
(1982) 12 DEL CK 0006
In the Delhi High Court
Case No : L.P.A. No. 28 of 1982

Collector of Central Excise at Poona and others	APPELLANT
Vs	
Sushil Kumar and others	RESPONDENT

Date of Decision : 10-12-1982

Acts Referred:

Citation : (1983) 14 ELT 2226

Hon'ble Judges : Prakash Narain, J;B.N. Kirpal, J

Bench : Division Bench

Judgement

B.N. Kirpal, J.—This appeal under clause X of the Letters Patent has been filed against the judgment dated 3rd November, 1981 whereby a single Judge of this Court allowed the petition under Article 226 of the Constitution filed by the respondents and had quashed the seizure, and subsequent confiscation, which had taken place on 9th July, 1968, of a large quantity of gold under the provisions of Gold (Control) Ordinance, 1968.

2. One Keshrimal Porwal had two businesses, a bidi business at Kamptee and a gold and silver shop in Mandsaur. On 7th October, 1952 he died leaving behind a widow named Ratanbai, a daughter named Shantabai and a son named Nemkumar. Both the said children were married. Shantabai had a son who had some congenital abnormality and was almost invalid since birth. Nemkumar, on the other hand, had five sons in all, one of them having been born at the time when Keshrimal was alive.

3. After Keshrimal's death the business at Mandsaur was stated to have been wound up and the family lived at Kamptee. On 9th July, 1968 the said family house at Kamptee was searched by the officers of the Central Excise Nagpur. The search resulted in the seizure of ten slabs and 9 pieces of gold and 230 gold coins which were lying in a big Godrej iron safe, which safe was inside a Godrej cupboard. The gold, at that time, was valued at Rs. 7,63,200.

4. The officials recorded the statement of Ratanbai and Nemkumar on the

following day i.e. on 10th July, 1968. Ratanbai stated that the said gold was the self-earned property of her late husband and she did not know the exact quantity of gold which was there. According to her, the gold had been kept by her in the safe about 8 of 10 years ago and she had all along kept the keys of the same in her possession and had not decided as to whom she would give the gold after her.

5. Nemkumar, on the other hand, in his statement stated that he did not know about the gold and he came to know of its existence only at the time of search and seizure. According to him the keys of the safe always remained with his mother and he had bought the safe about 8 or 9 years back from the agents of Godrej & Co. from Nagpur.

6. On 29th July, 1968 Ratanbai filed declaration to the Gold Control Officer at nagpur in respect of the seized gold. This gold was referred by her as having been earned by her husband and as meant for her grandsons.

7. Thereafter the Collector, Central Excise, Nagpur served notices dated 21st August, 1968 on Ratanbai and Nemkumar. They were asked to show cause why the said gold should not be confiscated and a penalty imposed. The allegation was that the said gold had been found in their possession, custody or control and it was being held by them in contravention of the Gold (Control) Ordinance, 1968. The gold was described as being primary gold. About the description of the gold there is no dispute in this case.

8. Time was asked for and obtained by Ratanbai and Nemkumar for enabling them to file a reply. On 16th September, 1968 Ratanbai wrote a letter to Superintendent, Central Excise, Nagpur. In that letter it was inter alias stated that in the statement recorded on 10th July, 1968 a mistake had crept in. According to her she had kept the gold in the safe "about 8 or 9 days ago" and not "8 or 9 years ago". She requested that the word "years" be substituted by the word "days".

9. The mother and the son, namely, Ratanbai and Nemkumar, thereafter sent their reply to the show-cause notice. The story put forth by them was that the gold in question belonged to Keshrimal. On 18th February, 1952 Keshrimal, when he happened to be at Mandsaur, secretly made a will. The said will was alleged to have been written by his Munim Moti Lal. One of the attesting witnesses was of Udaipur and the other was one Shri A. A. Patil, the then Collector of Mandsaur. Keshrimal had asked the said Moti Lal as well as the two attesting witnesses not to inform the members of his family about the existence of the will. It was further contended that after the death of Keshrimal the relations between Nemkumar and his mother deteriorated. Ratanbai is alleged to have spent the money left to her by her husband. She was unable to get any money from her son. Some time in June, 1968 Ratanbai went to Mandsaur. There, it is alleged, she met the aforesaid Munim, Moti Lal. According to Ratanbai, Moti Lal told her, for the first time, while she was at Mandsaur that Keshrimal had left a safe in the house at Mandsaur, which safe had been embedded in the ground in the cellar.

