

SPEED POST



F. No. 373/226/B/SZ/2019-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. 26/2/24

Order No. 56/24-Cus dated 26-02-2024 of the Government of India passed by Smt. Shubhagata Kumar, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal C.Cus. I. No. 69/2019 dated 18.03.2019, passed by the Commissioner of Customs (Appeals-I), Chennai.

Applicant : Smt. Samrin Banu, Kadappa, Andhra Pradesh

Respondent : The Principal Commissioner of Customs, Chennai-I

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ORDER

Revision Application No. 373/226/B/SZ/2019-RA dated 08.07.2019 has been filed by Smt. Samrin Banu, Kadappa, Andhra Pradesh (hereinafter referred to as the Applicant) against the Order-in-Appeal C.Cus. I. No. 69/2019 dated 18.03.2019, passed by the Commissioner of Customs (Appeals-I), Chennai. The Commissioner (Appeals) has upheld the Order-in-Original of the Joint Commissioner of Customs (Adjudication-AIR), New Custom House, Chennai, bearing No. 47/2018-19-Commissionerate-I dated 11.06.2018, except to the extent of setting aside the penalty of Rs. 20,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

2. The Joint Commissioner of Customs (Adjudication-AIR), New Custom House, Chennai has absolutely confiscated five numbers of crude gold kadas weighing 582 grams, valued at Rs. 18,03,036/-, seized from the Applicant under Section 111(d) and 111(l) of the Customs Act, 1962 (hereinafter referred as the Act) read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992, imposed a penalty of Rs. 1,80,000/- under Section 112(a) of the Act and also imposed a penalty of Rs. 20,000/- under Section 114AA of the Act on the Applicant.

3. Brief facts of the case are that, the Applicant arrived from Riyadh on 27.03.2018, at Anna International Terminal of Chennai Airport, Meenambakkam, Chennai. She was intercepted by the customs officers when she was about to exit the arrival hall after passing through green channel, on reasonable suspicion that she might be carrying gold/contraband goods either in her baggage or on her person. When questioned about the possession of the same, she replied in the negative. During the course of examination of her hand baggage, five numbers of crude gold kadas of 24 carat purity totally weighing 582 grams and valued at Rs. 18,03,036/- which were kept concealed inside the inner zip pocket of the stroller bag was recovered. As the Applicant was not eligible to import gold into India; was not in possession of any valid permit/licence for the legal import of impugned gold into India and as she had attempted to smuggle the gold by not declaring to Customs by concealing the same, the Customs officer seized the said gold kadas under

a mahazar under Section 110 of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 for further action under the said Act. In her voluntary statement dated 27.03.2018, she stated inter-alia the sequence of events that led to the seizure of the said gold kadas; that the recovered gold did not belong to her; that her husband Mr. Abdul Wasim Shaik had given it to her in Riyadh with instruction to keep it concealed and carry it without declaring to Customs and hand it over to an unknown person who would come and collect the above said gold from her home; that she had attempted to smuggle the said five crude gold kadas into India by concealing them inside the inner zip pocket of the stroller bag and by not declaring the same to Customs; that she was aware that smuggling of gold by way of concealment and non-declaration to Customs is an offence. Vide letter dated 27.03.2018, the Applicant requested for adjudication of the case without issue of Show Cause Notice. The adjudicating authority adjudicated the matter vide above said Order-in-Original No. 47/2018-19-Commissionerate-I dated 11.06.2018. Aggrieved, the Applicant filed an appeal before the Commissioner of Customs (Appeals-I), Chennai, who has upheld the order of lower adjudicating authority except to the extent of setting aside the penalty of Rs. 20,000/- imposed on the Applicant under Section 114AA of the Customs Act, 1962.

