(1987) 01 MAD CK 0029

In the Madras High Court

Asma Nachiar and Others APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 01-01-1987

Acts Referred:
Gold (Control) Act, 1968 — Section 12, 16(11), 16(3), 16(5), 2

Citation : (1987) 13 ECC 281 : (1987) 32 ELT 71

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Judgement

1. There are two writ petitions. The first petitioner in W.P.No.5146 of 1979 is the daughter of one Md. Yusuf Maracair and the petitioner in

W.P.No. 863 of 1980 is the son of the very same Md. Yususf Marcair. According to them, on 4-2-1959 the petitioner in W.P. No. 863 of 1980

was gifted with thirty bars of gold by their father and this evidenced by a document of even date. Md.Yusuf Marcair died on 2-6-1965. On 17-8-

1974 there was a raid by the Central Excise Officers attached to Thiruvarur Range, of the residential premises of both the petitioners and the bars

of the gold were seized and proceedings under the Gold(Control) Act, 45 of 1968, hereinafter referred to as the Act, were initiated. There were

issuances of show cause notices and replies. The first authority, namely, the third Respondent passed orders on 26-7- 1975, holding that the

possession of the bars of gold would come within the mischief of Section 8(1) of the Act and ordered confiscation of the bars of gold u/s 71(1) of

the Act. The third respondent exonerated the petitioners from the ambit of Section 16(11) of the Act. There were appeals and the appellate

authority, the second respondent herein, by a common order dated 14-10-1977, confirmed the order of the original authority. There were further revisions before the first respondent and they were not successful and the revisions were dismissed on 12-7-1979 by the first respondent. The

orders of the respondents are being impunged in these two writ petitioners.

2. Mr. M.R. Narayanaswami, learned counsel appearing for the petitioners, took the through the various provisions of the Act and also referred to

the preamble to state that no prohibition against holding or possessing gold as such could be spelt out from the scheme of the Act and its

provisions; and the Act was intended only to provide for the control of the production, manufacture,supply distribution, use and possession of, and

business, in gold, ornaments and articles of gold and the petitioners having been exonerated of any culpability u/s 16(11) of the Act, which

generally deals with gold, cannot be lugged in u/s 8(1) of the Act. Certain provisions of the Act, including those dealings with the definition will have

to be adverted to for the purpose of deciding the question raised by the learned counsel for the petitioners. Section 2(b) defines ""article"" as follows

:

article"", means any thing (other than ornament) in a finished form, made of, manufactured from or containing, gold, and includes -

(i) any gold coin,

(ii) broken pieces of an article; but does not include primary gold;

Section 2(i) defines ""gold"" as follows:

gold'' means gold, including its alloy (whether virgin, melted or re- melted, wrought or unwrought), in any shape or form, of a purity of not less

than none carats and includes primary gold, articles and ornament."" ""ornament"" has been defined u/s 2(p) as follows :

ornament'' means a thing, in finished form, meant for personnel adornment or of the adornment of any idol, deity or any other object or religious

worship, made of, or manufactured from, gold, whether or not set with stones or gems (real or artificial), or with pearls (real, cultured or imitation)

or with all or any of them, and includes parts, pendants or broken pieces of ornament.

Explanation . - For the purposes of this Act unfinished or semi- finished form and includes ingots, bars, blocks, slabs, billets, shots, pellets, rods,

sheets, foils, and wires;

3. Coming to section 8 which is found in Chapter III under the caption ""Restrictions relating to the manufacture, acquisition, possession, sale,

transfer or delivery of gold"", we can confine our concentration mainly on Section 8(1) which deals with primary gold. There is no dispute before

me that the bars of gold seized from the petitioners are primary gold. Section 8(1) standard extracted as follows :

Save as otherwise provided in this Act, no person shall -

(i) own or have in his possession, custody or control, or

(ii) Acquire or agree to acquire the ownership, possession,custody or control of, or

(iii) buy, accept or otherwise receive, or agree to buy, accept or otherwise receive any primary gold"".

Chapter IV deals with possession of gold by public religious institutions and Section 12 speaks about non-application of the and on possession of

primary gold which form part of a structure, etc., of public religious institutions and the said section read as follows :

Nothing in clause (i) of sub-section (1) of Section 8 shall apply to any primary gold which forms part of any structure or any other construction, or

appendage within the precincts of a temple, church, mosque, gurudwara or any other place of public religious worship if such primary gold has

been included in a declaration"".