This safe was allegedly recovered from the cellar. The safe was opened and the gold and silver was recovered. This is stated to have taken place on 30th June, 1968. According to Ratanbai, the will was in the said safe and she came to know about it at that time. According to her, before she could decide as to whether to distribute the gold in accordance with the will or to keep it with herself and utilise it as she wished, the excise officers came and seized it on 9th July, 1968. She submitted that she was unable to file any declaration before 30th June, 1968 as she did not know about the existence of the gold.

10. Along with the reply, Ratanbai enclosed affidavits of some of the witnesses, as well as a letter from Shri A. A. Patil, in order to establish the genuineness of the will.

11. The Collector thereafter recorded evidence of the parties. By his order dated 15th May, 1970, however, he ordered the confiscation of the gold and he also imposed a penalty of Rs. 38,000/- on Ratanbai. The Collector had held that the execution of the will could not be lightly brushed aside, but the story regarding the discovery of the will and gold at Mandsaur on 30th June, 1968 could not be believed. According to him, Ratanbai and Nemkumar had full knowledge about the existence of the gold and the gold was in her possession at least for the last 8 or 9 years.

12. Being aggrieved, an appeal was filed by Ratanbai to the Administrator. At that time the Gold (Control) Act had been amended by the Gold Control (Amendment) Act, 1971. Ratanbai submitted to the Administrator that, in deciding the appeal, it should be taken into consideration that the gold did not belong to her but had belonged to her grandsons, and that it was sought to be confiscated not for any fault of theirs but for the alleged act or omission of another person without the knowledge of the said grandsons. She contended that under the newly enacted proviso to Section 71 the gold could not be confiscated. By order dated 23rd February, 1972 the Administrator sustained the findings of the Collector and dismissed the appeal. He, however, released one gold coin because it was classifiable as a coin and hence could not be regarded as primary gold. The Administrator also did not dispute the genuineness of the will.

12A. Ratanbai thereafter filed a revision, against the order of the Administrator, to the Central Government. Simultaneously Sushil Kumar, the eldest son of Nemkumar, also filed a revision against the said order. According to him he was entitled to at least 500 Tolas of gold as per the aforesaid will of his grandfather. It was contended that because of the act of omission on the part of his grandmother the gold was being confiscated and this was without his knowledge and connivance, and, Therefore, in view of the newly added proviso to Section 71, the confiscation could not take place. It was also submitted that he and the other grandsons of Keshrimal had not been given an opportunity to substantiate their claim to the ownership and thus the principles of natural justice had been violated.

13. By letter dated 31st July, 1972 the revision of Sushil Kumar was summarily rejected by the Central Government. According to the Central Government revision could not be filed as Sushil Kumar had not filed an appeal against the Collector's order.

14. The revision filed by Ratanbai was dismissed by order dated 3rd May, 1973. The genuineness of the will was not disputed. It was, however, held that the gold seized was not the same as that which was mentioned in the will.

15. Sushil Kumar and his four brothers as well as his cousin Sankar Kumar, son of Shantabai then filed in this Court a petition under Article 226 of the Constitution being Civil Writ No. 1014 of 1973. In this writ petition the orders of confiscation were sought to be challenged, and it was further prayed that the confiscated gold should be ordered to be returned.

16. As already noted, the aforesaid writ petition was allowed by T. P. S. Chawla J. by his order dated 3rd November, 1981. The learned single Judge proceeded on the basis that, as held by the Government authorities, the will in question was genuine. The necessary corollary which followed from that is that the gold in question belonged to the minor grand-children of Keshrimal. The learned single Judge was of the opinion that in view of new sub-section (1) of Section 71 of the Gold (Control) Act, 1968 the gold in question could not be confiscated. According to the single Judge it was an act or omission on the part of Nemkumar who was stated to be the guardian of the minor children, which had resulted in the gold being confiscated. According to the single Judge Nemkumar should have disposed of the gold before 1st September, 1967, either by sale to a refiner or dealer or by conversion into ornaments. Nemkumar had failed to do so and this omission to act on his part had resulted in the confiscation of the gold. It was accordingly held that the petitioners were entitled to the benefit under the proviso to section 71 and the gold was not liable to be confiscated. The orders confiscating the gold were accordingly quashed and the authorities were directed to return the said gold to the petitioners.

