(1981) 09 MAD CK 0030

In the Madras High Court

Case No : W.A. No. 689 of 1980

Collector of Central Excise, Madras APPELLANT

Vs

R. Seshammal and Another RESPONDENT

Date of Decision : 21-09-1981

Acts Referred:

Gold (Control) Act, 1968 — Section 58, 59, 66, 66(3)
Gold (Control) Rules, 1968 — Rule 15, 17
Income Tax Act, 1961 — Section 132(5), 132(5), 222, 226
Judicature Act, 1873 — Section 89
Penal Code, 1860 (IPC) — Section 411, 412
Sea Customs Act, 1878 — Section 167, 178A
VOLUNTARY DISCLOSURE OF INCOME AND WEALTH ACT, 1976 — Section 14, 14(1), 15, 15(1), 16

Citation : (1983) ECR 209 : (1982) 10 ELT 404

Hon'ble Judges : Venugopal, J;Gokulkrishnan, J

Bench : Division Bench

Advocate : K.N. Balasubramaniam, Addl. Central Government Standing, for the Appellant; S.P. Subramaniam and Nalini Chidambaram, for the Respondent

Judgement

Venugopal, J.—The first respondent''s husband Rathinaswamy Chettiar was carrying on business in gold and gold jewellery under the name

and style of Sri Nataraja Vilas Jewellery Hall at Chidambaram. He died on 7-11-1971, and thereafter the business was being carried on by his

legal heir and the first respondent. On 3-9-1972, the intelligence wing of the Income Tax department searched the residence and business premises

of the first respondent and seized 21 Kgs of old and new gold jewellery and primary gold worth about Rs. 4,48,319. The Income tax Officer

passed a summary assessment order under S. 132(5) of the Income tax Act, determining the total income at Rs. 6,90,390 and the tax liability at Rs

6,30,775. On 3-10-1975, the President of India promulgated the Voluntary

Disclosure of Income and Wealth Ordinance, 1975 and the

Ordinance was subsequently repealed by the Voluntary Disclosure of Income and Wealth Act (Act No. 8 of 1976). The first respondent filed

voluntary returns as per S. 14(1) and 15 of the Act and paid the tax in respect of the income declared and also informed the Assistant Collector of

Central Excise, Pondicherry, and forwarded to him extracts of the entry in form G.S. 10, regarding the gold and gold ornaments owned and

possessed by her and declared under Act 8 1976. The first respondent then requested the Deputy Director of Inspection, Income Tax, to release

the gold and gold jewellery seized from her premises. As the Collector of Central Excise (appellant herein) refused to give concurrence for the

release the first respondent filed a writ petition before this court. Opposing the release of the gold jewellery it was contended on behalf of the

Collector of Central Excise that -

1. The First respondent has not made a full and proper disclosure of the gold and gold jewellery seized from her and she has not made a

declaration as contemplated under S. 16(1) of the Act.

2. At the time the first respondent made the declaration, she did not own, possess or control the gold and gold jewellery as they were already

seized by the Income Tax department.

3. As the Central Excise authorities were also associated with the Income Tax authorities in the search and seizure conducted on 3-9-1972, the

seizure must be deemed to have been made by the Central Excise authorities, and as there was seizure prior to the declaration made by the first

respondent she cannot claim immunity under the Gold Control Act.

4. As the Assistant Collector of Central Excise has directed the Ranger to get a statement from the first respondent, proceedings must be deemed

to have been initiated prior to the declaration made by the first respondent and consequently she cannot claim immunity.

2. All the above four contentions were rejected by this Court holding -

1. There is a full disclosure as required by Ss. 14 and 15 of Act 8 of 1976. The Income Tax Department has accepted that there is a full and

proper disclosure. It is not open to the Collector of Central Excise to say that there has been no valid and full disclosure.

2. As the Income Tax authorities have not exercised the power of sale and sold the gold and gold jewellery seized, the first respondent continued

to be the owner of the property and she must be taken to own and possess the gold and gold jewellery in respect of which she made the voluntary

disclosure.

