

(1986) 11 KL CK 0030
In the High Court Of Kerala
Case No : W.A. No. 370 of 1982

C.V. Govinda Rao

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 13-11-1986

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 23
Gold (Control) Act, 1968 — Section 167(8), 55, 71, 71(1), 74
Mysore Town Municipalities Act, 1951 — Section 27(3)
Sea Customs Act, 1878 — Section 182, 184

Citation : (1987) 32 ELT 63

Hon'ble Judges : V.S. Malimath, C.J.; V. Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : S. Parameswaran and R. Nithayanandan, for the Appellant; P.V. Madhavan Nambiar, for the Respondent

Final Decision : Allowed

Judgement

V.S. Malimath, C.J.—This is an appeal against the judgment of the learned single Judge in O.P. No. 171 of 1979. The relevant facts necessary for the disposal of this case may briefly be stated as follows : The appellant was a dealer in gold, holding licence issued by the Gold Control Licensing Authority. He was doing the business as a licensed gold dealer. On the 9th of July, 1974, the Superintendent of Central Excise, Integrated Divisional Office, Ernakulam and party searched the premises of the appellant and seized gold ornaments weighing 2029.500 grams under a mahazar prepared on the occasion. That was done on the allegation that the appellant had violated the provisions of Section 55 of the Gold (Control) Act, 1968 (hereinafter referred to as "the Act"), the appellant not having entered the possession of the said gold ornaments in the accounts which were required to be maintained in accordance with the said statutory provision. The appellant was duly served with notice u/s 79 of the Act on the 11th of January, 1975 requiring him to show cause as to why the seized gold should not be confiscated and as to why penalty should not be imposed u/s 74 of the Act. The appellant filed a

representation in response to the said notice wherein it was inter alia contended that the notice, though dated 27-12-1974, it having been served only on the 11th of January, 1975, i.e., more than six months after the seizure of the gold, the seized gold is not liable for confiscation and that the appellant has become entitled to return of the seized gold. The Additional Collector of Customs and Central Excise made an order on the 5th of March, 1976 confiscating the seized gold and levying a penalty of Rs. 5,000. The appellant was permitted to redeem the gold on payment of redemption fine of Rs. 30,000. On appeal, the said order was confirmed by the Collector of Customs and Central Excise on 16th of October, 1976. On a further revision to the Central Government, the order was modified on the 20th of October, 1978 reducing the penalty to Rs. 2,500 and permitting the appellant to redeem the confiscated gold and the redemption fine was reduced to Rs. 20,000. It is the said decision that was challenged by the appellant in O.P. No. 171 of 1979, which having been dismissed by the learned single Judge on the 26th of February, 1982, this appeal is preferred.

2. It was contended by learned counsel for the appellant Smt. Lovely Poulse that the learned single Judge has committed an error of law in taking the view that the notice having been issued on the 27th of December, 1974, well within the period of six months from the date of seizure, the same must be regarded as a notice given in accordance with the provisions of Section 79 within a period of six months from the date of seizure.

3. Section 79 of the Act reads as follows :-

"79. Giving of an opportunity to the owner of gold, etc. - No order of adjudication or 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 -

(i) informing him of the grounds on which it is proposed to confiscate such gold, conveyance or animal or to impose a penalty; and

(ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and if he so desires, of being heard in the matter:

Provided that the notice and the representation referred to in this section may, at the request of the owner or other person concerned, be oral :

Provided further that where no such notice is given within a period of six months from the date of the seizure of the gold, conveyance or animal or such further period as the Collector of Central Excise or of Customs may allow, such gold, conveyance or animal shall be returned after the expiry of that period to the person from whose possession it was seized.

Explanation.- Where any fresh adjudication is ordered under this Act, the period of six months specified in the second proviso shall be computed from the date on which such order for fresh adjudication is made."