17. The present appeal has been filed against the aforesaid judgment of the learned single Judge, challenging the correctness of the same.

18. According to the learned counsel for the appellants, the learned single Judge did not correctly construe the provisions of the amended Section 71 of the Act. It was contended that the proviso to Section 71 was not applicable to the present case and the primary gold which had been seized could not have been ordered to be returned to the petitioners. The counsel for the respondents, however, supported the judgment and has submitted that the judgment of the single Judge does not call for any interference.

19. In order to appreciate the rival contentions, it is necessary to refer to the various provisions of law which would be relevant for the purposes of this case. On 12th December, 1962, the defense of India Act, 1962 was enacted, replacing an Ordinance which had been issued on 26th October, 1962. u/s 3 of the said Act

the Central Government framed defense of India Rules, 1962.

20. In the Rules, as originally framed, there was no provision dealing with the control of gold. By defense of India (Amendment) Rules, 1963 a new part XII-A was inserted with effect from 9th January, 1963. By this amendment Rules 126-A to 126-Z were inserted. Rule 126-A(d) defines gold as, inter alia, including primary gold as well as any ornament or any other article of gold. Chapter II contained provisions regarding the control of business in gold while Chapter III contained provisions providing for licensing of dealers and refiners. Section 126-H provided for restrictions on possession and sale of gold. Sub-rule (2)(d) was of general application and the same read as follows :-

"Save as otherwise provided in this part, -

..... (d) no person other than a dealer licensed under this Part shall buy or otherwise acquire or agree to buy or otherwise acquire, gold, not being ornament, except -

(i) by succession, intestate or testamentary, or

(ii) in accordance with a permit granted by the Board in this behalf :"

Restriction regarding the sale of gold was contained in sub-rule (2)(e) of rule 126-H. The effect of this was that except in the manner provided under rule 126-H(2)(d)(i) and (ii) no person could acquire or buy any primary gold. Rule 126-I required declaration to be made of the possession of gold other than ornaments. The relevant provisions of the said rule are as under :-

"126-I. Declaration as to possession of gold required other than ornament. -

(1) Every person, not being a dealer required to apply for a license, or licensed or a refiner licensed under this part, shall, within thirty days from the commencement of this part or within such further period as the Central Government may by notification specify make a declaration to the Board in the prescribed form as to the quantity, description and other prescribed particulars of gold (other than ornament) owned by him.

(2) For the removal of doubt it is hereby declared that the declaration referred to in sub-rule (1) shall be made -

(a) in the case of gold belonging to a minor or a lunatic, by the guardian or manager of such minor or lunatic, as the case may be;"

Sub-rule (1) of rule 126-I inter alia, provided that no person, other than a dealer, shall have in his possession any quantity of gold without the same having been included in a declaration which is furnished in accordance with the said rule, The net effect of the aforesaid provisions was that the acquisition, possession or control of primary gold, without a declaration, became illegal. Power was given for search and seizure of the gold in respect of which any of the said rules had been contravened. Under rule 126-M the gold which was so seized was liable to

be confiscated. In addition thereto, under rule 126-P, a person who had failed or omitted to file any declaration could be penalised.

21. The defense of India Rules were amended by the defense of India (4th Amendment) Rules, 1966. This amendment was made effective on 1st March, 1967. Sub-rules 1A to 1G were inserted in rule 126-H. By sub-rule 1A a ban was put on the possession of primary gold. The said sub-rule reads as follows :-

"No person (other than a dealer or refiner licensed under this part) shall, after the expiry of a period of six months from the commencement of the defense of India (Fourth Amendment) Rules, 1966, either own or have in his possession, custody or control any primary gold."

