratibha Processors v. Union of India (1996 (88) ELT. 12 (8.C.) held that penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute.

(b). In Hindustan Steel Ltd. v. State of Orissa [1978 (2) E.L.T. U 159) (S.C.) 1970 (1) SCR 753], the Apex Court observed that the discretion to impose a penalty must be exercised judicially; a penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. In Merck Spares vs Collector of Central Excise & Customs, New Delhi (1983 (13) E.L.T. 1261 (CEGAT)), Shama Engine Valves Ltd. Bombay v. Collector of Customs, Bombay [1984 (18) E.L.T. 533 (Tri.)] and Madhusudan Gordhandas & Co. v. Collector of Customs, Bombay [1987 (29) E.L.T. 904 (Tri.)], it has been held that in imposing penalty the requisite mens rea had to be established.

- 5.11. that no person can be held liable to penalty under section 112(a) and 112(b) of the Customs Act, 1962 simultaneously; that the department had not specified the provision under which clause under section 112 of the Customs Act, 1962, the penalty was being imposed; that penalty under section 112(a) and 112(b) is neither legal nor proper and the same was liable to be set aside.
- 5.12. that the impugned order was received on 07.07.2022 by speed post and hence, the same was filed on time

Under the circumstances, A1 & A2 have prayed that the Orders-in-Appeal Nos.MUM-CUSTOM-PAX-APP-563 to 565/2022-23 dated 29.06.2022 passed by the AA deserved to be set aside and the goods should be allowed to be cleared on payment of duty, fine and penalty and /or to grant any other relief as deemed fit and proper

6. Aggrieved with the above OIA, A3 has filed a separate revision application before the revisionary authority. The grounds of revision are as under;

- 6.01. that impugned order passed by the AA was illegal, arbitrary, baseless, capricious and full of assumptions, presumptions and prejudices in as much as A3 had no role in the smuggling of the gold by 2 passengers apprehended by AIU at Mumbai Airport on 26.11.2018.
- 6.02. that impugned order displayed total non-application and misapplication of mind by the OAA and AA in as much as neither of

- them had considered any of the submissions made by A3 in reply to the SCN or in the Appeal in proper perspective by neither supplying the documents requested nor giving any findings on the request.
- 6.03. that the OAA and AA had failed to appreciate that there was no evidence of how A3 had aided and abetted A1 and A2 in facilitating the clearance of seized gold on 26.11.2018 or on any other date; that their orders were bereft of any evidence and hence, charges was therefore baseless.
- 6.04. that the impugned AIA had been passed in violation of the principles of natural justice as the OAA had failed to supply the relied upon documents despite repeated requests of A3 vide letters dated 21.06.2019, 22.02.2020, 23.07.2020, 04.09.2020, 10.10.2020, 16.10.2020 and emails dated 08.09.2020, 12.10.2020, 13.10.2020 and 19.02.2021, and the AA too had failed to redress this violation of the principles of natural justice of non-supply of relevant documents.
- 6.05. that the AA had failed to appreciate that A3 was not on duty for clearance of baggage of passengers on the day of incident and that he was admittedly at the Inline Screening Area which is outside the Baggage Arrival Hall for screening of baggage of passengers on the day of seizure of gold from the said 2 passengers in arrival hall; that A3 had been called and brought from his Section at the Inline Screening Area on the baseless suspicion for questioning on the basis of retracted statements of the loader and one passenger, who knew him but had not met or communicated with him on the day of seizure of gold; that there was no credible evidence on record to hold that either of the 2 passengers had contacted A3 on 25/26th November 2018 for any assistance or even on any of the preceding 10 days prior to his arrival at Mumbai Airport on 26.11.2018.
- 6.06. that the learned AA had failed to take into consideration that the statements relied upon had been retracted immediately and that except for the said statements, no other corroborating evidence such as details of goods cleared with quantity and dates thereof was brought on record to show that A3 had at any point in time had helped the passengers in clearing any goods through customs brought by them.
- 6.07. that the AA had failed to appreciate that the statements of A3 as well as of the two passengers and loader had been immediately retracted by each of them, as being untrue and being recorded under threat and coercion; therefore, these statements were not admissible and reliable evidence to allege the involvement of A3 in this case.
- 6.08. that the AA had failed to note that the confrontation panchanama dated 26.11.2018 merely established the fact that A3 knew the

passenger and the loader but it did not prove that A3 had abetted in the smuggling of gold; that the impugned SCN did not show in what manner and with what motive A3 had abetted the smuggling of the gold seized on 26.11.2018 or on any earlier occasion; that A3 was not even found talking or contacting either of the 2 passengers or even Shri Mayur personally on the day of seizure of gold in question.

