

SPEED POST



F. No. 375/15/B/2020-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue.....29/3/22

Order No. 109/22-Cus dated 29-03-2022 of the
Government of India passed by Sh. Sandeep Prakash,
Additional Secretary to the Government of India, under Section
129DD of the Customs Act, 1962.

Subject : Revision Application filed, under Section 129 DD
of the Customs Act 1962 against the Order-in-
Appeal No. CC(A)/Cus/D-I/Air/438/19-20 dated
11.11.2019 passed by the Commissioner of
Customs (Appeals), New Delhi.

Applicant : Ms. Nazima Parvin, Karwar, Karnataka.

Respondent : Commissioner of Customs, IGIA, New
Delhi.

ORDER

A Revision Application No. 375/15/B/2020-RA dated 30.01.2020 has been filed by Ms. Nazima Parvin, Karwar, Karnataka (hereinafter referred to as the Applicant) against the Order-in-Appeal No. CC(A)/Cus/D-I/Air/438/19-20 dated 11.11.2019 passed by the Commissioner of Customs (Appeals), NCH, New Delhi. Commissioner (Appeals) has upheld the Order-in-Original No. 228/AS/JC/2017 dated 24.10.2017, passed by the Joint Commissioner of Customs, IGIA, New Delhi, whereby, 28 pieces of gold bars and 40 pieces of gold chains, collectively weighing 3725.92 gms and valued at Rs. 87,90,963/-, were confiscated absolutely under Sections 111(d), 111(j), 111(l), and 111(m) of the Customs Act, 1962. Penalty of Rs. 17 Lakhs was also imposed on the Applicant under Sections 112 and 114AA of the Customs Act, 1962.

2. Brief facts of the case are that the Applicant arrived, on 05.10.2015, at IGI Airport, New Delhi, from Dubai. She was intercepted by the officers of Customs near the exit gate after she had crossed the customs green channel and enquired if she was carrying any dutiable goods to which she replied in negative. During personal search of the Applicant, 28 pieces of gold bars and 40 pieces of gold chains, collectively weighing 3725.92 gms and valued at Rs. 87,90,963/- were recovered, found concealed around both the legs of the Applicant, by wrapping them in three packets of paper/adhesive tape and securing them with rubber bands. On inquiry, the Applicant could not produce any evidence or documents in support of licit possession of the said gold items. In her statement dated 06.10.2015, tendered under Section 108 of the Customs Act,

1962, the Applicant admitted the recovery of the gold items. She further stated that the gold was handed over to her by one Sajjad in Dubai to be handed over to a person at Delhi airport who would be standing outside the airport with her name plate; that she would be getting Rs. 20,000/- for this job; and that she did not declare the said gold at the red channel to save the customs duty. The Joint Commissioner of Customs, IGIA, New Delhi, confiscated absolutely the gold items and imposed a penalty of Rs. 17 lakhs on the Applicant. Aggrieved, the Applicant filed an appeal before the Commissioner (Appeals), who, vide the impugned Order-in-Appeal, rejected the appeal.

3. The instant revision application has been filed, mainly, on the grounds that the Panchnama drawn on the spot was not properly drawn; that gold is not a prohibited item; and that the gold items should be released to her on payment of applicable duty, reasonable fine and penalty.

4. Personal hearing was granted on 04.02.2022, 23.02.2022 and 28.03.2022. None appeared for either side nor any request for adjournment has been received. Since sufficient opportunities have been granted, the matter is taken up for disposal on the basis of records.

5. The Government has carefully examined the case. Gold bars and chains were not declared by the Applicant, even on specific query by the customs officers on her arrival, in violation of Section 77 of the Customs Act, 1962. In her statement dated 06.10.2015 tendered under Section 108 of Customs Act, 1962, the Applicant admitted that she had concealed the gold items

by tying them up on her legs with rubber bands to evade detection and payment of duty. There is nothing on record to establish that this statement was retracted, at any stage. This aspect is even more significant as the Applicant was arrested after the recording of her statement and produced before the Court. Thus, she had ample opportunity as well as legal advice to retract the statement, if it was not voluntary. As such, it can be concluded that the statement was voluntary. The Hon'ble Supreme Court has, in the case of K. I. Pavunny [1997 (90) ELT 241 (SC)], held that a confessional statement of accused recorded under Section 108 of the Customs Act, 1962, if found to be voluntary, can form the sole basis for conviction. Even earlier, in the case of Surjeet Singh Chhabra [1997 (89) ELT 646 (SC)], the Apex Court has held that confession statement made before customs officer (though retracted within six days) is an admission and binding. In the present case, as held hereinabove, the statement is voluntary. Therefore, it is undoubtedly binding. In this light, the doubts raised by the Applicant about the panchnama proceedings can also not be countenanced since the admissions made in the statement are in line with the panchnama proceedings.