3. It is not the case of the appellant in the counter or in the show cause notice that the search was made by the Gold Control authorities in terms of

S. 58 of the Gold Control Act. The fact that the Inspector of Central Excise assisted the Income tax authorities in making the seizure will not make

it a seizure under the Gold Control Act.

4. From the mere fact that the Range Officer of the Central Excise department has been directed to record a statement from the son of the first

respondent, it cannot be construed that a proceeding under the Gold Control Act was pending at the time the declaration was made by the first

respondent.

On these findings, the learned Judge of this Court held that there was a voluntary disclosure of income and wealth under Ss. 3(1) and 15(1) of Act

8 of 1976, and having complied with the provisions of S. 16 of that Act and also S. 16 of the Gold Control Act, the first respondent will be entitled

to immunity from the penal provisions under the Gold Control Act. On these findings the learned Judge allowed the writ petition. Hence the present

writ appeal.

3. On or after the enactment of the Voluntary Disclosure of Income and Wealth Act, 1975 (hereinafter to be referred to as Act 8 of 1976), any

person can make a declaration of income which he has failed or omitted to disclose before the commencement of the Act and enjoy immunity from

the provisions of the Income Tax Act, on payment of tax on the disclosed income at the special rates specified in the Schedule to the Act (vide S.

3 of the Act). Where money, bullion, jewellery or other valuable article belonging to a person were seized as a result of search under the Income

Tax Act or the Wealth-tax Act, such a person can also make a declaration of both income and wealth and after payment of tax chargeable in

respect of the income and wealth, he enjoys immunity from penalty, prosecution etc., under the Income Tax Act and Wealth-tax Act. The person

can also claim immunity from penalty, prosecution under the Gold Control Act if before making the declaration -

1. The gold or bullion was not seized as a result of the search made under the Gold Control Act; and

2. no proceeding was pending in respect of that gold before any authority under the Gold Control Act - [vide S. 16(5)(a) and (c) of the Act].

Thirdly, in a case where the gold is owned, possessed, held or controlled by licensed dealers, necessary entries should be made in the accounts,

registers and documents maintained under the Gold Control Act under intimation to the Gold Control Officer before the 1st day of February, 1976

and such other steps as are necessary for him to comply with the requirements of the Act in relation to such gold [vide S. 16(1)(A) of the Act].

The case of the first respondent is that she has complied with all the three requisites set forth above for claiming immunity under the Gold Control

Act, whereas the appellant contends that the three requisites for claiming immunity are not fulfilled in this case. The short question is whether all the

three essential requisites for claiming immunity under the Gold Control Act are complied with in the instant case.

4. The first question to be considered is whether, the gold in the instant case was seized under the provisions of the Gold Control Act. In the letter

dated 13th September, 1972, written by the Assistant Director of Income Tax department to the Assistant Collector of Central Excise, it is stated

that two inspectors of Central Excise were present at the time when the Income Tax department officials effected the search and seizure of the gold

jewellery from the premises of the first respondent. Relying on this letter, the learned counsel for the appellant contended that there can be a seizure

without search and as the two inspectors of Central Excise were present at the time of seizure, the gold must be taken to have been seized under

the Gold Control Act and as the seizure under the Gold Control Act was prior to the declaration made by the first respondent she is not entitled to

the immunity claimed. In the case reported in Gian Chand and Others Vs. The State Of Punjab, , the Inspector of Police on receiving information

that some smugglers were on point of transporting gold, organised a raid and in the course of search, certain bars of gold were found on the person

of some of the inmates of the house and the gold found was seized and they were charge-sheeted under Ss. 411 and 414 of the Indian Penal

Code. Later the case was dropped and the Customs authorities having taken possession of the gold from the police authorities proceeded to take

action under S. 167 of the Sea Customs Act. The question arose whether there was seizure by the Customs authorities within the meaning of S.

