

F.No. 371/118/B/2021-RA
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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. 371/118/B/2021-RA : Date of Issue : 30-01-2024
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ORDER NO. 39-92 /2024-CUS (WZ)/ASRA/MUMBAI DATED 29-01-2024
OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE
GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT,
1962.

Applicant No. 1. : Shri. Irfan Gulam Ahmed,		APPLICANTS
Applicant No. 2. : Shri Divyesh P. Shah,		
Applicant No. 3. : Shri. Akshay A Patel,		
Applicant No. 4. : Shri. Nitin Popatlal Shah		

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No. MUM-
CUSTM PAX-APP-1442/2020-21 dated 29.01.2021 issued on
12.02.2021 through [F.No. S/49-900/2019] in respect of
Applicant No. 1 & OIA No. MUM-CUSTM PAX-APP-670-
672/2020-21 dated 14.01.2021 issued on 20.01.2021
through [F.No S/49-899,901,902/2019] in respect of
Applicant No. 2, 3 & 4 passed by the Commissioner of
Customs (Appeals), Mumbai – III.

ORDER

These four revision applications have been filed by (i) Shri. Irfan Gulam Ahmed (herein referred to as Applicant No 1) against OIA No MUM- CUSTM PAX-APP-1442/2020-21 dated 29 01.2021 issued on 12.02.2021 through [F No. S/49-900/2019]; (ii). Shri Divyesh P. Shah, (herein referred to as Applicant No 2), (iii) Shri Shri. Akshay A Patel (hereinafter referred to as Applicant No 3) and (iv). Shri. Nitin Popatlal Shah (hereinafter referred to as Applicant No 4) against the Orders-in-Appeal No. MUM-CUSTM PAX-APP-670-672/2020-21 dated 14.01.2021 issued on 20.01.2021 through [F.No. S/49-899,901,902/2019] passed by Commissioner of Customs (Appeals), Mumbai – III.

2 01 Brief facts of the case are that on 20-08-2003, one International passenger viz Ms Neha Jayant Dave and the Applicant no 1 who was a domestic passenger arrived by the same flight from Bangkok. On the way she handed over a bag to Applicant 1 who was intercepted on suspicion by Customs in the passage area after Green Channel and before the Exit gate. The Customs Officers examined the bag and it was found to contain 26 plastic bundles containing white and coloured precious stones weighing 41.840 Kgs purported to be Cubic Zirconia. The goods were sent to SEEPZ, Mumbai for valuation, wherein it was found to contain precious and semi-precious stones like Cubic Zirconia, cut and polished Rubies and cut and polished Sapphires valued at Rs 35,39,315 88 (CIF) and Rs 50,56,165.55 (LMV).The same were seized in the reasonable belief that the same were smuggled into India and hence were liable for confiscation under the Customs Act, 1962

2 02 On the basis of Confrontation Panchnama dated 21-08-2003, statements recorded under Section 108 ibid and call data details of their mobile numbers it

was found that both of them were smuggling impugned goods on monetary consideration for Applicant No. 2 (staff of DM3Gem), Applicant No 3 (Partner of Applicant No.4) and Applicant No.4 (owner of DM3Gem). Though they all denied acquaintance of each other, it was found that they were actively in touch with each other by calling from their mobiles at the relevant time of the impugned smuggling. Even a mobile pertaining to Applicant No. 3 was being used by Applicant No. 4. The mobile pertaining to Applicant No.1 was seized from the possession of the international passenger, Ms Neha Dave. The Applicant no 2, 3 & 4 never appeared before the investigating agency even after the issuance of repeated summons. The Adjudicating Authority i.e. the Commissioner of Customs, Airport, Mumbai vide OIO No. COMMR/PVR/ADJN/11/2006 dated 31-07-2006 ordered for absolute confiscation of the impugned goods; imposed penalty of Rs.3,00,000/- on the international passenger and Applicant No.1 under Section 112 (a) of the Customs Act,1962; imposed penalty of Rs.1,00,000/- on Applicant no. 2 & 3 and imposed penalty of Rs.2,00,000/- on Applicant no. 4 under Section 112(a) of the Customs Act, 1962.

2 03 Aggrieved by the impugned Order, the Applicant No. 2, 3 & 4 filed appeal in CESTAT. Hon'ble Tribunal vide Order No. A/86002-86004/17/SMB dated 10-02-2017 observed that the applicants had sought cross examination and the adjudicating authority has not recorded whether he is accepting or rejecting the request of the cross-examination. CESTAT set aside the impugned Order and remanded the matter to the Adjudicating Authority with a direction to grant opportunity of cross-examination and then decide the case.