- 6.09. that the AA had failed to appreciate that mere acquaintance with one the passenger Shri Mohammed Salim Abdul Karim was not an offence while the gold had been recovered from the other passenger Shri Khalid Abdul Rehman who had not mentioned the name of A3 and A3's statement dated 26.11.2018 also stated that he was not known to Shri Khalid Abdul Rehman; that in the now retracted statement of Shri Mohammed Salim Abdul Karim, it was said that A3 had arranged the loader to collect the gold and clear the same for monetary consideration but the confrontation panchnama records that the four persons knew each other but it does not show that that A3 had facilitated smuggling in any manner.
- 6.10. that the AA had failed to realize that the passenger, Shri Khalid Abdul Rehman from whose possession the 2 gold bars were recovered, had neither named A3 nor was he recognized by Applicant and the possession of the 2 gold bars was with Shri Khalid whom A3 did not know at all.
- 6.11. that the AA as well as the OAA had failed to appreciate that A3 was off duty from Uniform Batch duty on 26th November, the day of seizure and there is no evidence to show that the said passengers brought any gold on the day when A3 was on uniformed batch duty from 02.05.2018 to 25.11.2018 as per the duty roster records being relied upon by the department in Para 16(11) of the Show Cause Notice.
- 6.12. that the AA had failed to appreciate that Call records and forensic report of the seized mobiles of A3 did not prove his role in the present case and the department had not brought out any other case of smuggling of gold by either of the said 2 passengers during the period when A3 was posted at Airport from June 2018 to November 2018; that the said forensic report of call data records had not been supplied to A3 and in absence of which, he could not have submitted any explanation in defence; that no evidence of any deletion of any message from his phone before handing it over to the officers 26.11.2018 had been provided to A3.
- 6.13. that the AA had failed to investigate call recording content to prove that no incriminating conversations had taken place between A3 Applicant and any of the other accused persons.; that the customs department too had failed to investigate or provide such evidence on

- which it relied upon to hold that the telephonic calls between A3 and the accused persons formed evidence of his involvement in smuggling activities; that the CDRs did not contain the letterheads of the service providers viz, Vodaphone, Airtel etc
- 6.14. that the AA had failed to consider that A1 and A2 had made several written requests for CCTV footage and the court of law had also passed directions to the department to provide CCTV recordings of the date of seizure of the baggage arrival hall. However, the department had deliberately failed to provide this important piece of evidence and suppressed it from coming on record.
- 6.15. that the AA and OAA had failed to take into consideration the vital fact that Shri Nitesh Narayan Ture (the other Loader) had allegedly received instructions from Shri Mayur Sutrave for receiving gold from the passengers and not from A3 but he was not made a concerned Noticee to the SCN.
- 6.16. that the AA had failed to note that neither the seizure panchanama dated 26.11.2018 nor the confrontation panchanama dated 26.11.2018 bore any signature of A3 which can establish that he was present during the said two panchanamas; that the confrontation panchanama did not bear the signatures of even the two passengers who were alleged to have identified A3 or MMS to establish their presence and the alleged identification of the accused persons with each other as mentioned therein.
- 6.17. that the AA had failed to note that there was not a single call to or from A3 after 22nd November, 2018 by the passenger Shri Mohammed Salim Abdul Karim or Shri Mayur Sutrave; that there were no transcripts of even a single call and there is no call record of 26.11.2018, the day of seizure.; that the last call from Shri Salim to A3 was on 9.11.2018 and from A3 to Shri Salim was on 16.11.2018 and that similarly, as per CDR of A3 and Mayur, the last call from A3 to Shri Mayur was on 22.11.2018 and from Mayur to A3 was on 19.11.2018; that the CDRS only showed that they were known to each other but do not show any complicity or role of A3 to the seized gold from the passengers on 26.11.2018.
- 6.18. that the AA had failed to note that arrival dates and times of the passenger, as per APIS system, in respect of Shri Mohammed Salim Abdul Karim and duty date and hrs, as per the official duty roster of A3, during the period from June 2018, upto the month of the incident did not establish anything because more than 30 officers alongwith A3 were posted in the A Batch and the duty timings of these 30 other officers also tallied with the arrival timings of the passenger; that prior to that date there was neither any evidence of seizure of goods from the said passengers nor is their confession of smuggling on the days when A3 was on duty in the baggage hall.

