(1991) 03 CAL CK 0044

Calcutta High Court

Case No: Matter No. 725 of 1988

Dilip Kumar Pyne		APPELLANT
	Vs	
Collector of Customs		RESPONDENT

Date of Decision: March 11, 1991

Acts Referred:

- Gold (Control) Act, 1968 - Section 63, 70

Citation: (1992) 39 ECC 133

Hon'ble Judges: Shyamal Kumar Sen, J; Ajit K. Sengupta, J

Bench: Division Bench

Judgement

Ajit K. Sengupta, J.
This is a reference u/s 82 B(3) of the Gold (Control) Act, 1968. The following question has been referred to this Court;-

Whether on the facts and in the circumstances of the case, the learned Tribunal is correct in holding that the Terms of the provisions of Section 70 of the Gold (Control) Act, 1968, at the time of seizure, statement can be recorded by any officer, and not. necessarily the seizing officer proper interpretation of the words "that officer" appearing in Section 70 is to be determined ?

2. Since this question has not been properly framed by the applicant, we reframe the question as follows:-

Whether on the facts and in the circumstances of the case, the Tribunal is correct in holding that in terms of the provisions of Section 70 of the Gold (Control) Act, 1968, at the time of seizure, statement can be recorded by any officer, and not necessarily the seizing officer ?

3. The facts which have been recorded by the Tribunal in the Statement of Case are as under:-

The applicant was intercepted in Burrabazar by the policemen who enquired from him as to what he was carrying in his possession. On his stating that he had gold bangles with him, he was taken to Burrabazar Thana. The police then informed the Customs Authorities and. the Customs Officers seized 10 (ten) unfinished gold bangles in crude form from his possession. The Officers took him to the Customs House where his statements were recorded. The seizure took place on 26.9.70 and that night two statements were recorded by the Customs Officers. He was put under arrest and kept in the Customs House the whole night. On the next day the shop of M/s. S.B. Pyne & Co., Howrah, of which he was stated to be a partner, was searched. During search, the officers recovered a small piece of gold with foreign markings and three strips of gold. The applicant was released on bail. Subsequently he was prosecuted.

4. The proceedings were launched in Courts against the applicant - one under the Customs Act in the Court of the Judicial Magistrate, Howrah and another under the Gold (Control) Act, in the Court of the Metropolitan Magistrate, Calcutta. In the Customs case, the proceedings were taken to High Court in a criminal revision and the High Court quashed the proceedings on the ground that the partnership firm, namely M/s. S.B. Pyne & Co, had not been impleaded.

5. In the second case, which was filed under the Gold (Control) Act, the Metropolitan Magistrate, Calcutta, acquitted the applicant holding that the prosecution had failed to prove the guilt of the accused.

6. In the Departmental proceedings, two cases were launched against the applicant - one under the Customs Act and another under the Gold (Control) Act. In both the cases, the applicant was found guilty. He was aggrieved by the said orders and filed two appeals - one under the Customs Act and another under the Gold (Control) Act - before the Collector (Appeals).

7. The Collector (Appeals), Calcutta heard both the appeals together and passed a common order rejecting both the appeals. Against this Order-in- Appeal, the applicant filed an appeal before the Tribunal. The Tribunal passed two orders - one under the Customs Act and another under the Gold (Control) Act. Both the appeals were rejected.

8. The applicant filed a Reference Application against the order dismissing the appeal under Gold (Control) Act. In its Order-in-Appeal the Tribunal had observed, inter alia, that apart from Section 70, there were other provisions under the Gold (Control) Act which could be utilised by the Gold Control Officers for examining a person and recording evidence and u/s 63 of the Act, any Gold Control Officer of a gazetted rank has power to summon any person to give evidence and u/s 64 any Gold Control Officer could examine any person acquainted with the facts and circumstances of the case.

9. Section 70 empowers an officer making arrest, seizure or detection to record statements at the time of arrest or seizure or detection. But if the statement was required

to be recorded at any time other than the time of arrest, seizure or detection, the provisions of Section 63 or 64 could be appropriately utilised.

10. It was also observed by the Tribunal that in view of the circumstances of the case including the recovery of unfinished gold bangles in crude form, piece of gold bar with foreign markings and cut pieces of gold strips, the statements of the applicant recorded after the seizure of the gold bangles and absence of any entry in the dealer''s record, the Department had succeeded in discharging its primary burden and the preponderance of probability was also in favour of the Departmental case.

11. As indicated earlier, the Department had not only initiated the adjudication proceedings under the Gold (Control) Act, but had also launched prosecution before the Metropolitan Magistrate (11th Court). The learned Magistrate had come to the conclusion that the statement was not lawfully recorded as per provisions contained u/s 70 of the Gold (Control) Act. The Customs Officers who recorded the statement were neither arresting, seizing or detecting officers and, therefore, the statement so recorded cannot be taken into consideration.

