(1972) 08 GAU CK 0014

In the Gauhati High Court

Case No : Civil Rule No. 582 of 1969

Ganpatrai Dhanuka — APPELLANT

Vs

A. K. Bandopadhyay, Collector, Customs and Central Excise, Shillong and another — RESPONDENT

Date of Decision : 30-08-1972

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : AIR 1973 Guw 8

Hon'ble Judges : P.K. Goswami, C.J;M.C. Pathak, J

Bench : Division Bench

Advocate : K. Lahiri and D. N. Choudhury, for the Appellant; G. K. Talukdar, Sr. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.K. Goswami, C.J.—This application under Article 226 of the Constitution of India is directed against an order dated 15th May, 1969, by which certain gold bar seized from the possession of the petitioner was confiscated u/s 71 (1) of the Gold (Control) Act, 1968 (No. 45 of 1968), hereinafter called ''the Act''. By the same order, sovereigns numbering 45, which had also been seized, were released.

2. The petitioner describes himself as the Karta of a Hindu joint family consisting of four adults and four minors and carries on business in the name and style of Ramjidas Ganpatrai Dhanuka, Strand Road, Gauhati. The petitioner gave a declaration of the gold, other than ornaments, in his possession under Rule 126-I of the Defence of India Rules, 1962, in the prescribed form (Annexure ''A'' to the petition) on 20th February, 1963. He stated as follows in his declaration in the return:

"I, Dhanuka Ganpatrai, Karta of the family (consisting of 4 adults and 4 minor members) RAMJIDAS GANPATRAI DHANUKA, residing at Strand Road, Gauhati hereby declare in the schedule appended hereto particulars of all gold other than ornaments, owned by me or in my possession, custody or control."

The schedule shows his possession as on the midnight of 9/10th January, 1963, as also on the day of declaration, of one piece of gold bar of 24 carats weighing 1084 grams, valued at Rs. 13,000/-. He also declared his possession of 45 sovereigns of 22 carats weighing 378.351 grammes, valued at Rs. 3,600/-. On 13th November, 1968, on a verbal enquiry by the Inspector of Central Excise, the petitioner stated that the stock of gold etc. was lying with him in the same quantity and in the same form as shown in his declaration of 20th February, 1963. On 13th December, 1968, the officers of the Central Excise Department seized the aforesaid gold and sovereigns from his possession. Thereafter on 10th March, 1969, he was asked to show cause before the Collector of Customs and Central Excise, Shillong as to why the gold bar and the sovereigns should not be confiscated u/s 71 (1) of the Act and why penalty should not be imposed on him u/s 74 thereof. The petitioner showed cause denying liability and challenged the validity of the seizure. He also raised various other legal pleas which he has repeated before this Court as will be seen below. After giving a hearing to the petitioner, the Collector passed the impugned order of confiscation on 15th May, 1969. Hence this application.

3. Mr. K. Lahiri, the learned council for the petitioner, submits that the gold bar is not liable to confiscation u/s 71 of the Act inasmuch as the petitioner had already given a declaration with regard to the same under Rule 126-I of the Defence of India Rules. Secondly, he submits that Section 71 is not attracted as the petitioner has not contravened any provision of the Act or any Rule or order made thereunder in terms of that section. Thirdly, his contention is that Section 8 itself opens with the words "save as otherwise provided in this Act", and therefore possession of the gold bar in question is saved, according to him, u/s 16 of the Act. Fourthly, he submits that the petitioner has not contravened provisions of Section 8 (1) as the bar in question is not ''primary gold'' within the meaning of Section 2 (r) of the Act.

