SPEED POST

F.No. 372/09/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...13/12/21..

Order No. 283 /21-Cus dated 13-12- 2021 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. KOL/CUS(Prev)/PTPL/AKR/192/2020 dated 27.02.2020 passed by the Commissioner of Customs (Appeals), Kolkata.

Applicant : Sh. Md. Sarfaraz, North 24 Paraganas, (WB)

Respondent : Commissioner of Customs (Preventive), Kolkata.

ORDER

A Revision Application No. 372/09/B/2020-RA dated 14.07.2020 has been filed by Sh. Mohd. Sarfaraz, North 24 Parganas, West Bengal (hereinafter referred to as the Applicant) against the Order-in-Appeal No. KOL/CUS(Prev)/PTPL/AKR/192/2020 dated 27.02.2020 passed by the Commissioner of Customs (Appeals), Kolkata. Commissioner (Appeals) has upheld the Order-in-Original No. 03/AC/CUS/PTPL/19-20 dated 22.08.2019, passed by the Assistant Commissioner of Customs, Petropole, wherein, 03 pieces of gold chains of 24 Karats, collectively weighing 183.530 gms and valued at Rs. 4,98,009/-, were confiscated absolutely under Section 111(d) and 111(l) of the Customs Act, 1962. Penalty of Rs. 15,000/-, was also imposed on the Applicant under Sections 112(a) and 112(b) of the Customs Act, 1962.

2. Brief facts of the case are that 03 pieces of gold chains, collectively weighing 183.530 gms and valued at Rs. 4,98,009/, were recovered by the Petrapole customs officers from the Applicant, on 31.01.2016, at the baggage hall of Petrapole Customs Office. These 24 karat gold chains were not declared by the Applicant before customs on his arrival from Bangladesh. In his statement dated 31.01.2016, tendered under Section 108 of the Customs Act, 1962, the Applicant stated that he had tried to import the said goods illicitly without declaring the same to avoid duty; that he was not the owner of the gold chains and some unknown person in Dhaka had given

him these chains to be delivered to some person who would call him. Later, on 09.02.2016, the Applicant submitted aletter claiming the ownership of goods and requested for release of goods on payment of fine and penalty. He also requested for waiver of Show Cause Notice. The original authority absolutely confiscated the gold chains and a penalty of Rs. 15,000/- was also imposed on the Applicant. Aggrieved, the Applicant filed an appeal before 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 Applicant was not provided with any declaration opportunity; that the gold chains were not concealed, as alleged; that gold ornaments are allowed as a part of baggage as per Baggage Rules and are not 'prohibited goods'; that the Applicant's earlier statement was recorded under force which was retracted later and holding the retraction as an afterthought is not legally sustainable; and that the goods should be allowed to be redeemed on payment of duty/fine/penalty, being non-prohibited goods.

4. Personal hearing was held on 10.12.2021, in virtual mode. Sh. Md. Sarfaraz, Applicant appeared and reiterated the contents of the revision application. He requested for the offending goods to be released on payment of fine, duty and penalty. None appeared for the Respondent department and no request for adjournment has also been received. Hence, the

matter is being taken up for disposal on the basis of records available.

5. The revision application has been filed with a delay of 36 days. The reason attributed for this delay is the prevalent pandemic conditions. Delay is condoned.

6. The Government has carefully examined the case. Gold chains were not declared by the Applicant, in violation of Section 77 of the Customs Act, 1962. In his statement tendered under Section 108 of Customs Act, 1962, the Applicant admitted that he was not the owner of the gold chains and some unknown person in Dhaka had given him these chains to be delivered to some receiver who would be calling him on arrival. Later, the Applicant, however, contended that the chains belonged to him and requested for release on payment of duty/fine/penalty. The Government observes that a statement made, at the time of occurrence of the incident is more reliable than a statement made later on. Thus, the subsequent statement/letter is found untenable as this could be nothing but an afterthought.

7. 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 chains were not declared by the Applicant to the customs officers, as required under Section 77 of Customs Act, 1962. He admitted that he had intentionally not declared the gold items to avoid customs duty. No document evidencing licit possession of gold chains have been placed on record. The Applicant, thus, failed to discharge the burden placed on him, in terms of Section 123, ibid.

8.1 The Applicant has contended that the import of gold is not 'prohibited'. Hon'ble Supreme Court has, in the case of Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors [1971 AIR 293], 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."*

8.2 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, specifically 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----."

8.3 The gold and gold ornaments are allowed to be imported subject to certain conditions and, 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'.

9. The original authority has denied the release of offending goods on 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 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 according to the rules of reason and justice; has to be based on relevant considerations*". Further, in the case of Commissioner of Customs (Air), Chennai-I Vs P. Sinnasamy {2016(344) ELT1154 (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' ".* In the present case, no grounds are established to consider the order of absolute confiscation of goods to be based on irrelevant or unreasonable considerations.

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

Sh. Md. Sarfaraz, S/o Sh. Oyoli Mohammed,
A/12/3,Uttarayan Sarani, Kamarhati,
North 24 Paraganas (W.B.) – 700058.

Order No. 283 /21-Cus dated 13-12-2021

Copy to:

1. The Commissioner of Customs (Preventive), Kolkata, 15/1, Strand Road, Customs House, Kolkata – 700001.
2. The Commissioner of Customs (Appeals), Kolkata, 3rd Floor, 15/1, Strand Road, Customs House, Kolkata – 700001.
3. PA to AS(RA).
4. Guard File.
5. Spare Copy.

ATTESTED

(Ashish Tiwari)
Assistant Commissioner (RA)