During the aforesaid six months grace period, all primary gold was required to be disposed of by sale to a refiner or a dealer or could be converted into ornaments. The procedure in this behalf which had to be followed was set-out in sub-rule 1B. The effect of this was that, within six months of 1st March, 1967 i.e. by 1st September, 1967, no person, other than a dealer or a refiner, could be in lawful possession of primary gold. This was notwithstanding the fact that prior to the amendment of the Rules a declaration under the un-amended rule 126-I may have been made. Yet another amendment which was inserted by the aforesaid amending rules was that a new proviso was added to rule 126-H(2)(d) which read as follows :-

"Provided further that no person shall, after the expiry of a period of six months from the commencement of the defense of India (Fourth Amendment) Rules, 1966, acquire any primary gold by succession, intestate or testamentary."

The effect of this was that after 1st September, 1967, the primary gold could not even be acquired by succession.

22. As, by virtue of the fourth amendment Rules, acquisition and possession of primary gold had been made illegal, there could obviously be no question of retaining any provision with regard to a declaration being made regarding primary gold. As such, rule 126-I was also amended. By virtue of the amendment every person was required to make a declaration in respect of "any article or ornament, or both, owned by him." Reference, in the said rule, to "gold" was deleted for even after declaration primary gold could not be retained.

23. Part XII-A of the defense of India Rule, 1962 was thereafter repealed and replaced by the Gold (Control) Ordinance, 1968. This Ordinance was promulgated on 29th June, 1968. At the time when the gold was seized this Ordinance was in force. The Ordinance was itself repealed by the Gold (Control) Act, 1968 which came into force with effect from 1st September, 1968.

24. The provisions of the Ordinance, as well as of the Act, are practically identical. By the said Act the Ordinance was repealed. Sub-section (2) of Section 116, however, inter alias provided that notwithstanding the repeal of the Ordinance, anything done or action taken under the said Ordinance or under the

defense of India Rules shall, in so far as it is not inconsistent with the provisions of the Act, be deemed to have been taken under the corresponding provisions of this Act, as if the Act had come into force on the 29th June, 1968. The effect of this was that though seizure had taken place on 9th July, 1968, it is the provisions of the Act which would be applicable with regard to the further proceedings which could take place under the Act.

25. Restrictions regarding acquisition, possession and disposal of gold were provided by Section 8(1) of the said Act. Section 8(1), which is relevant for the present case, reads as under :-

"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."

Sub-section (6) of Section 8 contained the power of relaxation and the said sub-section reads as under :-

"Notwithstanding 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, authorise 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."

Section 16 set out provisions with regard to declarations to be made of articles or ornaments. Section 16(1) reads as follows :-

"16. Declarations as to articles or ornaments. - (1) 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 article, or any ornament, or both, owned, possessed, held or controlled by him :

Provided that no such declaration shall be required to be made where a person who, having owned, possessed, held or controlled any article or ornament before the commencement of this Act, has already made a declaration in relation to that article or ornament, or both :

Provided further that nothing in this sub-section shall be construed as enabling any declaration to be made in respect of any gold for which the period prescribed

or allowed under the law for the time being in force before the commencement of this Act had expired before such commencement."

The other section to which reference has been made during the course of arguments is sub-section (3) of Section 16, which reads as under :-

"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, held or controlled by such person exceeds 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 acquired."

The reading of the aforesaid provisions of the defense of India Rules, unamended and amended, the Ordinance and the Act make it apparent that restriction with regard to acquisition and purchase of primary gold was for the first time inserted by the defense of India Rules in 1963. At that time possession of primary gold could be retained, in case a declaration of the quantity of primary gold which was held had been made. In other words, if no declaration had been made, the possession of primary gold could not be retained by any person and such undeclared gold would be liable to confiscation. Fresh acquisition of primary gold was, however, prohibited, except that it could be inherited. A change was thereafter brought about by the amendment to the defense of India Rules with effect from 1st March, 1967. The amended rules made a reference to the primary gold which had been declared and provided that the said declared gold could be sold to the refiner or dealer or could be converted into ornaments. The period within which this could be done was of six months. No reference was made in the amended rules to the undeclared gold because, as already noted, the said undeclared gold had already become contraband, and liable to confiscation. If the declared gold was not disposed of or converted within the stipulated period then the same became liable to be confiscated. After 1st September, 1967, therefore, no person could hold primary gold. This prohibition was continued in the Ordinance as well as in Section 8(1) of the Gold (Control) Act. Articles or ornaments, other than primary gold, could be retained if declarations were made in this behalf. Section 16 makes provision for such declarations to be made. Sub-section (1) of Section 16 makes reference to articles and ornaments only and