4. Before we proceed to deal with the submissions of the learned counsel, it is necessary to give the history and sequence of the legislation with regard to the control of gold. For the first time, by the Defence of India (Amendment) Rules, 1962, Part XII-A providing for ''Gold Control'' was added in the Defence of India Rules. This Part contains six chapters and opens with Rule I26-A and ends with Rule 126-Z. Next, in order, is the Gold (Control) Act, 1965 (No. 18 of 1965) which was passed by Parliament on 22nd September, 1965. This Act, however, was not brought into force by the Central Government u/s 1 (3) of the said Act. The Defence of India (Fourth Amendment) Rules, of 1st November, 1966, amended the Defence of India Rules, 1962 in Chapter XII-A and we may only quote for our purpose the material portion of Rule 126-H as amended by the 1966-Rules:

"126-H. Restrictions on possession and sale of gold:-

(1) Except in the case of any quantity of gold acquired after the date of making any return, no dealer, and no refiner, who is licensed under this Part shall have in his possession or under his control any gold which has not been included in such return:

Provided that any gold acquired after the date of making such return shall be included in the next succeeding return.

(IA) 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 Defence of India (Fourth Amendment) Rules, 1966, either own or have in his possession, custody or control any primary gold.

(IB) Every person who owns or has in his possession, custody or control at the commencement of the Defence of India (Fourth Amendment) Rules, 1966, any primary gold which has been included in a declaration or further declaration made under Rule 126-1 (as in force immediately before the commencement of the said Rules) or in respect of which no such declaration is required to be made under that rule, shall dispose of such primary gold in the following manner, namely:-

(i) if he, being the owner, is in possession, custody or control thereof at such commencement, he shall, within a period of six months from such commencement, either sell such primary gold to a refiner or dealer licensed under this Part or deliver the same to a dealer or goldsmith licensed or certified, as the case may be, under this Part for conversion thereof into ornaments;

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Then came the Gold (Control) Ordinance, 1968, which was promulgated by the President on 29th June, 1968, with a view to continuing the law relating to gold control. The Ordinance repealed the provisions of Part XII-A of the Defence of India Rules, 1962 and incorporated these provisions with necessary changes along with some new provisions. Then comes the Gold (Control) Act, 1968 (Act No. 45 of 1968) which repealed both the Gold (Control) Act, 1965 and the Gold (Control) Ordinance, 1968.

5. It may be appropriate to note that the vires of some of the provisions of the Gold (Control) Act, 1968 was challenged in the Supreme Court and the decisions are reported in Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others, and Badri Prasad and Others, etc. Vs. Collector of Central Excise and Others, etc., . By the first decision delivered on 30th April, 1969, the Supreme Court held that the Act is validly enacted by Parliament. The Supreme Court, however, held Sections 5 (2) (b), 27 (2) (d), 27 (6), 32, 46, 88 and 100 of

the Act as constitutionally invalid, but as those provisions were not inextricably bound up with the rest of the sections, the remaining Act survived the challenge. Thereafter, Parliament passed the Gold (Control) Amendment Act, 1969, which received the assent of the President on 29th August, 1969. By the second decision delivered on 30th March, 1971, the Supreme Court held Section 8 to be valid but struck down Section 71 of the Act as unconstitutional. Thereupon the Gold (Control) Amendment Act, 1971 (Act No. 21 of 1971) was passed and it received the assent of the President on 24th June, 1971, thereby, inter alia, Section 71 of the Act was entirely substituted and sub-section (1) thereof "shall be and shall be deemed always to have been substituted". We will, therefore, have to deal with the present case in the light of the amended Section 71 (1) notwithstanding that the order of confiscation was made on 15th May, 1969.

6. The learned Senior Government Advocate submits that the gold bar is liable to confiscation u/s 71 (1) read with Section 8 of the Act. Mr. Lahiri resists this contention.

7. It will be next necessary to set out Section 8 and Section 71 (1) of the Act, as amended by Act No. 21 of 1971:

8. Restrictions regarding acquisition, possession and disposal of gold.- (1) 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.

It is not necessary to quote the other subsections of Section 8.

71. (1) 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.

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.

The preamble of the Act is "to provide, in the economic and financial interests of the community, for the control of the production, manufacture, supply, distribution, use and possession of, and business in, gold, ornaments and articles of gold and for matters connected therewith or incidental thereto.