178-A of the Sea Customs Act. The Supreme Court pointed out that the expression ''seized'' in the context in which it is used means ''take

possession of, contrary to the wishes of the owner of the property''. On the same analogy the seizure contemplated under the Gold Control Act

must be both actual and physical and not fictional or symbolic or deemed seizure. Secondly, the seizure must be in accordance with the provisions

relating to the seizure under the Gold Control Act and by the officers empowered to effect the seizure. Any Gold Control officer authorised in this

behalf has reason to suspect that any provision of the Gold Control Act has been, or is being or is about to be contravened, he may search and

seize the gold along with the package, covering or receptacle if any, in which the gold is found. This power of search and seizure is provided under

Ss. 58, 59 and 66 of the Gold Control Act. In the instant case, there in nothing to show that the Gold Control officer had reason to believe that in

respect of any gold any of the provisions of the Act has been or is being or is attempted to be contravened by any person. The Income Tax

department which conducted the search was least concerned with the contravention of the Gold Control Act. Secondly, there is nothing to indicate

that the two inspectors who were present at the time of search are Gold Control officers authorised to effect the search and seizure as provided

under the Gold Control Act. Even granting for argument''s sake, that there was a seizure by the Gold Control officer the seizure came to an end

and after the expiry of six months under S. 66(3) of the Gold Control Act so that there was no seizure subsisting or in operation on the date when

the first respondent made the declaration under Act 8 of 1976. Thus in any view of the matter, the first respondent''s claim for immunity cannot be

defeated on the ground that before the declaration was made the gold was seized under the provision of the Gold Control Act.

5. The next question to be considered is whether any proceeding was pending in respect of the gold before any authority under the Gold Control

Act. On 8-9-1972, the Assistant Collector of Central Excise, Pondicherry, addressed a letter to the Assistant Director of Income Tax, with a copy to the Range Officer, Central Excise, Chidambaram, to record statement from R. Balasubramaniam, son of late R. Rathinasami Chettiar. In

pursuance of this letter, when the Range Officer, Chidambaram, went to record the statement from R. Balasubramaniam, he was informed that the

statement was already sent to the Assistant Collector of Central Excise, Pondicherry. The Range Officer procured a copy of the statement and

sent the same to the Assistant Collector of Central Excise, Pondicherry. On these facts, the learned counsel for the appellant contended that since

a letter was addressed with a copy to the Range Officer, to record a statement from R. Balasubramaniam, proceedings under the Gold Control

Act must be deemed to have been commenced on 8-9-1972, and so proceedings under the gold Control Act were pending, at the time when the

first respondent made the declaration under Act 8 of 1976, she is not entitled to the immunity claimed.

6. The word ''proceeding'' is defined in the Shorter Oxford dictionary as ''doing a legal action or process, any act done by the authority of a court

of law''. In ''Words and Phrases'' Permanent edition, Vol. 34, a number of American decisions are referred to for ascertaining the meaning of the

word ''proceeding''. It is said that the term ''proceeding'' is a very comprehensive term and generally speaking means a prescribed course of action

for enforcing a legal right and hence it necessarily embraces the requisite steps by which a judicial action is invoked. In the decision reported in In

Re: Sv.Rm.Ar. Ramanathan Chettiar, the court while interpreting the word ''proceeding'' in the Stamp Act, held -

The words ''suit or proceeding'' have been interpreted in various senses in different statutes according to the intent and scope of the statute, some

times, in a narrow sense and some times in a wide sense... In its narrow sense it (proceeding) is a step in any action or in an independent

proceeding analogous to an action by which a litigation is initiated.

In Ganga Naicken and Another Vs. A. Sundaram Aiyar, , the Court held -

A ''proceeding'' may in some enactment mean an action or that which initiates an action and in other enactments it may also mean a step in an

action....the words ''any proceeding'' in S. 89 of the Judicature Act, 1873, was understood to be equivalent to ''any action'' and not any step in an

action. But in the rules of the Supreme Court, Order 64, rule 13, ''proceeding'' is used as meaning a step in an action... Any other proceeding in the

''action'' in the rules of the Supreme Court, Order 26, rule 1 mean any proceeding with a view to continuing the action i.e., a step forward, not one

backward.

