

(1988) 07 CAL CK 0003

Calcutta High Court

Case No: Matter No. 367 of 1988

Narayan Prasad Dutta

APPELLANT

Vs

Collector of C.E. (Gold) Cell

RESPONDENT

Date of Decision: July 27, 1988

Acts Referred:

- Constitution of India, 1950 - Article 226
- Gold (Control) Act, 1968 - Section 11(1), 27(1), 4(4), 66, 71

Citation: (1989) 19 ECC 175 : (1989) 21 ECR 223 : (1989) 41 ELT 17

Hon'ble Judges: Ajit Kumar Sengupta, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Ajit Kumar Sengupta, J.

The application is directed against the order dated 24th April, 1986 of the Tribunal rejecting the prayer of the petitioner to redeem offending gold on payment of redemption fine. The facts leading to this application are stated hereinafter.

2. The first petitioner carries on business, inter alia of husking mill building materials at Dwarhatta in the district of Hooghly, West Bengal. The second petitioner is the wife of the first petitioner. The father of the first petitioner carried on business in gold at Sonapatti, Burrabazar, Calcutta. But the first petitioner is stated to have never dealt in gold. The father of the first petitioner died in the year 1930 when the first petitioner was only 2 years old. Before his death, the father of the first petitioner kept some gold bars with his mother. The first petitioner occasionally lends money to relatives against deposit of gold ornaments for which the first petitioner maintained a separate account. In or about 1973 the mother of the first petitioner gave the said gold bars to him for keeping the same in India Safe Deposit Vault Co. Ltd. at No. 2, Brabourne Road, Calcutta for safe custody. The first petitioner kept the said gold bars weighing about 1575.100 grams in the locker of

the aforesaid vault. 3. On February 22, 1975 the Gold Control Authorities searched the said locker and seized the gold bars alongwith some assorted gold ornaments and articles. On the basis of the said search and seizure a show cause notice dated August 16, 1978 was issued by the Collector of Central Excise inter alia directing the first petitioner to show cause as to why primary gold articles and ornaments should not be confiscated u/s 71 of the Gold (Control) Act, 1968 (hereinafter referred to as the said Act). The first petitioner duly replied to the said show cause notice and a personal hearing was given thereafter to the first petitioner. The Collector of Central Excise by an order dated August 19, 1976 held that the gold bars were obtained by melting smuggled foreign biscuits and the petitioners were indulged in clandestine dealing of gold. The Collector confiscated the gold bars u/s 71 of the said Act. An option was however given to , the petitioners to redeem the seized gold articles and ornaments u/s 73 on payment of fine of Rs. 10,000/-. The Collector also imposed penalty of Rs. 20,000/- on both the petitioners.

4. The petitioners preferred an appeal before the Administrator, Gold Control against the order dated August 19, 1976 of the Collector and the Gold Control Administrator by an order dated November 21, 1977 held that there was no evidence to show that the petitioners were dealing in gold and the charges Under Sections 27(1) and 11(1) of the said Act were not established. Accordingly, the gold articles and ornaments of the petitioners were released and also set aside the penalty imposed and reduced the penalty to Rs. 5,000/-. However, the Administrator confirmed the order of the Collector in regard to the absolute confiscation of the primary gold.

5. The petitioners thereafter, made a revision petition before the Government of India against the said order of the Administrator dated 21st November, 1977 claiming that option should have been given to the petitioners to pay redemption fine in lieu of confiscation of the primary gold. The Government of India by its order dated March 5, 1980 rejected the application of the petitioner.

6. The petitioners moved an application under Article 226 of Constitution challenging the said order of the Government of India dated March 5, 1980 on the ground that the petitioners should have been given an option to pay the fine in lieu of confiscation of the said gold. The said writ application being C.R. No. 682(W) of 1981 was heard by me and after hearing the counsel for the parties I directed the matter to go back to the Revisional authority for consideration whether the petitioners should be given an option to pay redemption fine in lien of confiscation. As the Revisional Authority was Customs, Excise and Gold (Control), Appellate Tribunal the matter was remanded to the said Appellate Tribunal for adjudication on the said point. The Tribunal was also directed to consider as to whether the order imposing penalty of Rs. 5,000/- on the first petition should be sustained.