3. In view of the CESTAT Order, Additional Commissioner vide OIO No ADC/AK/ADJN/77/2019-20 dated 24-06-2019 provided the opportunity of cross-

examination to the applicant and then decided the Order wherein the penalty imposed on the Applicants vide the earlier OIO were unchanged

4. Aggrieved by this order, A1, A2, A3 & A4 filed appeals before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai who vide his (i) OIA No MUM- CUSTM PAX-APP-1442/2020-21 dated 29.01.2021 issued on 12.02.2021 through [F.No. S/49-900/2019] in respect of Applicant No. 1 and (ii) Orders-in Appeal no. MUM-CUSTM PAX-APP-670-672/2020-21 dated 14 01.2021 issued on 20.01.2021 through [F.No. S/49-899,901,902/2019] in respect of Applicant No 2, 3 & 4 upheld the OIO dated 24-06-2019 passed by Additional Commissioner.

5 Aggrieved with the above order, A1, A2, A3 and A4 have filed these 4 revision applications on the following grounds of appeal,

[A]. The grounds of revision filed by A1 were raised before the Appellate Authority and are reiterated as follows;

- 5.01. that the goods which were seized under the panchnama had no foreign marking and that the copy of the panchnama had not been given to the applicant and that there was no signature of the applicant; that the statement of the applicant was written by the Officers and was asked to sign the same;
- 5.02. that it is the case of the department that there are communications between mobile numbers which has been referred in the SCNs, but no printouts have been annexed;
- 5.03 that the applicant had no knowledge about the contents of the goods as the goods belonged to the international passenger viz Ms Neha Dave;
- 5.04 that the applicant has not accepted anything in the confrontation panchnama or in the statements and that the documents have been drafted by the AIU officers to suit their purpose;
- 5.05 The advocate of the applicant has submitted that to prove the facts of their client, they should be allowed to cross examine such witness who have drawn the seizure panchnama of goods and recorded the statements;

5.06 That the applicant may be exonerated in the adjudication and legal proceedings

In view of the above, the Applicant 1 prayed that he may be exonerated in the adjudication and legal proceedings.

[B]. The grounds of appeal filed by Applicant No. 2, 3 & 4 are as under

- 5.07. That the order passed by the Appellate Authority is bad in law and has been passed without application of mind;
- 5.08. That the applicant had denied knowing Applicant 1, Applicant 3 and Ms Neha Dave and that there is no evidence adduced by the department to show any nexus of the applicant with the said persons;
- 5.09 That the case put forth by the department does not show the involvement of the Applicants; that the applicant had nothing to do with the seized goods and that nothing incriminating was found during the search of the office and residential premises of the applicants;
- 5.10. That the applicant has been implicated on the mere statements of the co-noticee who alleged that the seized cubic zirconia was to be handed over to the applicant, without any investigation to substantiate the truthfulness of the same;
- 5.11. That Ms Neha Dave and the Applicant 1 had not implicated the name of the applicants in their earlier statements and had implicated in his later statement which is an afterthought and at the behest of the person who has master minded the entire operation;
- 5.12. That the Adjudicating and the Appellate Authority ought to have accepted that Applicant 2 had lost his mobile phone bearing No.9820527499 in the second week of August 2003;
- 5.13. That the impugned order has sought to give emphasis on the alleged calls exchanged on the mobile and landline phones which is improper; that no

independent investigations have been carried out to implicate the applicant;

In view of the above, the Applicants requested to set aside OIA No MUM-CUSTM-PAX-APP-670 to 672 dated 14-01-2021 or to remand the matter back to the Adjudicating authority for fresh adjudication with a direction to observe principles of natural justice.

6. Personal Hearing in the case was scheduled on 15-12-2023. Shri A.M Sachwani and Shri V.M. Advani, Advocates appeared for the hearing and submitted that the Adjudicating Authority and the Appellate Authority has not considered the cross-examination of officers. They further submitted that main accused is the person who brought contraband on her own and applicants have nothing to do with the same. They further submitted additional written submissions on the matter. They further submitted that the applicants have been penalised without any evidence. They requested to set aside the penalty on the applicants.

7. Government has gone through the facts of the case. Government finds that this case was remanded by the CESTAT to the Original Adjudicating Authority for decision after giving opportunity of cross examination. On going through the Additional Commissioner's OIO dated 24-06-2019, it is observed that opportunity for cross examination was allowed to the Applicants.

8. Government finds that in this case there is no dispute that the seized gold was not declared by the Applicants 1 to the Customs. Further, from the statements of Applicant 1 and Ms Neha Dave, it is very clear and also admitted by them that the bag seized by the authorities was handed over to Applicant 1 who is a domestic passenger, by Ms Neha Dave, an International passenger for clearing the same through the green channel without customs check. Later, during the

investigations, they changed their story but the fact remained, that the goods were seized from Applicant 1 and the same was not disputed by him. The case was adjudicated by the Commissioner earlier and had ordered absolute confiscation of the goods seized and penalty was imposed on the applicants and the international passenger viz Ms Neha Dave. Government notes that appeal was filed in Tribunal against the said Commissioner's Order only by Applicant No. 2, 3 & 4 which shows that Applicant 1 and the international passenger had accepted the Order. Subsequently Applicant No. 1 and the Applicant's No.2, 3 & 4 had filed appeal against the Additional Commissioner's Denovo Order wherein personal penalty imposed by the Commissioner in his Order dated 31-07-2006 was not changed. Commissioner Appeal also upheld the Additional Commissioner's Order. The Revision Application has been filed on the grounds that the Adjudicating and the Appellate authority had not considered the submissions made during the cross-examination of the officers and that there are inconsistencies in the investigations.