It is clear from this provision that the power to confiscation or power to levy penalty can be exercised only after informing the grounds on which it is proposed to confiscate the gold, etc., or to impose the penalty and giving a reasonable opportunity of making a representation in writing within such reasonable time as may be granted in the notice. If so desired, an opportunity of hearing is also required to be given. The fact that the notice issued in this case is dated 27-12-1974 and that it was actually served on the appellant on the 11th of January, 1975 are not disputed. It is also not disputed that the seized gold was liable to confiscation having regard to the contravention of Section 55 of the Act. Hence the only limited question for examination is as to whether the second proviso to Section 79 is attracted to the facts of the present case. The second proviso provides that if no notice is given within a period of six months from the date of seizure of the gold, etc., or within such further period as may be granted by the authority, the same shall be returned after the expiry of that period to the person from whose possession it was seized. A valuable right accrues in favour of the person from whose possession the gold is seized, if no notice as contemplated by Section 79 is given within the specified period. It is not the case of the parties that any further extension of the period was given by the Collector of Customs and Central Excise. The period of notice to be given in this case was six months from the date of seizure of the gold. What the second proviso requires is the giving of the notice within a period of six months from the date of seizure of the gold. It was contended by the learned counsel for the appellant that it is not the date of issue or the issuance of the notice that is relevant, but it is the date on which the notice is served or is tendered to the person that is relevant for the purpose of establishing that the notice was given within the prescribed period. It is however contended by Senior Central Government Standing Counsel Sri Madhavan Nambiar that what is contemplated by the second proviso is the issuance of the notice and not actually service of notice. This contention found favour with the learned single Judge. It has been held that if giving of the notice contemplates actual service or tender of notice, the person concerned may defeat the object of Section 79 by evading service of notice for the specific period of six months.

4. It is necessary to point out that the expression used in the second proviso to Section 79 is "where no such notice is given". The emphasis is obviously on giving of notice. It is not possible to understand the expression "giving of notice" as only conveying the intention to give or to take steps for giving notice. The expression understood in the common parlance would convey that the notice must be served or tendered in order to complete the process of giving of such notice. The Supreme Court had occasion to examine the precise question in *K. Narasimhiah Vs. H.C. Singri Gowda*, . That was a case in which the giving of notice of the requisite period u/s 27(3) of the Mysore Town Municipalities Act came up for consideration. Their Lordship's of the Supreme Court have observed as follows in paragraphs 10 and 11 :

"10. This brings us to the main contention that three days" notice of the special

general meeting was not given and so the meeting is invalid. We find it difficult to agree with the High Court that "sending" the notice amounts to "giving" the notice.

11. "Giving" of anything as ordinarily understood in the English language is not complete unless it has reached the hands of the person to whom it has to be given. In the eye of law however "giving" is complete in many matters where it has been offered to a person but not accepted by him. Tendering of a notice is in law therefore giving of a notice even though the person to whom it is tendered refused to accept it. We can find however no authority or principle for the proposition that as soon as the person with a legal duty to give the notice despatches the notice to the address of the person to whom it has to be given the giving is complete. We are therefore of opinion that High Court was wrong in thinking that the notices were given to all the councillors on the 10th October. In our opinion, the notice given to five of the Councillors was of less than three clear days."

It is thus clear from the authoritative pronouncement of the Supreme Court that the giving of notice contemplated by Section 79 is not the same thing as sending the notice. Hence we have no hesitation in taking the view that the notice in this case was given only on the 11th of January, 1975 when it was served on the appellant. It is necessary to point out that it is not the case of the respondents that the notice was tendered to the appellant on any date prior to 11-1-1975 and that the appellant in spite of such tender of the notice refused to accept the same. It is also not the case of the respondents that any other mode of service was effected on the appellant on any date prior to 11-1-1975. The mere assertion that the appellant was evading cannot be accepted as it is not based on any material in support of such an assertion, nor can such an assertion be regarded as amounting to refusal of the notice when tendered by the authorities to the appellant. All that the respondents have been able to say is that the notice was sent by registered post to the address known and that the notice could not be served as the appellant was not available at that place. It was further re-directed to another place and thus there was delay in actual service of the notice by registered post till 11-1-1975. Hence we have no hesitation in taking the view that the notice was given in this case only on the 11th of January, 1975. As the seizure was made on the 9th of April, 1974-, it is obvious that the notice was given beyond the prescribed period of six months.