12. However, the Tribunal had come to a different conclusion by holding that Section 70 was required to be read with Sections 64, 65, 66 and 68 of the Gold (Control) Act, and u/s 63 of the said Act evidence could be recorded by any gazetted Officer. The Tribunal had concluded that the proceedings were not vitiated and had proceeded on this basis.

13. The Tribunal in the statement of case recorded the submissions of the learned Advocates appearing for the parties which were made at the time of hearing of the Reference Application as well as a part of the order rejecting the said Reference Application. The Tribunal reproduced in the statement of case the following extract from the order rejecting the Reference application of the applicant.

I observe that the applicant has not pressed the point Nos. 2, 3, 4, 5 and 6 and has prayed that only point No. 1 may be referred to the Hon''ble High Court for opinion. Accordingly I am confining myself to point No. 1.

This point refers to the interpretation and application of Section 70 of the Gold (Control) Act which was raised during the course of appeal and was also mentioned in the Order-in-Appeal passed by the Tribunal. However, it is not that every point of law is necessarily required to be referred to the High Court for opinion, as already observed by the 1984 ECR 1763 In other words, it is only such a question of law (or mixed question of fact and law) which was required to be so referred.

Therefore, it is required to be considered in the first instance as to whether this point merited any reference to the Hon''ble High Court.

In this connection, I observe that although Section 70 was mentioned in the order of the Tribunal (as it was one of the points raised during the course of hearing) but the

Tribunal''s order is not based on Section 70.

As a matter of fact, there is no doubt or dispute that the statements in question were not recorded u/s 70.

There is also no doubt or dispute that u/s 63 of the Act, any Gold Control Officer of gazetted rank can summon a person to give evidence and can, therefore, record a statement.

Since there is, thus, no doubt that Sections 63 and 64 were also available to the Department apart from Section 70 for the purpose of recording statements and since in this case the statements were apparently recorded u/s 63 and not u/s 70 (although not specifically cited) the discussion regarding the interpretation of Section 70 acquired an academic character and did not materially affect or alter the position of the case.

The order of the learned Presidential Magistrate is an order of the Court and it will not be appropriate to make any observation with reference to the same.

However, the legal position in terms of Section referred to above is very clear and there is no doubt and dispute that a statement can be recorded in terms of Section 63 and utilized in the proceedings under Gold (Control) Act.

As the position in law is clear I consider that no purpose will be served by allowing the reference of the case to the High Court.

As such, the application is rejected.

14. The Tribunal thereupon recorded as follows:

The applicant moved a petition before the Hon''ble High Court of Calcutta against the above order of the Tribunal rejecting his Reference Application. The Hon''ble High Court of Calcutta thereupon issued a rule and made the same absolute vide its order dated 15.6.87 in matter No. 1623 of 1986 and directed the Tribunal to refer the point of law framed therein.

15. Accordingly, the question of law as set out herein-before has been referred to this Court.

16. At the outset it must be observed that the Tribunal in drawing up the case should incorporate the facts found and/or admitted by the Tribunal. It is not necessary to incorporate in the statement of case what transpired at the time of hearing of the Reference Application in as much as the Court is concerned with the facts and circumstances appearing from the appellate order out of which the question of law arises. The Tribunal cannot put gloss on the Appellate order while disposing of the Reference Application. With these observations we propose to deal with the question which has

been referred to us.

17. The question is whether Section 70 of the Gold (Control) Act, 1968 has been pressed in service and if so whether the provision duly complied with or not; Section 70 reads as follows:

70. Power to record statements: Where at the time of arrest or seizure under this Act, or the detection of any contravention of any provision of this Act, or any rule or order made thereunder, any person makes a statement to the officer making such arrest or detection, that officer shall record in writing the statement of such person in as nearly as possible the language in which such statement is made and shall on demand by such person furnish him with a copy of the statement.

18. The Tribunal in the Appellate Order observed as follows:

A plain reading shows that where any person makes a statement to the officer making arrest, seizure or detection, that officer shall record the statement in as nearly as possible the language in which the statement is made. In other words, the emphasis is on the correct and proper recording of the statement. This Section, to my mind, does not mean that a statement cannot be recorded by an officer other than the arresting, seizing or detecting officer. This would be clear if Section 64, 65, 66 and 68 are read together and Section 70 is read with reference to the context provided by the aforesaid Sections. If it was done, it would be seen that the aforesaid Sections use the words "Any Gold Control Officer". Therefore, Section 70 can only be interpreted enjoin on any Gold Control Officer who makes arrests, seizures or detection to record the statement properly. Obviously, if this statement is recorded at the time of arrest, seizure or detection, it can or could be expected recorded by the arresting, seizing or detecting officer, but if an officer examines the person concerned u/s 64, he could certainly record a statement for the purpose of the said Section and in such an eventuality, he need not necessarily be one of the seizing, arresting or detecting officers. It is also important in this connection to note that the Gold Control Officer of a gazetted rank could also proceed with the matter and summon persons to give evidence in terms of Section 63. Section 63 refers to a gazetted officer but Section 64 mentions any Gold Control Officer and similarly Section 70 only uses the word "officer", and, therefore, the statements under Sections 64 and 70 can be recorded even by non-gazetted officers. But even if it was held that the statements were required to be recorded in terms of Section 70 only by an arresting, seizing or detecting officer, then too the recording of a statement by another Gold Control Officer will not vitiate the proceedings as a whole.