makes no reference to primary gold. The first proviso to Section 16(1) provides that any declaration already made with regard to "article" or "ornament" before the commencement of the Act would continue to be valid, and no further declaration need be made with regard thereto. The second proviso, however, made it clear that the enactment of sub-section (1) of Section 16 could not enable any person to make declaration of "gold", if the period prescribed for such declaration had already expired before the commencement of the Act.

26. It was, however, contended by the learned counsel for the respondents that under the Gold (Control) Act, 1968 there was no absolute ban on the possession of primary gold. This submission was made on the basis that Section 8(1) in turn says that "save as otherwise provided in the Act". In this connection reference was made to Sections 8(6) and 16(11) of the said Act. We are unable to agree with this submission. u/s 8(6) power is given to the Administrator, in special circumstances and cases, to "authorise 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". The plain reading of this sub-section shows that even the Administrator cannot give any permission for the possession of primary gold to be retained. In any case, merely because Section 8(6) gives a power of exemption to be exercised by the Administrator, it does not mean that the normal rule does not exist, namely, that there can be no retention of the possession of primary gold. Section 16(11), on which reliance is placed by the learned counsel for the appellants, reads as follows :-

"16(11). 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, as the case may be :

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

This sub-section permits possession of certain quantity of gold which is required to be included in a declaration and which has been so declared. It is, Therefore, to be seen as to under which provision of the Act can the possession of primary gold be retained after it has been declared. It appears to us that such a provision is the one contained in Section 12. Under that section primary gold which forms part of any structure, or any other construction or appendage within the precincts of a temple, church, mosque, gurdwara or any other place of public religious worship can be retained, if it has been included in a declaration. No other provision of the Act has been brought to our notice which permits retention of possession of primary gold on any declaration being made. It would, Therefore, appear that Section 16(11), in so far as primary gold is concerned, can have reference only to Section 12, and to no other section. Of course, sub-section (11) of Section 16 uses the expression "gold" which, by virtue of its definition u/s 2(j) would include "article" and "ornament" also. Therefore, according to Section 16(11) even the possession, custody or control of "articles" and "ornaments" could not be retained unless a declaration, required to be made

under the Act, had been furnished. Section 16(11) has also to be read in conjunction with Section 8(1) as Section 8(1) does not contemplate the retention of primary gold by the making of any declaration. We are unable to agree that Section 16(11) should be so construed as to permit retention of primary gold merely on declaration being made. Such a construction of Section 16(11) would clearly bring the said provision in conflict with Section 8(1). In our view, neither the language nor the intent of the provisions can possibly persuade us to come to the conclusion that u/s 16(11) primary gold can be retained on making of a declaration.

27. It was also contended on behalf of respondents that Section 16(3) could save the possession of primary gold. This submission must be repelled. Sub-section (3) is attracted where any person, who did not own, possess, hold or control gold before the commencement of the Act acquires, after the commencement, the ownership, possession, custody or control of the gold. In the present case the writ petitioners did own the gold before the commencement of this Act. Therefore, the first part of sub-section (3) will not apply. The petitioners no doubt did not possess, hold or control the gold before the commencement of this Act, but they have not acquired the possession or control over the same after the commencement of the Act, because the gold had been seized prior to the coming into force of the Act. Moreover, we are in respectful agreement with the learned Single Judge who has held that the expression "gold" in sub-section (3) should be given a limited meaning and restricted to "articles" and "ornaments". This conclusion was reached because sub-section (3) makes a reference to sub-section (5), which specifies the weight limit. Sub-section (5), however, makes no reference to primary gold, but refers to "articles" and "ornaments" only. Sub-section (3) cannot be read in isolation and the same has to be read in conjunction with sub-section (5). Sub-section (3) cannot refer to any gold which is not referred to in sub-section (5). That being so, "gold" referred to in sub-section (3) can only mean "articles" and "ornaments", and not primary gold.

