(1988) 01 KL CK 0029

In the High Court Of Kerala

Case No : Criminal Appeal No. 382 of 1986

Assistant Collector of Central Excise APPELLANT

Vs

George RESPONDENT

Date of Decision : 08-01-1988

Acts Referred:
Gold (Control) Act, 1968 — Section 2, 27(7), 55, 85(1)

Citation : (1989) 65 CompCas 103 : (1988) 17 ECC 305 : (1988) 35 ELT 338

Hon'ble Judges : K.G. Balakrishnan, J

Bench : Single Bench

Advocate : K. Prabhakaran, for the Appellant; M.N. Sukumaran Nayar and B. Raman Pillai, for the Respondent

Final Decision : Allowed

Judgement

K.G. Balakrishnan, J.—The Assistant Collector, Central Excise, Trichur, is the appellant. He challenges the acquittal of the accused in C.C. No. 45 of 1985 on the file of the Additional Chief Judicial Magistrate, Economic Offences, Ernakulam. The accused was tried on two counts. viz., for violation of Sections 27(7)(b) and 55 of the Gold (Control) Act, 1968 ; these offences are made punishable u/s 85(1) of the Act.

2. The accused is a gold dealer having his place of business at Trichur in the name and style " Chemmannur Jewellers ". P.W. 1, the Superintendent of Preventive Unit, Trichur, searched the premises of the place of business of the accused on September 23, 1981, between 10.45 a.m. and 7 p.m. The accounts maintained in the shop were verified and the entire stock of gold was also physically verified. As per the account, the accused should have a stock of 1,372 pieces of gold ornaments having a total weight of 11,075.400 grams but on physical verification of the accounts, the total weight was 11,061.50 grams and the shortage was to the extent of 13.900 grams by weight. On the very same day, PW-1 and his subordinates made a search on the third floor of the very same building where the accused''s shop is housed arid found in a card board

box 169 pieces of gold ornaments consisting of 31 bangles, 15 rings, 59 lockets, talis, cross, etc. The total weight of these 169 pieces was 667.850 grams and at the prevailing market rate they were worth about Rs. 1,10,000. PW-1, who was convinced that the gold found in the shop was liable to be confiscated, prepared exhibit P-8 mahazar. On the very same day, PW-1 also conducted a search in a sister concern of the accused, namely, "Nedumpadam Rubbers ". But no gold was recovered from that shop. One Alagiriswami, an accountant of Lakshmi Jewellers, Coimbatore, was seen in the office of the Nedumpadam Rubbers and on questioning him he admitted he was in possession of Rs. 2 lakhs paid by the accused towards the price of gold ornaments purchased from Lakshmi Jewellers, Coimbatore, and that he had been waiting there to collect the balance amount of Rs. 64,000, The amount of Rs. 2 lakhs was also seized from Alagiriswamy. PW-1 questioned the accused, his employees and the other witnesses. The accused had a licence only to conduct the jewellery shop in the ground floor of the building, and according to the prosecution, he had conducted business in the third floor of the building for which he had no licence and, therefore, committed an offence u/s 27(7)(b) and the accused had gold in excess of the account maintained by him and, therefore, he also committed an offence u/s 55 of the Act.

3. On the side of the prosecution, nine witnesses were examined and exhibits P-1 to P-22 were marked. The appellant, when questioned u/s 313, Criminal Procedure Code, maintained that the excess gold found in the shop was the gold purchased by the brother of the accused who is also a partner in the business, from Coimbatore on September 23, 1981, and the same was brought to the shop in the early morning and there was no occasion to bring the same into the accounts and there was no willful negligence on the part of the accused to show false accounts, and as regards the recovery of the gold ornaments from the third floor of the building, the accused contended that these gold ornaments were sorted out separately since one customer wanted to purchase these articles and to avoid mixing up of the same with the other articles kept in the shop, the same were taken to the room upstairs and kept there separately and this did not in any way violate the provisions of Section 27(7)(b) of the Gold (Control) Act, since no business was conducted in that room.