8. From the history of the legislation initiated by promulgating the Defence of India Rules, 1962 (Part XII-A) and such of its continued sequence by amendment of the Defence of India Rules, by Ordinances and by the Acts, it is, among other things, obvious that possession of gold, as defined, by a person, in contravention of the Act, was illegal. From the provision of Rule 126-H (IB), set out above, every person in possession of primary gold, which has been included in a declaration under Rule 126-1, was under a legal obligation to dispose of such primary gold in the manner laid down under that sub-rule. That being then the legal position, we have to consider the submission of Mr. Lahiri to the effect that because the petitioner had declared in his return about the possession of the gold bar, the said quantity of gold was not liable to confiscation. Section 8 of the Act prohibits a person from possessing any primary gold, save as otherwise provided in the Act. The Act does not refer to Rule 126-H (1-B) in terms. The declaration of the gold under Part XII-A will have to be considered in the light of Section 16 of the Act. This takes us to the second and third submissions of Mr. Lahiri. We have to see whether the petitioner''s possession is protected under any provisions of the Act as laid down u/s 8. Mr. Lahiri has drawn our attention of Section 16 of the Act. Section 16 (1) deals with declaration as to articles or ornaments and has nothing to do with primary gold, with which we are concerned. ''Article'' is defined u/s 2 (b) and ''ornament'' is defined u/s 2 (p).

(9) We may now quote Section 16 (3), (4), (5) and (11):

16. (3) 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 subsection (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 off controlled by him immediately after such acquisition, and

(b) the person from whom the ownership, possession, custody or control of such gold was acquired.

(4) If any person who has made a declaration, whether under sub-section (1) or under sub-section (3) or under Part XII-A of the Defence of India Rules, 1962, or under the Gold (Control) Ordinance, 1968, as to gold owned, possessed, held or controlled by him, acquires (whether by succession, intestate or testamentary, or otherwise), or parts With, after such declaration, the ownership, possession, custody or control of any quantity of gold, he shall, as often as he acquires or

parts with the ownership, possession, custody or control of any quantity of gold, make within thirty days from the date of such acquisition or parting with, or within such further period as the Administrator may, on sufficient cause being shown, allow, a further declaration in the prescribed form stating the quantity, description and other prescribed particulars of the gold in relation to which such ownership, possession, custody or control has been acquired or parted with by him and giving the prescribed particulars of the person from whom the ownership, possession, custody or control of such gold was acquired or in whose favour the ownership, possession, custody or control of such gold was parted with, as the case may be.

(5) No declaration referred to in subsection (1) or sub-section (3) shall be required to be made,-

(a) in relation to articles, unless the total weight of articles owned, possessed, held on controlled by,-

(i) a minor, who is not a member of a family, exceeds twenty grammes,

(ii) an individual (other than a minor), who is not a member of a family, exceeds fifty grammes,

(iii) a family, exceeds fifty grammes,

(iv) any person referred to in clauses (b) to (f) and (h) to (m) of sub-section (2), exceeds fifty grammes;

(b) in relation to any ornaments, or both articles and ornaments, where both articles and ornaments are owned, possessed, held or controlled, unless the total weight of such ornaments or both articles and ornaments, as case may be, owned, possessed, held or controlled by,-

(i) an individual who is not a member of a family, exceeds two thousand grammes,

(ii) a family, exceeds four thousand grammes;

(c) in relation to any ornaments, or both articles and ornaments owned, possessed, held or controlled by any person referred to in clauses (b) to (f) and (h) to (m) of subsection (2) unless the total weight of such ornaments, or both articles and ornaments, exceeds two thousand grammes;

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(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 unless such gold has been Included in a declaration or further 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.

Whatever be the previous legal position, under Rule 126-H (IB), it is clear that the gold in question is liable to confiscation u/s 71 of the Act read with Section 8 as claimed by the learned Senior Government Advocate. But Section 8 will not be attracted if it can be shown that u/s 16 (11) a person can possess certain quantity of gold which is required to be included in a declaration and he has included it in such a declaration.