19. As indicated earlier, the Tribunal in the statement of case recorded that there is no doubt that Section 63 and Section 64 were also available to the Department apart from Section 70 for the purpose of recording statements and since in this case the statements were apparently recorded u/s 63 and not u/s 70, although not specifically stated as such, the discussion regarding the interpretation of Section 70 became academic. The Tribunal

has not come to any finding whether the statements which were recorded and relied on by the authorities in holding the applicant liable for the contravention of the Gold (Control) Act were recorded u/s 63 or Section 64 of the said Act. The contention of Mr. Lahiri, learned Counsel appearing on behalf of respondent, is that the statements which were recorded came within the purview of Section 64 or Section 65. We are, however, unable to accept this contention. Section 63 empowers any Gold Control Officer of a gazetted rank to summon any person to give evidence or to produce any document in any enquiry which such officer is making in connection with the contravention of any provision of this Act. Section 64 empowers any Gold Control Officer, during the course of any inquiry in connection with the contravention of any provisions of this Act, to call for information from any person or require any person to produce or deliver any document or examine any person acquainted with the facts and circumstances of the case. Section 64 can only be pressed into service during the course of an enquiry in connection with the contravention of any provisions of this Act. In course of such enquiry any person can be asked to give information or produce or deliver documents and any person acquainted with the facts of a case may also be examined. In this case, at the stage when the statements were recorded, no enquiry was initiated, nor any case was started. The powers under both Sections 63 and 64 can be invoked only when there is a pending inquiry, or in any event an inquiry has already been initiated. Section 63 authorizes any Officer conducting the inquiry to summon any person to give evidence or to produce documents. Section 64 is available to any Gold Control Officer during the course of any inquiry. As indicated, in this case at the material time there was no inquiry or proceeding or case, where such direction can be made for production of documents or for examination of the person concerned. As a matter of fact, it is the finding of the Tribunal, which we have already noticed, that the statements which were recorded in this case might have been recorded u/s 63. But this conclusion of the Tribunal is based on assumption of fact which is not apparent from the records. The Tribunal did not advert its mind to the question before relying on the statements as to whether such statements were recorded by the concerned Officer in compliance with Section 63 or Section 64. Whether the authority would be entitled to rely on the statements obtained from a person would entirely depend on the question whether such statements were recorded in compliance with the provisions of the Act or not.

20. Although, the Tribunal had said, as we have indicated, that it was not necessary to go into the interpretation of Section 70, nonetheless the Tribunal came to the conclusion that any Gazatted Officer could record the statements even u/s 70 of the Act. We are, however, unable to subscribe to this view. Section 70 makes it quite clear that a statement has to be made to the Officer making arrest or seizure or detection of any contravention of the provision of the Act and not to any other Officer. This will be evident from the following expression.

...any person makes a statement to the officer making such arrest, seizure or detection, that officer shall record in writing the statement of such person.ï¿½

It is not the question of recording the statement as nearly as possible in the language in which such statement is made. That the officer who makes the arrest will record the evidence is evident from the fact that it is only possible for that officer to record as nearly as possible. The question is who recorded such statement. If the statement was made by the person concerned at the time of arrest, seizure or detection, then that particular officer who made the arrest or made the seizure or made the detection under the Gold (Control) Act would only be entitled to record the statement if such person makes any such statement. It is not the mode of recording as the Tribunal said, but the authority of the person who records such statement which is relevant.

21. The arrest or seizure has to be made under the Gold (Control) Act and the provisions have been made under Sections 66 and Sections 68 for seizure and arrest. It is that officer who exercises the power u/s 68, before whom a statement is made at the time of such arrest or seizure, who alone can record such statement; no other officer, whether gazatted or ungazetted, can record any such statement at the time of seizure or arrest. Similarly, an officer who has made detection of any contravention of the provisions of the Act, it is he who alone can record the statement of the person if such person makes a statement before him. We are, therefore, of the view that in this case the expression "that Officer" in Section 70 signifies the particular officer who makes the seizure or arrest or detection and no other officer, and accordingly any statement recorded by any officer other than the seizing or arresting or detecting officer will be invalid and cannot be relied on in course of any proceeding. It was, therefore, necessary for the Tribunal to find out whether the statements were recorded in terms of Section 63 or Section 64 or Section 70 of the Act and whether such recording was made in compliance with those provisions. The admissibility of such statements will mainly depend on the findings of these questions.

22. For the foregoing reasons we answer the question in this reference in the negative and in favour of the applicant. The Tribunal will dispose of the appeal afresh on merits in the light of the observations made in the judgment.

23. There will be no order as to costs.

Shyamal Kumar Sen, J.

24. I agree.