(1988) 01 KL CK 0019

In the High Court Of Kerala

Case No : Criminal Appeal No. 382 of 1986

Asst. Collector of Central Excise — APPELLANT

Vs

C.D. George — RESPONDENT

Date of Decision : 08-01-1988

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 313

Citation : (1988) 16 ECR 340

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

Bench : Single Bench

Final Decision : Allowed

Judgement

K.G. Balakrishnan, J.—The Assistant Collector of Central Excise, Trichur is the appellant. He challenges the acquittal of the accused in C.C. 45 of 1985 on the file of the Additional Chief Judicial Magistrate, Economic Offences, Ernakulam. The accused was tried on two counts, viz., for the 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". PW1, the Superintendent of Preventive Unit, Trichur searched the premises of the place of business of the accused on 23.9.1981 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 1372 pieces of gold ornaments having a total weight of 11075.400 grams, but on physical verification of the accounts the total weight was 11061.50 grams and the shortage was to be extent of 13.900 grams by weight. On the very same day PW 1 and his subordinates made search on the 3rd floor of the very same building, where the accused''s shop is housed, and found in a card board box 169 pieces of gold ornaments consisting of 31 bangles, 15 rings, 59 lockets, talies, cross etc. The total weight of these 169 pieces was 667.850 grams and on the prevailing

market rate it was worth about Rs. 1,10,000/-. PW 1, who was convinced that the gold found in the shop was liable to be confiscated, prepared Ext.P8 mahazar. On the very same day PW1 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 the Lakshmi Jewellers, Coimbatore was seen in the office of the Nedumpadam Rubbers and on questioning him he admitted that 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. PW1 questioned the accused, his employees and the other witnesses. The accused had 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 3rd floor of the building for which he had no licence and therefore committed the 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 9 witnesses were examined and Exts. P1 to P22 were marked. The appellant when questioned u/s 313 C.P.C. 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 23.9.1981 and the same was brought to the shop in the early morning and there was no occasion to bring the same into account and there was no wilful negligence on the part of the accused to show false accounts, and as regards the recovery of the gold ornaments from the 3rd 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 upstair room and kept there separately and this did not in any way violated 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 they violated Section 55(3) of the Gold (Control) Act that no licenced dealer or refiner and no certified goldsmith shall, in his capacity as licenced 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 gold found in excess of the stock, was purchased by the brother of the accused and they were about to be included in the stock. Inspection of the shop began at 10.45 p.m. on 23.9.1981. As per accounts there should have been 1375 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 shortage of 13.900 grams. The evidence is that the weighing of these gold ornaments were not done very carefully. Moreover, it has also come in evidence that the person who was in charge of this inspection had simultaneously conducted search in the shop premises of the accused''s brother. This evidence

has been discussed in detail by the learned Chief Judicial Magistrate. The further discussion of this point is not necessary, as the accused had admitted that the search was conducted and the total weight of gold found in the shop was 11,061.500 grams. In the 3rd 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 in the morning of 23 9 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 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 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 CD. Vincent had brought gold to the shop of the accused on 23.9.1981. PW5 is one K.P. Manian, the Managing Partner of Lakshmi Jewellers, Coimbatore. He also supported the defence version and gave evidence to the effect that he had sold gold to CD. Vincent Another important circumstance is that at the time of inspection in the shop of the accused''s brother there was one Alagiriswami. PW1 the Superintendent of Central Excise and Customs while conducting search suspected the conduct of this Alagirswamy. On questioning him a sum of Rs. 2 lakhs was found in his possession. This amount was seized by PW1 and Alairiswamy stated to PW1 that this amount was part of the total consideration he had received from CD Vincent and he had been waiting in the shop to get the balance amount of Rs. 64,000/- The officials of the Central Excise had also questioned one Vasanthi. However, she was not examined. So from the evidence on record it is quite possible that CD. Vincent the brother of 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 PW1 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) X X X

(b) A licensed dealer shall not carry on business as such dealer in any premises other than the premises specified in his licence.

In the instant case 667.850 grams of gold worth Rs. 1,10,000/-was found in the shoo situated in the 3rd floor of the building. The accused was admittedly conducting shop in the ground floor and as per 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 was found favour by 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. Any way the learned Counsel for the accused has not raised any contention that the room in the 3rd floor also formed part of the licensed premises.

8. 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 667.850 grams in that room. These ornaments were selected by a customer on the previous day and the accused wanted to keep it separately 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.

9. I am not inclined to accept this contention. The 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 carried 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 included-".

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. The counsel also place reliance on a Civil writ No. 1221/1972, Civil Miscellaneous No. 3537 of 1972 and 5468 of 1972 decided on 25th July, 1972 by the High Court of Punjab and Harayana Gian Chand Kapur and 175 Ors. v. Union of India and Ors. The court held that:

the word ''carry on business'' as postulated in Sub-section (7) of Section 27 of the Act, would 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 the same 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 its finality.

Relying on the above decision it was contended that the stocking of gold in room other than the licensed premises is not violative of the 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 in the licensed premises. Stocking of the gold also is part and parcel of the business. Even in the present case the contention of the accused is that the customer selected this 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 Gold (Control) Act. In the statute there is provision to the effect that the accused shall obtain prior licence for dealership before starting business. He should also give the specifications of the room to get 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 u/s 9 of the Gold (Control) (Forms fees etc.) Rules. if Authorities while giving licence to the dealer would approve the place of business and if any sort of business is done in the premises other than the licensed premises that is violative of Section 27(7)(b) of the Act.

10. 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 the Section 27(7)(b). Otherwise, if the dealer was found in short of the declared stock he could very well bring the gold ornaments from other shop and make good the shortage and escape from the penal liability. Therefore, stocking of gold in a 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 the offence u/s 27(7)(b) of the Act.

11. 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 3 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 3 months and to pay a fine of Rs. 5000/-. In default of payment of fine the accused shall undergo simple imprisonment for a period of 2 months. Accused shall surrender to this bail bonds.

The Criminal appeal is allowed as above.