28. From what has been stated hereinabove, it is clear that : (1) under the unamended defense of India Rules, possession of primary gold could be retained if a declaration in respect thereto had been made; (2) after the amendment had been made to the defense of India Rules with effect from 1st March, 1967 primary gold, which had been declared, had to be converted or sold within six months thereof, with the result that after 1st September, 1967 no person could hold primary gold; (3) the Ordinance and the Act continued the prohibition of any person possessing primary gold.

29. From the aforesaid it would follow, that in the instant case, the primary gold was required to be declared under the unamended defense of India Rules. No declaration was admittedly filed. Therefore, its possession became illegal at that time. Even after the amendment to the defense of India Rules, no declaration was filed and nor was the gold sold or converted. Therefore, in any case, with effect from 1st September, 1967 the continued possession of the said primary

gold was illegal. This illegality of the possession continued even under the Ordinance and the Act. In view of the provisions of the defense on India Rules the said primary gold was liable to be confiscated firstly, when no declaration was made in respect thereto, prior to the amendment of the said Rules, and secondly in any case when the same was not converted or sold within six months of 1st March, 1967. We may here observe that we must proceed to decide this case on the basis that the will put forth by Ratanbai was the genuine will. The Department Authorities in their impugned orders had not disputed the genuineness of the will. It is now not open to the appellants to contend that, on the facts and circumstances of the case, we should hold that the will was not genuine.

30. As the possession of primary gold was illegal, we are again in agreement with the learned Single Judge that the declaration filed by Ratanbai on 29th July, 1968 could not be of any avail, There was no provision of law under which any such declaration could be made. That gold had become liable to be confiscated u/s 71(1). Section 71(1), as was originally enacted, read as under :-

"Any gold in respect of which any provision of this Act or any rule or order made there under has been, or is being, or is attempted to be, contravened, shall be liable to confiscation."

The Supreme Court in *Badri Prasad and Others, etc. Vs. Collector of Central Excise and Others, etc.*, held the said section to be unconstitutional. Thereafter by Gold (Control) Amendment Act, 1971 new Section 71 was enacted. Sub-section (1) of the said section is as follows :-

"Any gold in respect of which any provision of this Act or any rule or order made there under has been, or is being, or is attempted to be, contravened, together with any package, covering or receptacle in which such gold is found, shall be liable to confiscation, provided that where it is established to the satisfaction of the officer adjudging the confiscation that such gold or other thing belongs to a person other than the person who has, by any act or omission, rendered it liable to confiscation, and such act or omission was without the knowledge or connivance of the person to whom it belongs, it shall not be ordered to be confiscated but such other action, as is authorised by this Act, may be taken against the person who has, by such act or omission, rendered it liable to confiscation."

Under sub-section (1) of Section 71, without referring to the proviso, any gold which is being held in contravention of the Act is liable to be confiscated. Therefore, if the proviso to sub-section (1) of Section 71 does not apply, there can be, in our view, little doubt that the gold in question, which had become contraband long ago, was liable to be confiscated. There is no provision in the defense of India Rules or in the Ordinance or in the Act under which the possession of the primary gold could be retained, either by Ratanbai or by Nemkumar or by the writ petitioners.

31. The Single Judge, however, has held that the newly added proviso to sub-section (1) of Section 71 entitles the writ petitioners to contend that the primary gold should not be ordered to be confiscated, There can be little doubt that if proviso to Section 71 applies then the confiscation of the primary gold was illegal. On the other hand, if the proviso is inapplicable then the only conclusion which can follow is that the confiscation was valid. Therefore, the most important question which arises now is as to what is the correct interpretation of the said proviso.

32. On the plain reading of the proviso it appears to us that the same will apply only to those cases where, by any reason of any act or omission, gold is rendered liable to confiscation. The words in the proviso "..... the person who has, by any act or omission, rendered it liable to confiscation....." clearly mean that the confiscation is the result of an act or omission on the part of a person other than the owner. To put it differently, the proviso implies that gold would have been permitted to be retained if a particular act had been performed by a person or that there had been no omission on his part. This is further made clear from the later portion of the proviso wherein it is stated that "..... action..... may be taken against a person who has, by such act or omission, rendered it liable to confiscation". The aforesaid words leave no manner of doubt that the proviso refers to only that types of gold which becomes liable to be confiscated by reason of an act or omission on the part of a persons. As already observed where, as in the present case, under no circumstances could primary gold be retained, then it cannot be said that the primary gold is lost by any person's act or omission. In consequence the proviso will have no application. The primary gold become liable to be confiscated by reason of the various provisions of law. The confiscation is not dependent upon any act or omission on the part of a person. The moment the primary fold became contraband it became liable to be confiscated.