In Chapter V relating to declarations, we find only one provision enacted therein and that is Section 16. Section 16(1) (provisos omitted) reads as

follows :

Save as otherwise provided in this Chapter, every person who owns, or is in possession, custody or control of, any article or ornament at the

commencement of this Act, or acquires the ownership, possession, custody or control of any article or ornament thereafter, shall make, within

thirty days from such commencement or from such acquisition, as the case may be, or within such further period as the Administrator may, on

sufficient cause being shown allow, a declaration in the prescribed form as to the quantity, description and other prescribed particulars of any

article, or ornament, or both, owned, possessed, held or controlled by him :

Section 16(13) may have relevance and reads it as follows :

If any person who did not own, possess, hold or control, before the commencement of this Act, any quantity of gold in excess of the quantities

specified in sub-section (5) acquires, after such commencement, the ownership (whether by succession, intestate or testamentary, or otherwise),

possession, custody or control of any gold and if, as a result of such acquisition, the total quantity of gold owned, possessed or held or controlled

by such person excess the quantities specified in sub-section (5), such person shall, within thirty days from the date of such acquisition or within

such further period as the Administrator may, on sufficient cause being shown, allow, make a declaration in the prescribed form stating the total

quantity, description and other prescribed particulars of -

(a) The gold owned, possessed held or controlled by him immediately after such acquisition, and

(b) the person from whom the ownership, possession, custody or control of such gold was acquitted"".

To appreciate the place of Section 16(3), Section 16(5) also needs extraction as follows :

No declaration referred to in sub-section (1) or sub-section (3) shall be required to be made -

(a) in relation to articles, unless the total weight of articles owned, possessed, held or controlled by -

(i) a minor, who is not a member of a family, exceeds twenty grams.

(ii) an individual (other than a minor), who is not a member of a family exceeds fifty grams,

(iii) a family, exceeds fifty grams,

(iv) any person referred to in clauses (b) to (f) and (h) to (m) of sub- section (2), exceeds fifty grams;

(b) in relation to any ornaments, or both articles and ornaments, where both articles and ornaments are owned, possessed, held or controlled,

unless the total weight of such ornaments or both articles and ornaments, as the case may be, owned, possessed, held or controlled by,

(i) an individual who is not a member of a family, exceeds two thousand grams,

(ii) a family, exceeds four thousand grams"".

Section 16(11) is also relevant and it runs as follows :

No person shall own or have in his possession, custody or control any quantity of gold which is required to be included in a declaration unless

such gold has been included in a declaration or further declaration, as the case may be :

Provided that nothing in this sub-section shall apply taken in expiry of the period within which a person is entitled to make a declaration or further

declaration"".

Confiscation is contemplated u/s 71 and the action taken in the present case is u/s 71(1), the language of which is as follows :

Any gold in respect of which any provision of this Act, or any rule or order made thereunder has been, or is being, or is attempted to be,

contravened, together with any package, covering or receptable in which such gold is found shall be liable to confiscation"".

4. Section 8(1)(i) adumbrates an embargo with regard to owning or having possession, custody or control of any primary gold, save as otherwise

provided in the Act. This provision will be operative after the coming into force of the act with effect from 1-9-1968. There is no challenge in these

writ petitions of the vires of the provisions of the Act. The definition of the ""gold"" in section 2(j) takes in ""primary gold"", ""article"" and ""ornament"".

We are not concerned with article or ornament and we are concerned only with primary gold, in the present cases. Section 16 speaks about

declarations in respect of article or ornament and it does not speak about declarations in respect of primary gold. It is true that in more than one

place, the expression ""gold"" has been used in the Section 16. In sub-section (3) of Section 16, the expression ""gold"" occurs. But, sub-section (3)

refers to sub-section (5) which lays down the exempted limit for articles and ornaments and sub-section (3) calls for declarations in respect of

acquisitions after the commencement of the Act, of ownership, possession, custody or control of any gold in excess of the quantities specified in

sub-section (5). Hence,, the ""gold"" referred to in sub-section (3) necessarily could have reference to articles and ornaments dealt with under sub-

section (5). Section 16 by itself does not provide for declarations to be made in respect of primary gold. The only provision which lifts the ban on

ownership, possession, custody or control of primary gold adumbrated in Section 8(1)(i) is found in Section 12, extracted above, and it speaks

about inclusion of such primary gold as set out therein in a declaration. The other place where the expression ""gold"" occurs in Section 16 is in sub-

section (11). But that against speaks about gold which is required to be included in a declaration. The other place where the expression ""gold

occurs in Section 16 is in sub-section (11). But that against speaks about gold which is required to be included in a declaration. In section 16 itself

primary gold is not required to be declared. Section 16, as already stated, speaks about declarations in respect of ornaments and articles which

also fall within the definition of ""gold"" in Section 2(j). It is only in Section 12, declaration in respect of primary gold of the categories mentioned

therein is contemplated. Hence, if at all Section 16(11) could have reference to primary gold, it could be only with reference to the primary gold set