7. Pursuant to the direction given by this court, the petitioners made application before the Appellate Tribunal for release of the said offending gold on payment of

redemption fine. The contention of the first petitioner before the Tribunal was that the said gold are ancestral property of the petitioner, that the father of the first petitioner carried on business of gold prior to 1930 and that he gave the said gold bars to the mother of the first petitioner prior to his death, and that when his father died in 1930 he was only 2 years old and that the first petitioner never carried on business of gold and that the violation of Section 8(1) of the Act was a technical one. On these facts, the prayer was made that the Tribunal should grant the option to pay the fine instead of confiscation. The first petitioner's reliance on a circular dated July 30, 1976 issued by the Administrator, Gold Control, which accords permission to take back the primary gold or articles on its release with or without fine in lieu of confiscation, provided the primary gold is sold to a licensed dealer or converted into ornaments. At the said personal hearing an undertaking was also given on behalf of the petitioners to furnish a certificate from the licensed dealer certifying that the said gold was converted into ornaments. It was also submitted before the Tribunal that after such conversion the total weight of the ornaments possessed by the petitioners would not exceed 4000 grams.

8. The Appellate Tribunal by an order dated April 24, 1986 held that violation of Section 8(1) cannot be considered as a technical or nominal violation as the said primary gold was inherited by the first petitioner from his father who was a gold dealer at Sonapatti in Calcutta. The Tribunal further held that the first petitioner belonged to a family of goldsmith and his father did never declare the said confiscated gold which was later seized from the possession or custody of the petitioners and accordingly the Tribunal held that it was not a fit case where the petitioners can be given an option to redeem gold on payment of fine. The Tribunal also held that the penalty imposed was proper and no interference was necessary.

9. Thereafter, the petitioners made an application u/s 82B of the said Act requiring the Tribunal to draw up a statement of case and to refer to this court the questions of law mentioned therein. But the Tribunal rejected the said application on October 28, 1986. The petitioners, in order to save limitation filed a reference application u/s 82B(3) in or about January, 1987 which is still pending.

10. In this application the petitioners have challenged the said order dated April 24, 1986 of the Tribunal. The petitioners contend that the said order of the Tribunal is erroneous on facts and in law is liable to be set aside. The contention is that finding of the Tribunal is perverse and as such its decision cannot be sustained.

11. On the other hand, the contention of the learned counsel for the respondents is that the order of the Tribunal is reasonable and it does not call for any interference by this court inasmuch as the Tribunal has taken into account all relevant facts and circumstances.

12. I have considered the rival contentions. Admittedly the father of the first petitioner died in the year 1930 when the first petitioner was only 2 years old. The

first petitioner is the only son of his father. In 1930 in British India there was no Gold Control Act and there was no prohibition of import of gold. The question of giving any declaration under the Gold (Control) Act, 1968 by the father of the first petitioner did not and could not arise in the facts of this case, not only because he was dead but because there was no Gold Control Act prevalent in the year 1930. After the death of the father, the first petitioner or the members of his family did never carry on any business of gold. It may be that the petitioner on rare occasions granted loan to some relatives on hypothecation of gold ornaments which were released by the Collector of Central Excise. The birth of the first petitioner in a family of goldsmith without anything more cannot be a ground to refuse the redemption of the gold. The finding of the Tribunal that the charges u/s 8(1) of the Act cannot be lightly taken is clearly not sustainable. The admitted position is that the confiscated gold was neither smuggled nor of foreign origin. The proceedings initiated under the Customs Act relating to the said gold were dismissed by the Special Secretary. As I said, the first petitioner received the said gold from his parents which he did not declare under the Gold Control Act. It appears to me that the Tribunal did not take into account the prevalent practice on the circular of the Government in this regard. The circular of the Gold Control Administrator issued under Sub-section (4) of Section 4 of the Gold Control Act is as follows : -

"The Administrator hereby authorise every adjudicating officer u/s 78 and every Appellate Authority u/s 80, of the said Act, to exercise the powers exercisable by me under Sub-section (6) of Section 8 of the said Act, in so far they relate to authorising a person, from whom primary gold or articles was seized u/s 66 of the said Act, to take back such primary gold or articles into fine his possession, custody or control consequent on its release with or without fine in lieu of confiscation in pursuance of an order under the said Section 78 or Section 80, as the case may be :

Provided that where the release relates to primary gold :

(a) Such primary gold shall be sold to a licensed dealer or got converted into ornaments,

(b) The person concerned shall, within one month of taking back into his possession, custody or control such primary gold, furnish to the concerned control officer, a certificate from the licensed dealer that such primary gold has been sold to him and where such primary gold has been converted into ornaments, a certificate from the licensed dealer or the certified goldsmith, as the case may be that such primary gold has been so converted."