- 6.19. that A3 had submitted that the CDRs of these other 30 officers had never been investigated to find out if there was any other officer in the A Batch who was in contact with the said passengers for aiding them in clearance of the smuggled gold; therefore, in the absence of this investigations, it could not be concluded that Shri Salim had deliberately scheduled his said arrivals because of the presence of A3 at the airport or because of Shri Salim's arrangements with some other officer.
- 6.20. that the AA had failed to consider that the gold had been seized from the possession of only one passenger, i.e. A1 but his call records were never investigated or tallied with duty timings of either A3 or any other person; Proper investigations in this regard would have revealed no connection of A3 with the accused passenger, Shri Khalid Abdul Rehman from whose possession the gold under seizure had been recovered.
- 6.21. that the AA had failed to appreciate that there was no record of any specific case in which A3 had allegedly helped the said passengers in the past and in the present case admittedly he was alleged to help them in the clearance of gold on 26th November 2018 but had not rendered any help whatsoever.
- 6.22. that the AA had failed to appreciate that A3 was in no position to help A1 and A2 in clearing the smuggled gold as on 26.11.2018, he was posted in Inline Baggage Screening which was away from the Customs Arrival Hall from where the passengers are cleared; that no evidence was available that A3 was present in the Baggage Hall to aid and abet in smuggling of gold as alleged and on the other hand there was recorded evidence that A3 was called to the office of the AIU from his posting at the Inline Screening Section after the seizure of gold from the passengers on 26.11.2018; that there are no text transcripts of any call records to prove the role of A3.
- 6.23. that it was alleged that the modus operandi was that the gold would be handed over to the loader Shri Mayur Sutrave in the toilet of the arrival hall who would clear it and hand over to the passenger who would be waiting outside the airport; that A3 had no role to play in such activity as he was not posted in the Customs Arrival Hall to have aided either the passengers or the loader to clear customs.
- 6.24. that the only allegation against A3 that survives was that several months back it was he who had introduced the loader, Shri Mayur Sutrave to the passenger Shri Mohammed Salim; that for mere introduction he could not be held responsible for acts of commission and omission committed by MMS.
- 6.25. that the AA had failed to realize that the details of removing gold were told by Shri Mayur Sutrave to Shri Nitesh Ture and not by A3 to Shri Nitesh Ture and as such the said statement of Shri Nitesh

- Ture was hearsay and vague and as such it carried no evidentiary value
- 6.26. that the AA had appreciated and favourably considered the fact that the Indian Currency of Rs 5,10,500/- was satisfactorily explained by A3 in as much as Rs.1,95,000/- was given by his mother in law and Rs. 2,00,000/- by his brother in law to the wife of A3 and the balance Rs.1,15,000/- was from the personal savings of his wife over the years and was pleased to order release of the Indian Currency under seizure
- 6.27. that the entire case was based only on assumptions and presumptions against him and the only basis being relied upon is his statement and other accused persons; that these statements had been recorded under threats, duress and coercion and which had been retracted
- 6.28. that it was settled law that retracted statements/confessions by the accused and co-accused cannot be relied upon to impose penalty for any purpose whatsoever unless the contents of such statements are corroborated in material particulars; A3 has relied upon the case of
- (a). Vinod Solanki, 2009(233) ELT157 (SC), where the Apex Court had held a confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon
- (b) In Ram Prakash Versus Collector of Customs, New Delhi, 2003 (161) ELT882, where the CESTAT had held that as the statements have been retracted by the appellants immediately the goods cannot be confiscated and the appellants cannot be penalised solely on the basis of such statements,"
- (c).In Mohtesham Mohd Ismail vs Spl Director, Enforcement Directorate reported in 2007 (220) ELT 3 (SC) the Apex Court had held that a confession of a co-accused person cannot be treated as substantive evidence
- d). In Francis Stanley@ Stalin vs Intelligence Officer, Narcotic Control Bureau, Thiruvanthapuram (2006 (13) SC 386), Apex Court has emphasized that confession only if found to be voluntary and free from pressure, can be accepted.
- 6.29. that penalty was not imposable on him as there was no abetment; that A3 has relied on the following case laws;
- (a). In M Vasi 2003 (151) ELT 312 (Tri-Mumbai),
- (b). In the case of RP Hussain 1990 (49) ELT 452 (Tribunal)
- 6.30. that retractions had not been taken into account by the AA; that in view of the facts narrated above, submissions etc imposition of penalty on A3 was unjustified.