6. Section 123 of Customs Act 1962 reads as follows:

"123. Burden of proof in certain cases.

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person, —

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold and manufactures thereof watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."

Hence, in respect of the gold and manufactures thereof, the burden of proof that such goods are not smuggled is on the person, from whom goods are recovered. In the present case, the gold items were not declared by the Applicant to the customs officers. No documents evidencing licit acquisition and possession have also been placed on record. Further, the manner of concealment makes the intent to smuggle gold clearly evident. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. The Government observes that Hon'ble Supreme Court, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], has held that for the purpose of Section 111(d) of the Customs Act, 1962, the term *"Any prohibition" means every prohibition. In other words all types of prohibition. Restriction is one type of prohibition*". Gold is not allowed to be imported freely in baggage and it is permitted to be imported by a passenger subject to fulfillment

of certain conditions. In the case of M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi [2003(155) ELT423(SC)], the Apex Court has held that *"if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods"*. Further, in the case of UOI & Ors vs. M/s Raj Grow Impex LLP & Ors (2021-TIOL-187-SC-CUS-LB), the Hon'ble Supreme Court has followed the judgments in Sheikh Mohd. Omer (supra) and Om Prakash Bhatia (supra) to hold that *"any restriction on import or export is to an extent a prohibition; and the expression "any prohibition" in Section 111(d) of the Customs Act includes restrictions."*

7.2 In the case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI, Chennai [2016(341) ELT65(Mad.)], the Hon'ble Madras High Court has summarized the position on the issue, in respect of gold, as under:

"64. Dictum of the Hon'ble Supreme Court and High Courts makes it 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", in Section 2 (33) of the Customs Act, 1962----."

7.3 The original authority has correctly brought out, in para 3.3 to 3.5 of the Order-in-Original, that the gold is allowed to be imported subject to certain conditions and that, in this case, the conditions, subject to which gold could have been legally imported, have not been fulfilled. Thus, following the ratio of

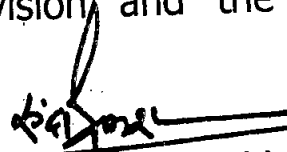
the aforesaid judgments, there is no doubt that the subject goods are 'prohibited goods'.

8. The original authority has denied the release of offending goods on payment of redemption fine under Section 125 of Customs Act, 1962. In terms of Section 125, the option to release 'prohibited goods', on redemption fine, is discretionary, as held by the Hon'ble Supreme Court in the case of Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]. In the present case, the original authority has refused to grant redemption as the Applicant attempted to smuggle the goods by ingenious concealment, with intent to evade Customs Duty. The original authority has also been guided by the objectives of Government policy restricting import of gold, in refusing redemption. In the case of Raj Grow Impex (supra), the Hon'ble Supreme Court has held "*that 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 relevant considerations*". Further, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT 1154 (Mad.)}, the Hon'ble Madras High Court, after extensive application of several judgments of the Apex Court, has held that "*non-consideration or non-application of mind to the relevant factors, renders exercise of discretion manifestly erroneous and it causes for judicial interference*". The Hon'ble High Court has further held that "*when discretion is exercised under Section 125 of the Customs Act, 1962, the twin test to be satisfied is 'relevance and reason'*". It is observed that the original authority has, in the instant case,

after appropriate consideration, passed a reasoned order, refusing to allow redemption for relevant consideration. Thus, the discretion exercised by the original authority does not merit intervention.

9. The case laws relied upon by the Applicant in support of various contentions are not applicable as these have been passed without noticing the dictum of Hon'ble Supreme Court, as above.

10. In view of the above, the impugned Order of the Commissioner (Appeals) does not merit revision and the revision application is rejected.


(Sandeep Prakash)


Additional Secretary to the Government of India

Ms. Nazima Parvin,
R/o Bukhari House, Good Luck Road, 6th Cross, Post-Shirali
Bhatkal, Karwar-581 320, Karnataka.

Order No. 109/22-Cus dated 29-03-2022

Copy to:

1. The Commissioner of Customs, IGIA, New Delhi.
2. The Commissioner (Appeals), NCH, New Delhi.
3. Sh. Prakash K. Shingrani, Advocate, 12/334, Vivek New MIG Colony, Bandra (E), Mumbai-400 051.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

(Ashish Tiwari), AC(RA)