(1992) 07 OHC CK 0001

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1891 of 1981

Binod Behari Panda APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 16-07-1992

Acts Referred:
Gold (Control) Act, 1968 — Section 71, 8

Citation : (1993) 42 ECC 78

Hon'ble Judges : G.B. Patnaik, J;A. Pasayat, J

Bench : Division Bench

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—The petitioner assails the orders passed by the authorities under the Gold Control Act, 1968, directing confiscation of the gold recovered from the petitioner''s premises and levying penalty on the petitioner.

2. The brief facts are that the Central Excise staff searched the residential premises of the petitioner on 2.4.1976 and seized gold ornaments which according to the petitioner belong to the family and part, of it had been pawned with the petitioner by different persons. According to the excise authorities the seized articles consist of both primary gold weighing 1,210.848 grams and gold ornaments pledged with the petitioner by different persons weighing 12,825.806 grams. Apart from this 1,648.870 grams of gold ornaments belonging to the family of the petitioner were also recovered. The Central Excise authorities on being satisfied that the petitioner failed to produce any evidence and contravened Section 8 of the Gold (Control) Act, initiated a proceeding calling upon the petitioner to explain as to why the primary gold as well as the gold ornaments should not be confiscated u/s 71 of the Act and why penalty should not be imposed u/s 74 of the Act. This notice of the Excise authority asking for explanation is dated 14.7.1976. In reply to the aforesaid show-cause notice, the petitioner filed his explanation on 31.3.1977 taking the stand that the four balas which the authorities have assumed to be primary gold are, in fact, gold

ornaments and the seven other balas are also gold ornaments belonging to the members of the family. So far as the gold ornaments are concerned, the petitioner took the stand that 12,825.806 grams of ornaments had been pledged with the petitioner by different persons and in support of the same it was contended that different slips had been attached to such ornaments. It was also further contended that 1648.970 grams of gold ornaments belonged to Smt. Haripriya Devi, mother of the petitioner and to other members of the family and thus there had been no contravention of the provisions of the Gold Control Act. In support of the stand that the balas are, in fact, gold ornaments, statements of important personalities of the area had been filed they being the then Deputy Minister in the Orissa Cabinet and the then Member, Orissa Legislative Assembly from Kokasora Constituency. The show-cause filed by the petitioner has been annexed as Annexure-2.

3. Opposite party No. 3, who is the adjudicating authority, however, came to the conclusion that the petitioner had contravened Section 8(1) of the Gold Control Act. He rejected the petitioner''s plea with regard to the balas and held that the so-called balas were primary gold. In coming to the aforesaid conclusion the adjudicating authority has basically relied upon the facts that the two ends of those balas have never been joined and a gap remains and further the appearance does not give a good look or lustre indicating the same to be an ornament and on the other hand, it appears that a gold bar was by crude method made into a round shape without the ends being joined. He has, therefore, held that the same is primary gold within the ambit of Section 2(r) of the Gold Control Act. The adjudicating authority further fortifies his conclusion by finding out the purity of the gold and according to him no ornament can be of such purity. The adjudicating authority accepted the petitioner''s plea that 4 balas were in fact the pledged properly of third persons, but still he came to the conclusion that the proviso to Section 71 would not apply and the mere possession even as a mortgagee would amount to contravention of law and thereby the same were liable for confiscation u/s 71. So far as the gold ornaments arc concerned, the adjudicating authority came to hold that 14,474.776 grams of ornaments were seized and even if the plea of pledging by different persons was accepted, but still the ornaments were liable for confiscation being in excess of the permissible limit. Accordingly he directed confiscation of 1,315.788 grams of primary gold including the balas and 14,369.836 grams of gold ornaments u/s 73 of the Gold (Control) Act and further levied penalty to the tune of Rs. 2,50,000/- u/s 74 of the said Act. The aforesaid order of the Collector, Central Excise, has been annexed as annexure-3.