Under the circumstances, A3 has prayed that penalty imposed by OAA and upheld by the AA i.e. in the OIO and OIA deserves to be set aside; the amount of Rs 7,500/- paid as Penalty may be directed to be refunded and grant any other reliefs.

7(a). Personal hearing of the case was scheduled for 07.09.2023, 14.09.2023. Ms. Reema Deshnaare, Advocate appeared on 07.09.2023 on behalf of A1 and A2 and submitted that applicants brought some quantity of gold. She further submitted that gold is not a prohibited item. She requested to allow redemption of gold on reasonable fine and penalty.

7(b). Shri. H.A Sayed, Consultant and A3 appeared for personal hearing on 14.09.2023 and they reiterated earlier submissions. They submitted an additional written submission on the matter. They further submitted that apart from statements, which were retracted immediately, no other evidence has been brought against applicant. They requested to drop the penalty against the applicant.

7(c). In their additional written submission dated 14.09.2023 handed over during the personal hearing, A3 has reiterated the earlier submissions laying stress on the fact that the statements had been retracted; that principles of natural justice had not been followed as relied upon documents had not been supplied to him inspite of repeated reminders; that he was not on duty in the baggage hall on the date of the incident; mere acquaintance of A2 was not an offence; that forensic examination of his mobile phones did not bring out any evidence; that there was no allegation of any benefit to him; that the Indian currency had been released.

8. The Government has gone through the facts of the case. A1 and A2 had been intercepted after they had crossed the green channel. A1 had not declared the gold bars to Customs as required under Section 77 of the Customs Act, 1962. A1 informed that though both the gold bars had been found in the bag carried by him, one gold bar belonged to him and the other belonged to A2, who too had not declared the gold bar. The quantity of gold recovered from them is quite substantial; gold was in primary form. The quantum indicates that the same was for commercial purpose. The confiscation of the gold is therefore justified and thus, A1 and A2 had rendered themselves, liable for penal action.

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 Applicants i.e. A1 and A2, thus liable for penalty.

11. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of 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.

12. Government observes that the quantity of gold was quite substantial. Over 1 kg of gold was recovered from each of them i.e. from A1 and A2. Investigations carried out revealed that both A1 and A2 were found involved in a previous case. The cases were separate. (a). Documents recovered from the residence of A1 indicates that way back in 2014, a person apprehended by Customs for smuggling of gold had named that the same had been done by him at the instance of A1. Clearly, A1 is a repeat offender and the plea taken by him in the present case, that he was the owner of one gold bar and had brought it for the future of his kids, holds no credence. (b). Investigations carried out revealed that A2 was found involved in a case of smuggling of 510 grams of gold in 2017. A1 and A2 are both habitual offenders.

13. 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 quantum of gold being substantial, gold was in primary form, they being habitual offenders, non-declaration of the gold, etc have all been considered by the OAA who had rejected the plea of ownership of the gold bars. Thus, this is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of two gold bars. The redemption of the gold especially considering that they both were habitual offenders, will encourage non-bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Customs authorities the passenger gets away with smuggling and if not, he has the option of redeeming the gold. 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 order of the Appellate authority upholding the order of the adjudicating

authority is therefore liable to be upheld and the Revision Application is liable to be dismissed.

14. The plea taken by A1 and A2 that they had retracted their statements does not come to their rescue. The fact remains that a substantial quantity of gold had been recovered from them (i.e. A1 and A2). The lower authorities have dealt with the retractions and had discussed the same in their orders. Under the said circumstances, Government finds that the issue of retraction raised by the applicants as far as it relates to A1 & A2 does not alter the factual matrix. Government does not find any substance in this averment.

15. The Government finds while imposing penalties on A1 and A2 under Section 112(a) and (b) of the Custom Act, 1962, the lower authorities have considered the role played by each of them in the smuggling activity and had appropriately imposed a penalty of ₹ 2,00,000/- each. Government finds that the penalty imposed on A1 and A2 is commensurate with the omissions and commissions committed by them and is therefore, not inclined to interfere in the same.