5. A similar view has been taken by the High Court of Gujarat in *Ambalal Morarji Soni Vs. Union of India and Others*, following the decision of the Supreme Court in *K. Narasimhiah Vs. H.C. Singri Gowda*, . This decision of the Gujarat High Court has been followed by the Orissa High Court in *Shri Nathulal Aggarwalla Vs. Deputy Collector of Central Excise and Others*,

6. As the notice was not given within a period of six months from the date of seizure, the conditions specified in the second proviso to Section 79 are fulfilled. Thus the appellant became entitled to return of the gold seized. This question is

also no more res Integra as it has been ruled by the Supreme Court in Assistant Collector of Customs Vs. Charan Das Malhotra, that on the expiry of the prescribed period of six months, if no notice has been given within the said period, the person from whose possession the gold is seized acquires a valuable right for restoration of the seized gold. Hence we have no hesitation in taking the view that the appellant is entitled to return of the seized gold.

7. It was next contended by learned counsel for the appellant Smt. Lovely Poulose that the order levying penalty must automatically fall to the ground, we having held that the respondents are liable to return the seized gold to the appellant. It was submitted that as the seized gold is required to be returned to the appellant, the same cannot be subject-matter of confiscation. If the said gold cannot be confiscated, it was contended that it must be regarded as gold which is not liable for confiscation. It was submitted that the provisions regarding liability to penalty require that the conduct of the appellant must be such which renders the gold liable to confiscation. If having regard to the operation of the second proviso to Section 79, the gold is not liable for confiscation, it was contended that the penalty also cannot be levied against the appellant.

8. Section 74- which provides for levy of penalty reads as follows :-

"74. Liability to penalty. - Any person who, in relation to any gold, does or omits to do any act which act or omission would render such gold liable to confiscation under this Act, or abets the doing or omission of such an act, or is in charge of the conveyance or animal which is liable to confiscation under Act, shall be liable to a penalty not exceeding five times the value of the gold or one thousand rupees, whichever is more, whether or not such gold has been confiscated or is available for confiscation."

It is no doubt true that it is only the conduct of the appellant that would render the gold liable for confiscation that attracts the penalty u/s 74 of the Act. The question for consideration is as to whether the liability incurred by the department under the second proviso to Section 79 to return the gold seized renders the gold not liable for confiscation. Whether the gold is liable for confiscation or not depends upon the conduct of the appellant. It is not disputed that there has been contravention of Section 55 of the Act rendering the gold liable for confiscation. When such is the position, can it be said that the gold ceased to be liable for confiscation for the purpose of Section 74 of the Act merely because the respondents have incurred the liability to return the seized gold, the conditions specified in the second proviso to Section 79 having been duly fulfilled. It is necessary to point out that the second proviso to Section 79 does not say that if the notice is not given within a period of six months from the date of seizure of the gold, the gold ceases to be liable for confiscation under the Act. All that it says is that such gold becomes liable to be returned to the person from whose possession the gold is seized. Whether the gold is liable for confiscation or not depends upon the question as to whether the conditions specified for confiscation have been satisfied. Section 71 of the Act deals with

confiscation of gold. Sub-section (1) of Section 71 provides that any gold in respect of which any provision of this Act or any Rule or Order made thereunder 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. It therefore becomes clear that as the appellant has contravened Section 55 in this case, the gold became liable for confiscation. Even though the gold became liable for confiscation, it could not be confiscated as the respondents incurred a statutory liability to return the gold having regard to the fulfilment of the conditions specified in the second proviso to Section 79 of the Act. It is not as though actual confiscation is a pre-requisite for incurring liability to penalty u/s 74 of the Act. The concluding portion of Section 74 itself makes it clear that levy of penalty can be made whether or not such gold has been confiscated or is available for confiscation. In this case all that can be stated is that [the] gold is not available for confiscation. As the gold is liable to be returned to the appellant, it cannot for that reason alone be stated that the gold is not liable for confiscation. That depends, as already stated, on the question as to whether there has been contravention of one or the other statutory provisions incurring liability for confiscation under the Act. As it is not disputed that the appellant has contravened Section 55, it has to be held that liability to confiscation has been incurred u/s 71 of the Act. Confiscation and levy of penalty are two independent matters. It may be that in a given case the gold may be confiscated and in another case the gold may not be confiscated. The levy of penalty is an independent matter and does not depend upon the question as to whether the gold has been confiscated or not. It would be useful for our discussion to advert to the observations of the Supreme Court in this behalf in *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, in paragraphs 15 and 16 which reads as follows :-

15. "...The point to note is that so far as the confiscation of the goods is concerned it is a proceeding in rem and the penalty is enforced against the goods whether the offender is known or not known; the order of confiscation u/s 182, Sea Customs Act, operates directly upon the status of the property, and u/s 184 transfers an absolute title to Government."