In the decision reported in Kochadai Naidu v. Nagayasami Naidu, 1961 1MLJ 342, the court was considering a petition for transfer of some

criminal proceedings to a civil court to be tried along with a suit in the civil court. The court held that the term ''proceeding'' was not a technical

expression with a definite meaning attached to it, but the ambit of whose meaning would be governed by the statue''. From the decisions cited

above it is clear that the meaning to be attributed to the word ''proceeding'' would depend upon the scope of the enactment wherein the expression

was used and with reference to the particular context wherein it occurs. A proceeding is said to have commenced if a prescribed course of action

for enforcement of a legal right or taking a requisite step by which judicial action is invoked or a step in aid or action taken by the concerned

authority in the process of dealing with a person for contravention of any provision of the Act. It is in that sense the word ''proceeding'' has been

used under S. 16(1)-A of Act 8 of 1976. The proceedings contemplated under the Gold Control Act against a licensed dealer are -

(1) cancellation or suspension of licence;

(2) imposition of confiscation and penalties as a result of adjudication;

(3) prosecution for contravention of the provision of the Act.

For commencing any of those proceedings against a licenced dealer there must be an accusation or a charge and issue of a show cause notice to a

licenced dealer. Without an accusation or charge and issue of a show cause notice, no proceeding under the Gold Control Act can be said to have

can commenced against a licenced dealer within the meaning of S. 16(1)-(A) of Act 8 of 1976. In the instant case, there has been no accusation or

charge or issue of show cause notice to the first respondent. No proceeding under the Gold Control Act can be said to have commenced against

the first respondent when she made the declaration under Act 8 of 1976. It is no doubt true that on 8-9-1972, the Assistant Collector of Central

Excise, Pondicherry, addressed a letter to the Assistant Director of Income Tax with a copy to the Range Officer, Central Excise Chidambaram, to record a statement from R. Balasubramaniam son of late R. Rathinasami Chettiar. But, in pursurance of the letter no statement was recorded by

the Range Officer, Chidambaram, from R. Balasubramaniam. Even before the receipt of the letter, Balasubramaniam had already sent a statement

to the Assistant Collector of Central Excise, Pondicherry. The Range Officer merely procured a copy of the statement and sent the same to the

Assistant Collector of Central Excise, Pondicherry. Thus it can be seen that even before the Range Officer went to record the statement,

Balasubramanian of his own volition, has sent a statement by post to the Assistant Collector of Central Excise, Pondicherry. Such a voluntary

statement cannot be construed as taking a prescribed course of action or taking the requisite step against the licensed dealer for contravention of

the provisions of the Gold Control Act. Moreover, the declaration under Act 8 of 1976 was made by the first respondent. By no stretch of

imagination can it be said that a proceeding was pending against her at the time when she made the declaration disclosing her wealth and income

under Act 8 of 1976. The various letters exchanged between the Central Excise and the Income Tax departments (vide pages 15, 25 and 27 of

the paper book filed by the appellant), admit that no proceedings have been initiated against the first respondent under the Gold Control Act. A

similar admission is also made in the counter to the writ petition filed by the appellant. As no proceeding under the Gold Control Act can be said to

be pending against the declarant or against the gold seized, she is entitled to the immunity claimed.

7. The learned counsel for the first respondent contended that even conceding for argument''s sake that a proceeding was pending against the first

respondent before the declaration, the proceeding came to be terminated by acceptance of the return under the Gold Control Act. For the claim of

immunity made by the first respondent what is relevant to be considered is whether any proceeding was pending when the first respondent made

the declaration under Act 8 of 1976. The fact that the proceeding came to be subsequently terminated has no relevance for the purpose of

considering the immunity under S. 16(5)(c) of Act 8 of 1976. On this point we hold that no proceeding under the Gold Control Act was pending in

respect of the seized gold when the first respondent made the declaration.

8. Under S. 16(1)(A) of Act 8 of 1976, where gold is owned, possessed, held or controlled by a person in his capacity as a licensed dealer,

necessary entries should be made by him in the accounts, registers and documents maintained under the Gold Control Act under intimation to the

Gold Control officer, before the 1st day of February, 1976 and such other steps as are necessary for him to comply with the requirements of that

Act in relation to such gold should also be taken be him before that date. The learned counsel for the appellant contended that in pursuance of S.