4. As regards the first charge against the accused that he violated Section 55(3) of the Gold (Control) Act in that no licensed dealer or refiner and no certified goldsmith shall, in his capacity as licensed dealer or refiner, either own or have in his possession, custody or control, any gold which has not been included in the accounts referred to in Sub-section (1) of Section 55 of the Act, the defence put forward is that the gold found in excess of the stock was purchased by the brother of the. accused and it was about to be included in the stock. Inspection of the shop began at 10.45 p.m. on September 23, 1981. As per the accounts, there should have been 1,375 pieces of gold ornaments weighing 11,075.400 grams, but on inspection it was found that there were only 11,061.500 grams of gold and there was a shortage of 13''900 grams. The evidence is that the

weighing of these gold ornaments was not done very carefully. Moreover, it has also come in evidence that the person who was in charge of this search had simultaneously conducted a search in the shop premises of the accused''s brother. This evidence had been discussed in detail by the learned Chief Judicial Magistrate. A further discussion on this point is not necessary, as the accused had admitted that the search was conducted and that the total weight of gold found in the shop was 11,061.500 grams. In the third floor of the very same building where the shop room is housed, 667.850 grams of gold were also found and the contention of the accused is that this also formed part of the stock.

5. The accused contended that on the morning of September 23, 1981, the brother of the accused had brought some gold from Coimbatore and the same was kept in the shop room, but they could not be included in the account. It was also contended that the brother of the accused had to go to Ernakulam on that day itself, and so he could not meet the accused and apprise him of the fact that he had brought gold from Coimbatore and the same was kept inside the table. This plea was accepted by the court below. In order to prove that the accused had purchased gold from Coimbatore, the accused also produced purchase bills. In paragraphs 16 and 17 of the impugned judgment, the court below has dealt with in detail as to whether the brother of the accused, C. D. Vincent, had brought gold to the shop of the accused on September 23, 1981. PW-5 is one K. P. Manian, managing partner of Lakshmi Jewellers, Coimbatore. He also supported the defence version and gave evidence to the effect that he had sold gold to C. D. Vincent. Another important circumstance is that at the time of inspection in the shop of the accused''s brother, there was one Alagiriswamy. PW-1, the Superin-, tendent of Central Excise and Customs, while conducting the search, suspected the conduct of Alagiriswamy. On questioning him, a sum of Rs. 2 lakhs was found in his possession. This amount was seized by PW-1 and Alagiriswamy stated to PW-1 that this amount was part of the total consideration he had received from C. D. Vincent and he had been waiting in the shop to get the balance amount of Rs. 64,000. The officials of the Central Excise Dept. had also questioned one Vasanthi, However, she was not examined. So, from the evidence on record, it is quite possible that C. D. Vincent, the brother of the accused, might have purchased gold from Lakshmi Jewellers, Coimbatore, and the same was not brought to the account and there was no excess gold as contended by the prosecution.

6. The court below has taken a reasonable view, and the benefit of doubt has been given to the accused. In view of the evidence of PW-1 and the seizure of Rs. 2 lakhs from Alagiriswamy, it can be assumed that the defence plea was not an afterthought, invented subsequently to get away from the clutches of law.

7. The next charge against the accused is that he had violated Section 27(7)(b) of the Act. It reads :

"27. Licensing of dealers.--.....(7)(b). A licensed dealer shall not carry on business as such dealer in any premises other than the premises specified in his licence."

8. In the instant case, 667.850 grams of gold worth Rs. 1,10,000 was found in the shop situated in the 3rd floor of the building. The accused was admittedly conducting shop in the ground floor and as per the licence given to the accused, he was fully authorised to conduct his business in the licensed premises. In the trial court, it seems that the accused raised a contention that the room in the 3rd floor also formed part of the licensed premises and this plea found favour with the trial court for the reason that the licence was not produced by the prosecution. The learned Magistrate forgot the fact that the licence would only be with the accused and if at all it is to be produced, it is by the accused. Anyway, learned counsel for the accused has not raised any contention that the room in the 3rd floor also formed part of the licensed premises.

9. The other contention raised by the accused is that he had not conducted any business in the room situated in the 3rd floor. The accused had only kept 169 pieces of gold ornaments weighing 667.80 grams in that room. These ornaments were selected by a customer on the previous day and the accused wanted to keep them secretly so as not to be mixed with other ornaments and this indeed was not part of the business and the accused was at liberty to store gold in any premises he chooses.