4. The revision application has been filed, mainly, on the grounds that the order passed is contrary to law, weight of evidence and probabilities of the case and should be set aside; that the gold kadas were brought from the earnings of her husband for the purpose of the her sister-in-law's marriage; there is no concealment and the gold kadas were ordinarily kept in her hand baggage and no intention to evade duty; that the request of the applicant for release/re-shipment ought to have been considered by the lower authority; that gold is not prohibited. The Applicant has also filed an application dated 02.07.2019 for the condonation of delay of 9 days in filing the said Revision Application due to the Ramzan fasting of the Applicant, who had not filed the same on time.

5. Personal hearings in the matter were scheduled on 22.11.2023, 22.12.2023, 10.01.2024 and 12.02.2024 but, no one appeared from Applicant's side. Sh. S. Ramesh, Assistant Commissioner (Legal), Custom Airport, Chennai appeared on 10.01.2024 on behalf of the Respondent and stated that as per Apex Court and High Court's orders, if

any condition is imposed for the import of goods, the non-fulfilment of the same implies that the goods are effectively prohibited and liable for confiscation. He quoted several case laws and submitted that the RA is devoid of merit and should be rejected.

6. The instant revision application has been filed on 08.07.2019 and the Order-in-Appeal received by the Applicant on 23.03.2019 as per column (5) of CA-8 submitted by the Applicant. Hence, there is a delay of 16 days in filing the said revision application i.e. after the expiry of three months from the date of receipt, i.e. 23.03.2019. However, as per proviso to sub-section (2) of the Section 129DD of the Customs Act, 1962 provides discretion to the Government to allow an application to be presented within a further period of three months if the Government is satisfied that the Applicant was prevented by sufficient cause from presenting the application within the normal period of three months. The delay is due to the Ramzan fasting of the Applicant and in view of the facts of the case, delay is condoned.

7. The Government has observed that the Applicant was intercepted with the above said impugned gold concealed in her baggage and no declaration was made to Customs. She had not declared the import of gold item voluntarily to the Customs officers, as required under Section 77 of the Customs Act, 1962 rather she admitted to having brought these impugned items for monetary gain. The Applicant had appeared before the original authority for hearing after waiving the requirement of Show Cause Notice. It was revealed that the Applicant had concealed five crude gold Kadas concealed inside the inner zip pocket of the stroller bag. She admitted that the recovered gold does not belong to her and it was given by her husband with the instruction to keep gold concealed and carry it without declaring to the customs and hand it over to an unknown person who would come and collect the same from her home. Further, though the Applicant claimed that she was the owner of the offending goods, but it is observed that Applicant's submissions before the original adjudicating authority did not corroborate that she was owner of the offending goods. Also, the entire proceedings have been covered under mahazar in the presence of independent witnesses and she had recorded her voluntary statement dated 27.03.2018 accepted her role in the smuggling. Therefore, the sequence of events recorded under the

mahazar has to be relied upon and it is not open to the Applicant to dispute the facts at this stage. As such, the subject contentions of the Applicant are sans merit.

6. As per Section 123 of the Act, *ibid*, 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. The Applicant did not declare the gold items, as stipulated under Section 77 of the Customs Act, 1962. No documents evidencing ownership and licit purchase have been produced. The Applicant has, thus, failed to discharge the burden placed on her, in terms of Section 123, *ibid*. Keeping in view the facts and circumstances of the case and as the Applicant has failed to discharge the onus placed on her in terms of Section 123, the Government agrees with the lower authorities that the seized gold items were liable to confiscation under Section 111 *ibid* and that the penalty was imposable on the Applicant.

7.1 The Applicant has contended that the import of gold is not 'prohibited'. However, the Government observes that this contention of the Applicant is against several judgements of the Hon'ble Supreme Court in which it has been held that the goods, import/export whereof is allowed subject to certain conditions, are to be treated as 'prohibited goods' in case such conditions are not fulfilled. In the case of *Sheikh Mohd. Omer vs Collector of Customs, Calcutta & Ors {1971 AIR 293}*, the Apex Court 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 fulfilment of certain conditions. In the present case, as correctly brought out by the lower authorities, the Applicant in this case did not fulfil the conditions specified in this behalf. In the case of *M/s Om Prakash Bhatia Vs. Commissioner of Customs, Delhi {2003(155) ELT423(SC)}*, the Hon'ble Supreme 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 (i.e the Hon'ble jurisdictional 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-----."