4. The petitioner carried the matter in appeal which was disposed of finally by the Gold Control Administrator by his order annexed as Annexure-5. The appellate authority reversed the conclusion of the Collector with regard to confiscation of pledged ornaments. He came to the conclusion that unless it was proved beyond doubt that the pawner has relinquished his right of redemption and the ownership is transferred to the pawnee, the pawned ornaments could

not be confiscated and since the Department has failed to establish the same, the pawned ornaments could not have been confiscated and, therefore, in view of the fact that slips had been attached to the different ornaments indicating that those had been pawned, those ornaments should be given back. So far as the gold ornaments weighing 1,648.970 grams are concerned, he, however, held that even if it is within the permissible limit of 4000 grams, but as it exceeded the limit after taking into account along with the pawned ornaments, they were liable for confiscation. But since the ornaments are the family ornaments, he directed that instead of confiscation penalty should be imposed on the petitioner for having not declared the ornaments. So far as the gold balas and small strip of gold weighing 1,315.788 grams are concerned he affirmed the conclusion that those are primary gold and, therefore, have rightly been confiscated. On the question of penalty, he, however reduced the penalty to Rs. 1,50,000/-. This order of the appellate authority has been annexed as Annexure-5.

5. The petitioner carried the matter further in revision and the revisional authority disposed of the same by his order dated 24th of March, 1991. In respect of the pledged items, the revisional authority came to hold that passing of an order in respect of such item without issue of a show cause notice to the owner who had pledged was not in accordance with law and, therefore, the said confiscation could not be sustained and accordingly set aside the same and directed the Collector to re-adjudicate the matter. So far as the gold balas are concerned, he, however, held that those were not ornaments, but primary gold and, therefore there was no infirmity with the orders passed by the lower authorities. On the question of penalty he has reduced the penalty to Rs. 75,000/-. This order of the revisional authority has been annexed as annexure -- 7. The petitioner has thereafter approached this Court.

6. Mr. Das appearing for the petitioner contends that the order of the appellate authority setting aside the confiscation of the mortgaged ornaments not having been challenged by the Department and the petitioner in his revision having challenged only the order of the appellate authority affirming the confiscation of the balas on a finding that they are primary gold, it was not open for the revisional authority to direct a fresh enquiry in respect of the pledged ornaments and, therefore, the said direction must be held to be without jurisdiction. So far as the question whether the balas are primary gold as found by the authority, or are ornaments, as contended by the, petitioner, Mr. Das argues that the revisional authority has failed to follow the principles of natural justice, inasmuch as though the petitioner had specifically asked for inspection and examination of those balas in his presence so that he would be able to establish that those are ornaments and not primary gold and, in fact, the authority had fixed the inspection and examination of ornaments at Bhubaneswar on 5.3.1981, but no notice of the same having been served on the petitioner, the petitioner was deprived of his right of establishing that in fact they are ornaments. Further, according to Mr. Das while coming to the conclusion that those balas arc primary gold and not ornaments, relevant materials have not been considered and the

evidence led have not been weighed and, on the other hand, the adjudicating authority has gone by its mere lustre and appearance and the appellate as well as the revisional authority confirmed the same without even applying his mind to the materials on record.

The learned Standing Counsel appearing for the Department, on the other hand, contents that the finding whether a particular piece of gold is a primary gold or ornament is a question of fact and concurrent findings having been arrived at by the forums below, it would not be appropriate for this Court to interfere with such finding. On the question whether in a revision filed by the petitioner it was open for the revisional authority to interfere with the direction of the appellate authority which was not challenged, the learned Standing Counsel is not in a position to assail the same.

7. Undisputedly, the adjudicating authority, namely the Collector had come to the conclusion that even the pledged ornaments were liable to be confiscated. On appeal, however, the appellate authority reversed the finding and came to hold that. it had not been established by the Department that the pawners had relinquished their right of redemption and, therefore, the ornaments could not be treated to be the ornaments of the person from whom they had been seized and consequently, those ornaments could not be confiscated and he accordingly set aside the order of confiscation. This part of the order had not been assailed in revision by the Department and, therefore, the revisional authority had no power under Sub-section (1) of Section 82 to interfere with that part of the appellate direction. Under Sub-section (2) of Section 82, no doubt a suo motu power has been conferred on the revisional authority, but the question of exercising that power in the facts and circumstances of the present case did not arise as the only ground on which the revisional authority directed a fresh adjudication in respect of the pawned ornaments in paragraph-2 of the revisional order is that no notice had been given to the pawners in the proceeding. But since the appellate authority had already set aside the order of confiscation and came to a finding that the ornaments had been pawned, the revisional authority obviously did not take that into consideration and passed the impugned direction. In this view of the matter, we have no hesitation to come to the conclusion that the direction of the revisional authority so far as the pawned articles are concerned is wholly without jurisdiction and cannot be sustained and the appellate order in respect of that must be implemented. We accordingly set aside that part of the direction contained in paragraph-2 of the revisional order relating to the pawned ornaments.