16(a). On the issue of the penalty imposed on A3, he has pleaded that penalty has been imposed on him only on the basis of statements which had been retracted. No other evidence has been brought against him; that merely, on hearsay of other co-accused, penalty was imposed on him; that as per the statements of A1, A2, it was alleged that in the past too, he had assisted A1 and A2 in smuggling however, no investigations had been carried out nor any charges for past clearance were levelled on him; that the Appellate Authority had released the Indian currency seized from the residence of A3 on the grounds that investigation had not been carried out; that at the relevant time of interception, he was at Inline Baggage Section which was away from the arrival hall, that CCTV had not been made available, etc.

16(b). Government observes that it has been alleged that A3 had aided and abetted A1 and A2 in the smuggling of gold. Government notes that investigations has not brought out direct evidence of involvement of A3. Reliance was placed only on statements which had been retracted and no other evidence of involvement was found. Currency found at the residence of A3 has been released on the specific ground that investigations had not been carried out and A3 has appropriately accounted for the currency. Government notes that the charge of 'aiding and abetting to smuggling' and that to by a Customs Officer is a very serious offence. The same cannot be based merely on statements, that too retracted subsequently. Corroboration of the statement should have been carried out with CCTV footage of the area which would have indicated presence of A3 in the baggage hall or interaction with A1, A2 or others. CDRs also did not bring reasonable evidence and are on weak footing since, it only indicated that A3 knew A1 and A2. Same is the case of duty roster which did not prove that A3 had actually participated or assisted in the act of smuggling.

16(c). Government notes that in Vinod Solanki vs. U.O.I, reported in 2009 (13) S.T.R. 337 (S.C.) [18-12-2008], the Apex Court had held as under;

22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. {See Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras [(1999) 6 SCC 1]}

16(d). All these indicate that sufficient evidence was not unearthed against A3 to hold the charge of abetment to the smuggling. Government finds that A3 has explained the currency seized from his residence, and the same has been accepted by the Department as Order of Appellate Authority has not been

challenged. Charge of assisting in smuggling is required to be established either through direct evidence or through recovery of benefits derived by such acts. Government finds that investigation has not made out sufficient grounds and that no direct evidence was available to implicate A3 in the smuggling of gold. Moreover, the money recovered from his residence has been properly accounted for, released and respondent has not filed any revision application on the same. Considering all these, Government is inclined to set aside the penalty imposed on A3 for lack of evidence.

16(f). In view of the same, Government finds that the penalty of ₹ 1,00,000/- imposed on A3 under Section 112(a) and (b) of the Customs Act, 1962 is not sustainable for the aforesaid reasons, and is inclined to set aside the same

17. In view of the above, Government modifies the OIA passed by the AA only to the extent of setting aside the penalty imposed on A3 under Section 112(a) and (b) of the Customs Act, 1962. The penalty of ₹ 1 lakh (Rupees One lakh only) imposed on A3 is accordingly, set aside. In other words, the absolute confiscation of the two gold bars weighing 2000 gms alongwith the penalties of ₹ 2,00,000/- each, imposed on A1 and A2 are upheld.

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


(SHRAWAN KUMAR)

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

823-
ORDER NO. 825/2023-CUS (WZ)/ASRA/MUMBAI DATED 06.11.2023

To,

1. Shri. Khalid Abdul Rehman, A-504, Dilshad Apartment, Bandivali Hill Road, Jogeshwari (West), Mumbai - 400 102,
2. Shri. Mohammed Salim Abdul Karim, House No. 5, Sagar Tower, Fairdeal Road, S.V. Road, Jogeshwari (West), Mumbai - 400 102,.
3. Shri. Vasant Kaka Kadam, **Address no. 1** : C-2/304, Ashar Estate 'C' Co-op. Hsg. Soc. Ltd., Shreenagar, Wagle Estate, Thane (West), Thane

- 400 604, **Address no. 1** : A / 8, Shubhalakshmi CHSL, Shreenagar,
Wagle Estate, Thane (West), Thane - 400 604,
4. Principal Commissioner of Customs, Chhatrapati Shivaji
International Airport, Level - II, Terminal - 2, Sahar, Andheri (East),
Mumbai - 400 099.

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