10. Iam not inclined to accept this contention. Learned counsel for the accused laid emphasis on the words used in Section 27(7)(b) of the Act . and the business carried on in the premises other than the premises specified in the licence should be a " business as such a dealer." The word " dealer " has been explained u/s 2(h) of the Gold (Control) Act, as follows :

" (h) '' dealer '' means any person who carries on, directly or otherwise, the business of making, manufacturing, preparing, repairing, polishing, buying, selling, supplying, distributing, melting, processing or converting, gold whether for cash or for deferred payment or for commission, remuneration or other valuable consideration, and includes. ..."

11. Based on the definition, it was contended that the accused had not been doing any such business in the room in the 3rd floor. Therefore, Section 27(7)(b) of the Act is not violated. Counsel also placed reliance on Civil Writ No. 1221 of 1972, Civil Miscellaneous No. 3537 of 1972 and 5468 of 1972 decided on July 25, 1972 by the High Court of Punjab and Haryana. (Gian Chand Kapur v. Union of India), The court held that:

" the words '',carry on business '', as postulated in Sub-section (7) of Section 27 of the Act, should be considered in relation to the dealer who is in fact selling the gold. No doubt the business consists in purchasing the gold, then selling it in the same form or in another form with a profit, but the real incidence of business is the selling of gold, because it is only by selling that a profit is made and the business culminates in the finality,"

12. Relying on the above decision, it was contended that the stocking of gold in a room other than the licensed premises is not violative of Section 27(7)(b) of the Act as the accused was not doing any business in that room. Section 27(7)(b) has been envisaged to prohibit dealers from carrying on business in places other than the licensed premises. Stocking of gold also is part and parcel of the business. Even in the present case, the contention of the accused is that the customer selected these gold ornaments and thereafter they were taken to the room in the 3rd floor to avoid the same being mixed with the other gold ornaments. It is to be presumed that the customer would come the next day and the accused would effect the sale. The accused made use of the room in the 3rd floor to stock this gold. So, it can safely be concluded that that room was also used as part of the business premises. This provision has to be viewed in the background of the entire scheme of the Gold (Control) Act. In the statute, there is a provision to the effect that the accused shall obtain prior licence for dealership before starting business. He should also give the specification of the room to get the approval of the Central Excise Authorities. This is covered by the Gold (Control) Licensed Dealer Rules, 1969, and if the licensed dealer wanted to change the premises of his business, that also should be done only under Rule 9 of the Gold (Control) (Forms, Fees, etc.) Rules. If the authorities, while giving licence to the dealer, approve the place of business and if any sort of business is done in premises other than the licensed premises, that is violative of Section 27(7)(b) of the Act.

13. If the contention of the accused that the gold intended for sale can be stocked in any place he chooses, is accepted, the provision u/s 55(1)(3) of the Act may not have any application. A dealer can stock his gold ornaments only in the licensed premises and if the dealer caused stock of the gold in any premises other than the licensed premises, it will be clearly violative of Section 27(7)(b). Otherwise, if the dealer was found short of the declared stock, he could very well bring the gold ornaments from the other shop and make good the shortage and escape penal liability. Therefore, stocking of gold in premises other than the licensed premises is to be construed as doing business as such a dealer, and applying this principle, it can only be held that the accused has committed an offence u/s 27(7)(b) of the Act.

14. As the accused is found guilty of having committed the offence u/s 27(7)(b) of the Gold (Control) Act, the acquittal of the accused u/s 27(7)(b) is set aside. Violation of Section 27(7)(b) is made punishable u/s 85(1)(b) of the Act. The punishment envisaged u/s 85(1) is simple imprisonment for a term of three years or with fine or with both. The quantity of gold found kept in the unlicensed premises was worth Rs. 1,10,000. Considering the quantity of the gold kept in the unlicensed premises, I sentence the accused to undergo simple imprisonment for a period of three months and to pay a fine of Rs, 5,000. In default of payment of fine, the accused shall undergo simple imprisonment for a further period of two months. The accused shall surrender to the bail bond. The criminal appeal is allowed as above.