9 Government notes that for the denovo proceedings, the Additional Commissioner to arrive at a proper decision, has allowed the cross examination, and also considered the submissions made during the cross-examination. He has considered in detail the role played by A1, A2, A3 and A4 and has then concluded and held at Para 43 as under

*".....I observe that the interception and recovery of the seized goods from Mr. Irfan Gulam Ahmed, who was handed over the goods by Ms Neha Dave for clearance from green Channel without customs check, is not in dispute.Thus I find that facts of the case, confessional statements of both the passengers and call details establishes link with other three noticees Mr Nitin P Shah, Mr Akshay A Patel and Mr. Divyesh P Shah. Mr Nitin P Shah appears to be a perpetrator in smuggling of cubic Zirconia in the instant case and Mr Akshay A Patel and Mr. Divyesh P Shah were associating him in equal; manner. **I also find that cross-examination of Panchnama Officer and Superintendent who had recorded the statement***

has not brought forth any new facts which would necessitate respite to other three noticees.”

10. Government notes that all aspects of the case have been looked into by the Adjudicating and the Appellate authority while imposing the penalty on the applicants. The applicants have not been able to counter the charges levelled and could not bring any contrary evidence. The goods were seized from Applicant 1 and he could not dispute the same or produce any evidence relating to the goods like purchase invoice etc. Government notes that the Applicant No. 2, 3 & 4 have submitted that they neither knew the international passenger nor Applicant 1. However the call records indicate that they were in constant touch with Applicant 1 on the material day. The Applicants have not shed any light in respect to the mobile conversation. Government finds that the adjudicating authority has dealt with the same in detail in the Denovo Order and held that the investigations had concluded that there was a nexus between the International passenger and Applicant 1 and between Applicant 1 and Applicant No.2, 3 & 4 and hence they were liable for penalty.

11. In view of the above Government finds that the Order issued by the Original Adjudicating Authority and upheld by the Appellate Authority is just and correct. However on the issue of amount of penalty imposed on the international passenger, A1, A2, A3 and A4 under Section 112(a) of the Customs Act, 1962, Government observes that the collective amount comes to Rs 10 Lakhs (Rs. 3L + Rs. 3L + Rs.2L + Rs 1L+ 1 IL), which is nearly 28% of the seizure amount of the precious and semi-precious stones valued at Rs.35,39,315.88 (CIF) and Rs.50,56,165.55 (LMV). Government finds that the same is harsh and excessive and not commensurate with the omissions and commissions committed. Government is inclined to reduce the penalty imposed on Applicant 1, 2, 3 & 4

Since the International passenger viz Ms Neha Dave has not contested against the penalty imposed on her, the penalty remains the same as in the OIO.

12. In view of the above Government modifies OIA No. MUM- CUSTM PAX-APP-1442/2020-21 dated 29.01.2021 and OIA Nos.MUM-CUSTM PAX-APP-670-672/2020-21 dated 14.01.2021 and reduces the penalties imposed on A1, A2, A3 and A4 as under;

- (i). penalty of Rs. 3,00,000/- imposed on A1 under Section 112(a) of the Customs Act, 1962 is reduced to Rs. 2,00,000/- (Rupees Two Lakh only).
- (ii). penalty of Rs. 1,00,000/- imposed on A2 under Section 112(a) of the Customs Act, 1962 is reduced to Rs. 50,000/- (Rupees Fifty Thousand only).
- (iii). penalty of Rs. 1,00,000/- imposed on A3 under Section 112(a) of the Customs Act, 1962 is reduced to Rs. 50,000/- (Rupees Fifty Thousand only).
- (iv). penalty of Rs. 2,00,000/- imposed on A4 under Section 112(a) of the Customs Act, 1962 is reduced to Rs. 1,00,000/- (Rupees One Lakh Only).

13. The 4 Revision applications filed by A1, A2, A3 and A4 are decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER No 89-92 /2024-CUS (WZ)/ASRA/MUMBAI DATED 29.01.2024

To,

- 1 Shri. Irfan Gulam Ahmed, 133/135, Isap Building, B. K. Street, Pydhonie, Mumbai-400003.
- 2 Shri Nitin Popat Lal Shah, 8/13, Verma Nagar, Andheri (East), Mumbai-400061
- 3 Shri Akshay A Patel, Patel Building, Bazr Peth, Kasara Haat, Kalyan (West), Thane-421301

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4. Shri. Divyesh P. Shah, Flat no. 74 & 10, Gopal Kunj, Sarojini Naidu Road, Kandivali (West), Mumbai-400067.
5. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
6. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to

1. Sachwani, Advani, Heera & Shah, Advocates, Nulwalla Building, Ground Floor, 41, Mint Road, Opp. G.P O, Fort, Mumbai - 400 001
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.