8. Coming to the next question which centres round the controversy as to whether the balas are gold ornaments or primary gold, we are not in a position to accept the submission of the learned Standing Counsel for the Department that it is a pure finding of fact. The expression "primary gold" has been defined in Section 2(r) to mean "gold in any unfinished or semifinished form and includes ingots, bars, blocks, slabs, billets, shots, pellets, rods, sheets, foils and wires".

"Gold" has been defined in Section 2(j) to mean, 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 nine carats and includes primary gold, article and ornament. "Ornament" has been defined in Section 2(p) to mean, a thing, in a finished form, meant for personal adornment or for the adornment of any idol, deity or any other object of 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. No definite tests have been prescribed under law to come to a conclusion as to whether a gold is primary gold within the meaning of Section 2(r). It, therefore, depends on the proof and in assessing the evidence led, the opinion of expert as well as that of the common man of the society in the area is a vital consideration. That being so, the finding on such question by a tribunal is a mixed question of fact and law.

9. As on today, under the new fiscal policy possession of gold is not an offence, but undisputedly the date on which the articles were seized, possession of primary gold was an offence and was liable for confiscation. Even though the law as it stands has no bearing in adjudicating the legality of the order of confiscation passed, but the change of law cannot be totally lost sight of. However, the revisional authority under the Gold Control Act was entitled to go into the relevant evidence and come to a conclusion as to whether the gold is a primary gold or not and in that view of the matter, he was entitled to examine the relevant materials which the petitioner had placed before the authority. A bare perusal of the revisional order would indicate that the said authority had never applied his mind to the relevant materials and mechanically confirmed the findings arrived at by the lower forums. Even the adjudicating authority, namely the Collector had also not examined the evidence led by the petitioner in support of his stand that the balas are in fact commonly used as ornaments in that part of the State. The adjudicating authority had merely gone by the fact that a bare look at the article would indicate that it was not in a finished form. Further when the petitioner had prayed before the revisional authority that the inspection be made in his presence so that the petitioner would point out the relevant features to establish that what was seized was in fact ornament and the revisional authority, in fact, directed'' inspection in his presence, but non-service of notice of the same on the petitioner has vitiated the inspection thus made and thereby it must be held that the petitioner was denied of a reasonable opportunity in the matter. Though a cryptic counter affidavit has been filed on behalf of the opposite parties, yet the petitioner''s assertion that he received the notice of inspection after the date of inspection has not been denied. In the aforesaid premises, we are persuaded to accept the submission of Mr. Das that there has been a violation of principles of natural justice, as contended by the petitioner. Therefore, the order of confiscation of balas must be held to be illegal and invalid. When the tribunals pass an order ignoring material pieces of evidence, then the conclusion is liable to be interfered with by this Court in a writ of

certiorari. When the tribunals pass an order violating the principles of natural justice, then also this Court is entitled to interfere with the order in a writ of certiorari. In that view of the matter, the order of confiscation in respect of the balas cannot be sustained.

10. The question further arises is as to what appropriate order can be passed by the Court which would meet the ends of justice. In our considered opinion, the matter has to be remitted back. But the further question that arises is whether we should remit it back to the revisional authority or to the adjudicating authority himself. In view of our conclusion that the adjudicating authority has also not considered the relevant materials produced before him by the petitioner and in view of the petitioner''s stand that the seized articles should be examined in his presence so that he can indicate the features for establishing that what was seized was ornament and not primary gold, we think it appropriate to remit the matter to the adjudicating authority, namely the Collector of Central Excise & Customs (opposite party No. 3). In the ultimate analysis, therefore, we set aside the direction of the revisional authority so far as it relates to the pawned ornaments and confirm the order of the appellate authority in that regard and, therefore, the petitioner would be entitled to the consequential relief in respect of the pawned ornaments as directed by the appellate authority in his order under Annexure-5. The order of confiscation in respect of the 11 balas and the conclusion that they are primary gold are set aside and the proceeding is remitted back to the Collector of Central Excise & Customs (opposite party No. 3) for reconsidering the question as to whether those balas are primary gold, as contended by the Department, or are ornaments, as contended by the petitioner. While reconsidering the matter it is needless to mention that the petitioner will have an opportunity of hearing and only the existing materials will be considered, but the petitioner cannot claim to adduce any further evidence in the matter. The order directing levy of penalty is also set aside and the question of levy of any penalty has to be re-decided by the adjudicating authority only after his conclusion on the liability of confiscation in respect of the balas in question.

The writ application is accordingly allowed. There will be no order as to costs.

A. Pasayat, J.

11. I agree.