10. u/s 16 (3), a person possessing in excess of the quantities specified in sub-section (5) has to make a declaration in the prescribed form. Sub-section (5) gives the quantities which can be retained although the sub-section refers to articles and ornaments for the purpose of ascertaining the admissible quantities. Sub-section (5) has to be taken note of as laid down under subsection (3) of Section 16. It is, therefore, clear that under sub-section (3) of Section 16 read with sub-section (5), if a family which did not own or possess, before the commencement of 1968 Act, gold in excess of 4000 grammes and acquires gold in excess of that quantity after the commencement of the Act alone is required to make a declaration in the prescribed form. Sub-section (4) of Section 16 provides that if any person who had made a declaration under Part XIIA of the Defence of India Rules, 1962, as in this case, acquires ownership or possession of any quantity of gold has to make a further declaration. It is obvious that he has not to make any declaration under 1968 Act with regard to which he had already made a declaration under the Defence of India Rules.

It is submitted by the learned Senior Government Advocate that although the word ''gold'' is used in sub-sections (3), (4) and (11) of Section 16, we should interpret the same as standing for ''articles'' and ''ornaments'' alone which are being dealt with under the opening Section 16 (1) in Chapter V. The word ''gold'' is defined in Section 2 (j), which means "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". The word ''article'' is defined u/s 2 (b) as "anything (other than ornament), in a finished form, made of, manufactured from or containing, gold and includes-

(i) any gold coin,

(ii) broken pieces of an article, but does not include primary gold".

Section 2 (p) defines ''ornament'' which means "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". By Section 2 (r) ''primary gold'' means "gold in any unfinished or semi-finished form and includes ingots, bars, blocks, slabs, billets, shots, pellets, rods, sheets, foils and wires".

Since, however, the words ''gold'', ''article'', ''ornament'' and ''primary gold'' are specifically defined in the Act, we are unable to accept the above submission of the learned Senior Government Advocate. We may note that ''gold'' under these sub-sections, therefore, is ''gold'' as defined in Section 2 (j). The basis of the order of confiscation as made out by the learned Senior Government Advocate is that after the promulgation of the Defence of India (Fourth Amendment) Rules, no one could own or possess primary gold. Under Rule 126-H (IB), the gold which had been declared had to be converted into ornaments by the petitioner. Since that has not been done, the gold in his possession is liable to confiscation. This position which the learned Senior Government Advocate has taken, cannot be supported from the provisions of Section 71 read with Section 8 relied upon by him. Contravention of no other provisions of the Act or Rule has been pointed out to us by him.

It may be, although Rule 126-H (IB), in emergency legislation, had made some provision with regard to conversion of gold into ornament, when the 1968 Act was later passed, the process of liberalisation was set in and the people were allowed to hold and possess certain gold, as defined u/s 2 (j), which was not in excess of the quantities mentioned in the Act, which is 4000 grammes for a family. We find that the possession of the gold here by the petitioner, who as the karta of the family was declaring on behalf of the family about possession of the gold, is not in excess of the quantity for a family provided for under the Act. That being the legal position, the order of a confiscation is not tenable u/s 71 read with Section 8 of the Act. The impugned order of confiscation is quashed. We, however, do not agree with the contention of Mr. Lahiri that the bar in question is not ''primary gold'' within the meaning of Section 2 (r) of the Act to attract Section 8.

11. So far as the particular point regarding confiscation that arises in this application, the scheme of the Ordinance of 1968 appears to be maintained without any substantial departure with particular regard to possession, declaration and confiscation of ''gold'' as defined u/s 2 (j) which includes articles, ornaments and also primary gold. Section 117 of the 1968 Ordinance nor Section 116 of the Act, nor even Section 6 of the General Clauses Act can come to aid to sustain the order of confiscation in this case, as urged by the learned Senior Government Advocate. All the three last mentioned sections provide, after repeal, for saving something done and some action taken etc., so far as it is not inconsistent with the provisions of the new law, by which the old law was repealed. Section 6 of the General Clauses Act also provides for effect of repeal and contains the words "unless a different intention appears" in the new Act.

12. In the result, the impugned order of confiscation is quashed. The seized gold shall be returned to the petitioner. The petition is allowed. The Rule is made absolute. We will, however, make no order as to costs.

M. C. Pathak, J.

13. I agree.