out in Section 12. If no declaration which is required under the provision of the Act in respect of ownership, possession, custody or control of

gold, is obtained, the embargo contemplated therein will be operative. This is how we have to understand Section 16(11). In respect of primary

gold other than the one coming u/s 12, no declaration is required and, of course it is of no avail at all. In such cases, the ownership, possession,

custody or control of primary gold will come within the mischief of Section 8(1)(i) and there is no escape from it. Merely because the petitioners

have been exonerated of the charge u/s 16(11), it will not make them escape the mischief of Section 8(1)(i) and there is no escape from. Merely

because the petitioners have been exonerated of the charge u/s 16(11), it will not make them escape the mischief of Section 8(1)(i) which squarely

applies to the facts of the present cases. ""Gold"" in Section 16(11) has reference only to gold as such except u/s 12, cannot have the benefit of a

declaration. In the above view, it is futile to bank upon the fact that the petitioners have been exonerated of the charge u/s 16(11) and then

advance a theory that Section 8(1)(i). The extractions of the various provisions as done above, though may appear to be elaborate, have been

done only to understand the scheme of the said provisions. Learned Counsel traced the implications of the previous rules. In my view, there is no

need to advert them, because on and from the date of commencement of the Act, the provisions therein will govern, and no submissions were

made before me with regard to the concerned provisions being prospective or retrospective. Mr. T. Somasundaram, learned Additional Central

Government Standing Counsel placed reliance on the pronouncement of a Bench of the High Court of Delhi in Vipin Maneklal and Others Vs.

Sushil Kumar and Others, to state that Section 8(1)(i) does not contemplate retention of primary gold by the making of any declaration and

Section 16(11) cannot be so construed as to permit retention of primary gold, merely on a declaration being made. The Bench of the High Court

of Delhi in that case was meeting the contention that under Act there is no absolute ban on the possession of primary gold, merely on a declaration

being made. The Bench of the High Court of Delhi in that case was meeting the contention that under the Act there is no absolute ban on the

possession of primary gold, because Section 8(1) of the Act says that ""save as otherwise provided in this Act"". In this connection, references was

made before the Bench to Sections 8(6) and 16(11) of the Act. The Bench repelled the argument that u/s 8(6), the administrator has got a power

to permit retention of the possession of primary gold. Section 8(6) reads as follows :

Not withstanding anything contained in this section, the Administrator may, if he is of opinion that the special circumstances of any case or class of

cases so require, authorize any person or class of persons to buy or otherwise acquire, accept, or otherwise receive, or sell, deliver, transfer or

otherwise dispose of, any primary gold or article"".

We are not, in the present cases, concerned with Section 8(6) at all. The petitioners do not claim that they have obtained any such exemption.

Hence, there is no need to go near the reasoning expressed by the Bench of the High Court of Delhi in this behalf. But, there is a discussion of the

implications of Section 16(11) in the judgment and it indicates that section 8(1) does not contemplate retention of any primary gold by the making

of any declaration and Section 16(11) could not be so construed as to permit retention of primary gold merely on a declaration being made. The

Bench opined that Section 16(11), so far as primary gold is concerned, can have reference only to Section 12 and to no other Section. I have also

expressed so by independent reasoning of mine as above, and they enable me to repel the submission made by the learned Counsel for the

petitioners that if they escape the swathe of Section 16(11), they cannot come within the mischief of Section 8(1)(i). Section 16(11) operates in a different sphere and though it speaks about gold in general terms, it is specifically qualified when it states ""which is required to be included in a

declaration"". The declaration aspect is found in Section 16 itself apart from Section 12. Hence, the exoneration from Section 8(1)(i) of the Act.

5. Mr. M.R. Narayanaswami, learned counsel for the petitioners, would advance a submission that the confiscation made is contrary to the

constitutional provisions relating to acquisition and deprivation of property. The cases, on hand, of course, have arisen prior to the deletion of the

provisions in the Constitution of the articles relating to right to property and deprivation thereof by the Forty- Fourth Amendments with effect from

20-6-1979 and the petitioners could not be deprived of the arguments which were available to them prior to the coming into force of the Forty-

Fourth Amendment. But the argument itself lacks substance. The ownership, possession, custody or control of primary gold after the

commencement of the Act, save as otherwise provided in the Act itself, will make such possession illegal and hence it comes within the action of

confiscation contemplated u/s 71(1) of the Act. Primary gold in such a contingency cease to have the qualities and adjuncts of ""property"" and it

becomes a contraband. Confiscation of contraband will not come within the mischief of the erstwhile constitutional provisions relating to right to

property. I find that a similar view has also been expressed by the Bench of the High Court of Delhi in the decision referred to above. For all these

reasons, the petition fail and the same are dismissed with costs. Counsel''s fee, Rs. 1,000.