16. "...Taking the view most favourable to the appellant, it may be said that the notice contemplated both kinds of proceedings, namely, one in rem and the other in personam and asked the appellant to show cause against the imposition of both penalties mentioned in the third column of Section 167(8); but the notice did not show any intention, nor did it suggest even a possibility, of proceeding against the appellant u/s 23 of the Foreign Exchange Act...."

It is thus clear that though one single notice was given u/s 79 of the Act requiring the appellant to show cause as to why the seized gold should not be confiscated and as to why penalty should not be levied, one is notice requiring him to show cause in respect of action to be taken in rem and another notice requiring him to show why action in personam should not be taken against him.

Hence the two portions of the notice are clearly severable. If action cannot be taken for confiscation having regard to the fact that the second proviso to Section 79 is attracted, there is no good reason to take the view that action cannot be taken for levy of penalty by relying upon the other portion of the notice given u/s 79 of the Act. The proviso to Section 71 also makes it clear that confiscation is not a pre-requisite for incurring liability for penalty. It reads s-

"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."

Thus it becomes clear that though the gold was seized on the ground that it is liable for confiscation having regard to the conduct of the person to whom the gold belongs, if the same was done without the knowledge of the person to whom it belongs, the gold is not liable for confiscation and the real owner of the gold becomes entitled to return of the gold seized. But if the conduct of the other person rendered the gold liable for confiscation though in fact the gold cannot be confiscated, the other person having regard to the conduct becomes answerable for action being taken under the other provisions of the Act, viz., penalty proceedings. Hence we have no hesitation in taking the view that though the second proviso to Section 79 is attracted and the gold is liable to be returned to the appellant, that does not come in the way of the respondents levying penalty u/s 74 of the Act. The decision of the Gujarat High Court in Ambalal's case to which we have referred to earlier in connection with the first point supports the case of the appellant in this behalf. It is observed in paragraph 9 of the judgment in that case as follows :-

"...In the instant case, it is clear on the facts narrated above that the notices in question at Annexures B and C to the petition, were not given within the period of six months from the date of seizure of the goods and further right to get back the seized goods have vested in the petitioner. It was not open to the respondent nos. 2 and 3 to proceed with the confiscation or imposition of penalty under the relevant provisions of the Customs Act or the Gold (Control) Act under these two show cause notices."

Though there is not much discussion in the judgment, it is clear that their Lordships have taken the view that the seized goods having become liable to be returned to the person from whom they were seized and the notice not having been given within the period specified in Section 79, the authorities also cannot take proceedings for levy of penalty. With great respect we find ourselves unable to agree with the view taken by the Gujarat High Court that merely because the goods are liable to be returned under the second proviso to Section 79, the authorities cannot take action for levying penalty u/s 74 of the Act, if the other

conditions for levying penalty are satisfied.

9. But it appears to us that the matter has to be remitted back to the original authority for the reason that the penalty was levied after making an order of confiscation of the seized gold. In other words, the fact that the 2029.500 grams of gold was confiscated was obviously taken into consideration while fixing the penalty amount. As we have now come to the conclusion that the order of confiscation is liable to be set aside and the seized gold is liable to be returned to the appellant, justice and fairness require that the matter should be remitted back to the Additional Collector of Customs and Central Excise to re-examine the question of levying appropriate penalty on the appellant. We are informed that the appellant has already paid the redemption fine of Rs. 20,000 and secured return of the gold in pursuance of the order of the Central Government. Until the penalty proceedings are concluded, we direct that the said sum of Rs. 20,000 be retained by the department. The excess amount, if any, after the levy of penalty shall be returned to the appellant after the penalty proceedings are over.

For the reasons stated above, this appeal is allowed, the judgment of the learned single Judge is set aside and the impugned orders of the Additional Collector of Customs and Central Excise Exts. P1, P3 and P5 are hereby quashed and the matter is remitted to the Additional Collector of Customs and Central Excise to determine the quantum of penalty to be imposed on the appellant expeditiously, we having affirmed the decision of the authorities holding that the appellant has become liable for penalty. In the circumstances, parties shall bear their respective costs.

Photostat copy of the judgment be given to both sides on usual terms.