16(1)(A), the first respondent should have made the declarations in form No. GS 3 and since no such declaration was made, there is non-

compliance of S. 16(1)(A) of Act 8 of 1976. The declaration in form No. GS 3 declaring the stock of gold must be by a person owning or

acquring gold other than a licensed dealer. It is, therefore, clear that the declaration in form GS 3 is not applicable to the case of a licenced dealer.

Rule 15 of the Gold Control (Forms, Fee and Miscellaneous matters) Rules, 1968, provides that the return in the case of licensed dealer must be

in form No. GS 17. Rule 11 provides that the account of gold referred to in S. 55 of the Gold Control Act shall be kept by the licensed dealer in

form Nos. GS 11 and GS 12. In the instant case, the first respondent''s son Balasubramanian wrote a letter to the Assistant Collector of Central

Excise, Pondicherry, enclosing a return in form No. GS 17, for the quarter ending 31-12-1975. On receipt of the above letter, the Assistant

collector of Central Excise, Pondicherry, acknowledged the same and directed Balasubramaniam to make the necessary entries as ''receipt'' in the

dealer''s account. The Central Excise officer has verified the entries in the books and affixed his signature in token thereof. Thus from the records

produced it is seen that under the directions from the Assistant Collector of Central Excise, the Range Officer, Chidambaram, verified the entries

made in the ledger by Balasubramaniam on 16-5-1976 and initiated the form No. GS 10 book. The entry in GS 10 included the gold jewellery

declared by the first respondent as owned and possessed under the voluntary disclosure scheme. The quarterly return in GS 17 also contained a

statement that 21660 gms of gold and gold jewellery seized by the Income Tax department have been included as per the voluntary disclosure

scheme. As the quarterly return in form GS 10 sent by Balasubramaniam to the Superintendent of Central Excise and the entries made in form GS

10 have been verified by the Range Officer on 16-7-1976, it is obvious that there has been a full compliance of S. 16(1)(A) of Act 8 of 1976, and

thus the first respondent is entitled to the immunity claimed by her.

9. The learned counsel for the appellant next contended that the declaration of wealth under Act 8 of 1976, was only of 21660 gms of gold

whereas what has been declared under the Gold Control Act in forms GS 10 and 17 was 24010 gms of gold and no immunity from the provisions

of the Gold Control Act can be granted in respect of the excess quantity of gold not covered by the declaration made under Act 8 of 1976. In the

quantity return of receipt issue and stock of gold sent in form GS 17 by the licensed dealer, it is clearly stated that the entire quantity of gold that

has been seized during the search and seizure by the Income Tax department is disclosed in the return in form GS 17. It is not the case of the

appellant that gold which has not been seized by the Income Tax department has been included in the return sent by the licensed dealer in form GS

17. It is also not the case of the appellant that the declaration made under Act 8 of 1976 was not in respect of the entire quantity of gold seized by

the Income Tax department and there was some quantity of gold left uncovered by the declaration made by the first respondent under Act 8 of

1976. All that is established in this case is that there is discrepancy in the weight of gold noted by the Income Tax department and the Central

Excise department. The weight of the seized gold and ornaments as noted by the Income Tax department is bound to be accurate, as it is stated

that the gold ornaments were weight by the approved valuers and the gold contents of the ornaments were determined after excluding the weight of

stones and lacquer used in making the gold ornaments. In the list prepared by the Central Excise department, the weight of gold is stated to be only

approximate. It can be further seen that they have not excluded the weight of stones and lacquer contents in the gold ornaments. This accounts for

the discrepancy in the weight of gold as determined by the Income Tax department and the Central Excise department. From this discrepancy in

weight, the arguments so strenuously built up that the declaration made under the Gold Control Act was in respect of a larger quantity of gold than

what was disclosed under Act 8 of 1976 and hence no immunity can be claimed in respect of the excess quantity of gold, has to be rejected.