33. It was submitted on behalf of the respondents that the words "by any act or omission" would mean any act or omission under the Gold (Control) Act or any act or omission which had taken place earlier. In our opinion this submission, even if correct, cannot alter the interpretation which we have put to the said proviso. In our opinion that proviso will apply only to such gold whose possession can be retained. If the proviso could apply to primary gold, and if the aforesaid contention of the learned counsel for the respondent is correct, then it must follow that confiscation cannot be ordered of the primary gold. In our opinion the confiscation of primary gold cannot be avoided in view of the Gold (Control) Act, 1968. Confiscation of primary gold is mandatory because, u/s 8(1), and earlier under the defense of India Rules, possession of primary gold was illegal, The proviso cannot be so construed as to permit primary gold, liable to be confiscated, to be allowed to be retained by prohibiting an order of confiscation from being passed. To put it differently, the possession of primary gold could never be legalized .The confiscation of primary gold takes place on the basis of such possession. Therefore, the proviso could not apply to primary gold as its

possession could not be retained even after the making of any declaration under the defense of India Rules. Even otherwise, the act of omission referred to in the proviso, must necessarily mean the act or omission under the Gold (Control) Act and cannot mean any act or omission under any other law.

34. It was finally suggested that, if we hold that primary gold is liable to be confiscated, then the effect of this would be that the said provision would be vocative of Article 19 of the Constitution. We are unable to agree with this submission. Prior to 1st March, 1967 the possession of gold could be retained legally. Between 1st March, 1967 and 31st August, 1967 the gold could be converted into ornaments or sold, with the result that the property would not have been lost to the owners. Thereafter primary gold became contraband. The possession, as well as the ownership of the same, was illegal, The illegal possession continued under the 1968 Act. If a person is being deprived of this illegal possession of contraband goods, surely he cannot contend that any of his fundamental rights including Article 19 have in any way been violated. Just as a thief cannot retain stolen property with him, similarly contraband articles like, primary gold, cannot be retained by a person in view of the express provision of law which prohibit any such ownership or retention of possession.

35. It was also held by the learned Single Judge that before confiscation could be ordered notice u/s 79 of the Act should have been given to the petitioners in the writ petition, and as this had not been done the order of confiscation was liable to be quashed. Before us also it was contended by the learned counsel for the respondents that notice u/s 79 should have been issued to the minors through the guardian, but this had not been done in the present case.

36. The relevant portion of Section 79 of the Act is as follows :-

79. Giving of an opportunity to the owner of gold, etc. - No order of adjudication of confiscation or penalty shall be made unless the owner of the gold, conveyance, or animal or other person concerned is given a notice in writing.....

Section 79 requires notice to be given to the owner of the gold or other person concerned therewith. Admittedly the gold was not in the possession of the minors. The gold was in a safe, the keys of which were with Ratanbai. The house in which the gold was found at the time of seizure possibly belonged to Nemkumar. It was from their possession that the gold was sized. They were, Therefore, certainly persons concerned with the gold. Even when it ultimately transpired that there was a will, and the ownership of the gold was to the minors, there was in our opinion sufficient compliance of Section 79 when notice was issued u/s 79 to Nemkumar and his mother, Nemkumar, as guardian, and his mother, as a trustee of the gold, were certainly persons concerned u/s 79 and notice could be given either to the owner of the gold or to the persons concerned with the gold. In any case, notice to the minors had to be given through their guardian who alone was competent to act on their behalf. In the present case it

must be held that there was sufficient compliance of Section 79 as notice was in fact issued to Nemkumar, the guardian of the minors.

37. For the aforesaid reasons the appeal is allowed, the judgment of the learned Single Judge is set aside and the writ petition filed by the respondents is dismissed. The appellants would be entitled to costs. Counsel's fee Rs. 550.