13. My attention has been drawn to the view taken by the Delhi Tribunal in an identical case where the Tribunal allowed release of the confiscated goods on payment of redemption fine. It appears that the practice prevalent in the Department in such cases is while ordering confiscation redemption is invariably allowed on payment of fine. The Department cannot take a contrary stand in the

instant case. It may be mentioned that the said circular of the Gold Control Administrator although relied on by the petitioners at the time of hearing before the Tribunal, the Tribunal, however, did not deal with that contention at all. It has been stated before me that the petitioners undertook to convert the primary gold into ornaments and furnish certificate of the licensed dealer.

14. In the premises aforesaid, I am of the view that the Tribunal fell in error in not giving option to the petitioners to redeem the confiscated gold on payment of redemption fine. This power to give option to release the goods on payment of fine is a power coupled with duty and should be exercised reasonably and not arbitrarily or capriciously. In this case the Tribunal did not act fairly or reasonably in rejecting the prayer of the petitioners for redemption of confiscated gold on payment of fine. In my view, the reasons given by the Tribunal in not allowing the option cannot be sustained.

15. Before I part with this case, I must also dispose of one of the points taken by the respondents. It is contended that this writ petition cannot be entertained inasmuch as a reference application filed by the petitioners against the impugned order of the Tribunal is pending in this Court. However it appears that the said reference application was filed in the early part of 1987 and the same has not yet appeared in the list as application for rule. As indicated earlier, the reference application was rejected by the Tribunal...reference application u/s 83B(3) is pending. If this court is of the view that a question of law does arise out of the impugned order of the Tribunal, in that event, the court would direct the Tribunal to submit a statement of case and thereafter the matter would be heard. It may take a few years before the matter would be heard and finally disposed of. In that view, even if there is alternative remedy, such remedy is expensive and is not an efficacious alternative remedy. It will only delay justice. The petitioners have given an undertaking to this court that they would not proceed with the reference application if this court sets aside the order of the Tribunal. As a matter of fact, if the order of the Tribunal is set aside, there would be no question of reference application being pursued any further.

16. Reliance has been placed by the respondents on a decision of the Madras High Court in the case of [Asma Nachiar and Others Vs. Union of India and Others](#), . This case has no application on the facts of this case. The question here is not whether confiscation would amount to deprivation of right to property. We are concerned with the short question whether the Tribunal on the facts of this case should have allowed the petitioners the option to redeem.

17. For the reasons aforesaid, this application is allowed. The order dated April 24,1986 passed by Customs, Excise and Gold (Control) Appellate Tribunal in case No. 258/CAL/86-1766 and the order dated August 19,1976 passed by the Collector of Central Excise (Gold) Cell, dated November 21,1977 and the order passed by the Administrator, Gold Control are all set aside and quashed insofar as the said orders

rejected the prayer of the petitioners for an option being given to the petitioners to redeem the confiscated gold weighing 1575.100 grams on payment of redemption fine. Inasmuch as the orders of the Collector and Appellate Authorities including the Tribunal are set aside, the Collector of Central Excise (Gold) Cell shall pass appropriate order allowing the petitioners to redeem the seized gold upon payment of redemption fine. In determining the quantum of redemption fine the Collector shall take into account the value of the gold as on the date of seizure made on February 22, 1975. Let the Collector pass an appropriate order within six weeks from the date of communication of this order. After the Collector passes the order allowing the petitioners to redeem the seized gold, the petitioners shall deposit such redemption fine and thereupon the respondents shall release the equivalent quantity of gold to the petitioners. The petitioners undertake to this Court to produce the certificate from the certified goldsmith as the licensed dealer in terms of the circular of the Gold Control Administrator as referred to in the judgment within three weeks from the date of release of the said gold to the petitioners.

18. In the event, such certificate is not produced by the petitioners, the respondents will be at liberty to take appropriate steps against the petitioners in accordance with law.

19. All parties concerned to act on a signed copy of the operative part of this judgment and order on usual undertaking.