10. The learned counsel for the appellant lastly contended that the declaration in forms GS 10 and 17 was made by Balasubramaniam, while the

writ petition for the return of the seized gold and ornaments was made by his mother, the first respondent herein, and the writ petition is not

maintainable. Such a plea has not been taken in the counter or in the grounds of appeal filed before this court. That apart, the contention raised also

lacks substance. As already stated, the first respondent''s husband Rathinasami Chettiar was carrying on business in gold and gold jewellery at

Chidambaram. After his death, the business was carried on by his wife (the first respondent herein) and his son Balasubramanian. At the time of

search by the Intelligence wing of the Income Tax department, the business was carried on in the status of A.O.P. and the first respondent as

member of A.O.P. made the declaration under Act 8 of 1976. Under Act 8 of 1976, any member constituting the A.O.P. can file the declaration.

Balasubramanian the son of the first respondent, as the licensed dealer, submitted the return in forms GS 10 and 17 under the provisions of the

Gold Control Act. The first respondent as the person making the declaration under Act 8 of 1976 and as a member constituting the A.O.P. is

entitled to the return of the gold and gold ornaments seized during the time of raid by the Intelligence wing of the Income Tax department. In this

view, the writ petition filed by the first respondent is certainly maintainable.

11. In the result, the writ appeal stands dismissed, with costs of the first respondent. Counsel''s Fee Rs. 500. The first respondent will be entitled to

get a release of the gold and gold jewellery seized under the search made on 3-9-1972, subject to payment of all subsisting tax liabilities of the first

respondent, imposed a result of the search made on 3-9-1972.

12. As soon as the judgment was pronounced the learned counsel for the appellant requests for grant of permission for leave to appeal to Supreme

Court. As no substantial question of law of public importance fit to be decided by the Supreme Court arises on the findings given by us, we do not

think that this is a fit case where special leave to appeal to Supreme Court can be granted. Hence the leave asked for is refused.

* * * * *

13. Venugopal, J. : (21-9-1981). - The matter was posted today for being spoken to. This court has given the directions that the first respondent

will be entitled to get a release of the gold and gold jewellery seized under the search made on 3-9-1972 subject to payment of all subsisting

liabilities of the first respondent imposed as a result of the search made on 3-9-1972. The learned counsel for the second respondent stated that as

stated in paragraph 4 of the counter affidavit a sum of Rs. 13,97,805 is due by way of assessment tax for assessment years 1972-73 to 1978-79,

and the demand notices have also been served on the respective assessees, and the first respondent through her authorised representative has

undertaken to pay the said arrears of tax by selling the gold after it is released to her and in view of this undertaking the order may be clarified that

the first respondent will be entitled to get a release of the gold only after paying all the subsisting tax arrears.

14. The learned counsel for first respondent stated that the second respondent is entitled to retain custody of such jewels as are sufficient to satisfy

the aggregate of the amounts referred to in sub-clauses (ii)(iia) and (iii) of S. 132(5) of the Income Tax Act, 1961, and in this view the order

passed by this court does not require any clarification.

15. It is not disputed that the representative of the first respondent has undertaken to pay the assessed tax both under the Income Tax Act as well

as the Wealth-tax Act for the assessment year 1972-73 to 1978-79. Modes of recovering the assessed tax have been provided under Ss. 222

and 226 of the Income Tax Act, 1961. It is, therefore, open to the second respondent to recover the arrears of tax in the manner provided under

the Act. However, in view of the undertaking given by the first respondent that she will pay all the arrears of tax by selling the gold after it is

released to her, the direction given by this court is modified by deleting the words ''imposed as a result of the search made on 3-9-1972.'' The

modified direction would read as under -

The first respondent will be entitled to get a release of the gold and gold jewellery seized under the search made on 3-9-1972, subject to payment

of all subsisting tax liabilities.

16. The learned counsel for the first respondent stated that since tax arrears can be paid by the first respondent only after selling the gold in the

custody of the second respondent, a suitable direction may be given for facilitating the sale of gold by the first respondent to pay the tax arrears.

Taking into account the difficulties faced by the first respondent in paying the tax arrears, the following further directions is given -

The second respondent is entitled to retain that much of the jewellery and gold as may be reasonable adequate for payment of all the subsisting tax

liabilities and release the balance of gold and jewellery in favour of the first respondent. As and when the tax arrears are paid, gold and jewellery

whose value may be appoximately equal to the tax paid, should be released in favour of the first respondent.