7.3 Moreover, the Hon'ble High Court of Delhi in its order dated 23.11.2023 in Writ Petition No. 8976 of 2020 in the matter of *Kiran Juneja Vs. Union of India & Ors.* has held that *"A fortiori and in terms of the plain language and intent of Section 2(33), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of "prohibited goods".* Hence, there is no doubt that the goods seized in the present case are to be treated as "prohibited goods", within the meaning of assigned to it under Section 2(33) of the Act, *ibid.*

7.4 In view of the above, the contention of the Applicant that the offending goods are not 'prohibited goods', cannot be accepted.

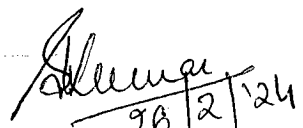
8. The Government observes that the original authority had denied the release of gold items on payment of redemption fine, under Section 125 of Customs Act, 1962. It is settled by the judgment of the Hon'ble Supreme Court, in the case of *Garg Woollen Mills (P) Ltd vs. Additional Collector of Customs, New Delhi [1998 (104) E.L.T. 306 (S.C.)]*, that the option to release 'prohibited goods' on redemption fine is discretionary. Hon'ble Delhi High Court has, in the case of *Raju Sharma [2020 (372) ELT 249 (Del)]*, held that *"Exercise of discretion by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motive."* Further, the Hon'ble Delhi High Court in its order dated 21.08.2023 in W.P. (C) Nos. 8902/2021; 9561/2021; 13131/2022; 531/2022; & 8083/2023 held that *".....an infraction of a condition for import of goods would also fall within the ambit of Section 2(33) of the Act and thus their redemption and release would become subject to the*

discretionary power of the Adjudging Officer". Therefore, keeping in view the judicial pronouncements above, the Commissioner (Appeals) has correctly refused to interfere with the discretion exercised by the original authority.

9. The Applicant has requested to be allowed to re-export the offending goods. The Government observes that a specific provision regarding re-export of baggage articles has been made under Section 80 of the Act, *ibid*. On a plain reading of Section 80, it is apparent that a declaration under Section 77 is a pre-requisite for allowing re-export. Hon'ble Allahabad High Court has, in the case of *Deepak Bajaj {2019 (365) ELT 695 (All.)}*, held that a declaration under Section 77 is a *sine qua non* for allowing re-export under Section 80 of the Act, *ibid*. In this case, the Applicant had made no declaration in respect of the subject goods. Further, the Hon'ble Delhi High Court has, in the case of *Jasvir Kaur vs. UOI {2019 (241) ELT 521 (Del.)}*, held that re-export "*cannot be asked for as of right-----*". The passenger cannot be given a chance to try his luck and smuggle Gold into the country and if caught he should be given permission to re-export." Hence, the request for re-export cannot be allowed.

10. The case laws relied upon by the Applicant, in support of his various contentions, are not applicable in view of the dictum of Hon'ble Supreme Court and Hon'ble High Courts, as above.

11. The revision application is disposed of accordingly, and the Commissioner (Appeals)'s order is upheld.


26/2/24
(Shubhagata Kumar)

Additional Secretary to the Government of India

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Order No. 56/24-Cus dated 26-02-2024

Copy to:

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2. The Principal Commissioner of Customs, Commissionerate-I, Chennai-I (Airport), New Custom House, Meenambakkam, Chennai-600027
3. Sh. S. Palanikumar, Kameshwaran & P. Kamala Malar, Advocates, No. 10, Sunkurama Street, 2nd Floor, Chennai-600001.
4. PPS to AS (RA).
5. Guard file.
6. ✓ Spare Copy
7. Notice Board

ATTESTED


26/2/24
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