
(1988) 08 OHC CK 0027

In the Orissa High Court

Case No : Criminal Revision No. 222 of 1983

Jyoshna Alankar Bhandar and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 11-08-1988

Acts Referred:

Gold (Control) Act, 1968 — Section 33, 85(1), 98B

Citation : (1989) 67 CLT 170 : (1989) 66 CompCas 23 : (1988) 18 ECC 269 : (1989) 23 ECR 291 : (1989) 40 ELT 326

Hon'ble Judges : L. Rath, J

Bench : Single Bench

Advocate : G. Bohiddar, G.N. Mohapatra, U.C. Mohanty and B.P. Das, for the Appellant; A.B. Misra, for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—The two petitioners having been convicted u/s 85 of the Gold (Control) Act, 1968 ("the Act" for short) and sentenced by the trial court to pay fine of Rs. 3,000 in default the licensed dealer representing the petitioner No. 1 to undergo rigorous imprisonment for one month and the petitioner No. 2, manager of petitioner No. 1 to pay fine of Rs. 3,000 in default to undergo rigorous imprisonment for one month, modified in appeal so far as petitioner No. 1 is concerned only to a fine of Rs. 3,000 but not to the "in default" sentence and confirming the sentence so far as the petitioner No. 2 is concerned, have preferred this revision to quash the convictions.

2. The facts leading to the prosecution case are that petitioner No. 1 is admittedly a jewellery shop purportedly owned by Dolagovinda Naik representing the shop as also the members of his family, but in respect of the shop only he is the licensed dealer. The shop was raided by the Central Excise Staff on February 14, 1978, and amongst other things, primary gold weighing 720.800 grams as also gold coins weighing 109.500 grams were seized under exhibit 1.

3. In respect of the seizure, two statements were obtained from P. Ws. Nos. 1 and 2 respectively marked as exhibits 4 and 5 and after investigation was completed, the prosecution report was submitted.

4. Six witnesses were examined on behalf of the prosecution whereas the defence examined fifteen witnesses, but both the courts below came to the conclusion that the primary gold and the gold coins have been illegally stocked in the shop and that hence the provisions of Section 85(1)(ii) of the Act have been violated.

5. Assailing the conviction, Mr. G.S. Bohidar, learned counsel appearing for the petitioner assisted by Mr. G.N. Mohapatra, advocate, has urged the ingredients of the offences not to have been satisfied and that both the courts below could not have come to the conclusion of any possession of gold by the petitioners as contemplated under the provisions of Section 85 of the Act. At this stage, it is pertinent to note that the courts below have proceeded on the footing of applying Section 33 of the Act which raises a presumption that if any primary gold, articles or ornaments are found in the premises of a licensed dealer, it shall be deemed to be a part of his stock-in-trade with the further provision that no licensee shall keep in the premises where he carries on his business as such dealer any primary gold, articles or ornaments which are not part of his stock-in-trade. Applying such provision, it has been held that since the gold in question was found in the premises as is also stated by both the accused in their statements in exhibits 4 and 5, their possession was prima facie illegal and hence they became liable u/s 85 of the Act.

6. To appreciate both the contentions raised, it is beneficial to extract the provisions of Section 33 and relevant portion of Section 85 of the Act :

" 33. Gold which is not a part of the stock-in-trade, not to be kept in the business premises of a dealer-

No licensed dealer shall keep in the premises where he carries on business as such dealer any primary gold, article or ornament which is not a part of his stock-in-trade or held by him in his capacity as a dealer and every primary gold, ornament or article found in such premises shall be deemed to be a part of the stock-in-trade of such dealer or held by him in his capacity as a dealer.

85. Punishment for illegal possession, etc. of gold-

(1) Whoever, in contravention of the provisions of this Act or any rule or order made thereunder,--

(ii) owns or has in his possession, custody or control any primary gold, or "

A plain reading of Section 33 discloses that it is only the licensed dealer in respect of the shop who can be held responsible for any unauthorised possession of gold in his stock-in-trade and that the presumption arising under that section in respect of any such gold of being ipso facto part of the stock-in-trade applies

to him alone. The provision evidently does not extend to raise a presumption also against either the manager or other employees of the shop. A prosecution for violation of Section 85 with the aid of Section 33 of the Act, can be invoked only so far as the violation by the licensed dealer himself is concerned and not by any other person. The first part of the section contains a prohibition requiring the licensed dealer not to keep in the premises any primary gold, article or ornament which is not a part of his stock-in-trade. Hence it will be reasonable to conclude that unless it is shown that the licensed dealer has so kept the gold in question, the offence would not seem to have been committed and that only to obviate such difficulty, the presumption is raised in the second part of the section.

7. Keeping unauthorised gold in the premises would ordinarily imply such conduct as a conscious act on the part of the person keeping the article and hence would ordinarily require conscious possession to be established. But so far as the provisions of the Act are concerned, absence of such mental state of consciousness has to be established by the person charged with the offence, as is stipulated under the provisions of Section 98B of the Act. The accused is to prove beyond reasonable doubt that he had not the requisite mental state which, in this case, would mean that he did not have conscious possession of the excess primary gold or the gold coins in his stock-in-trade. The very wording of Section 98B is in the most rigorous cast to the extent that the presumption arising under it regarding the existence of the mental state would not stand rebutted by establishment by the accused on a mere preponderance of probability and on the contrary, the same has to be displaced beyond reasonable doubt. In other words, so far as the provision is concerned, the roles of the prosecutor and of the accused are reversed by a statutory fiction to the effect that if the prosecution has been able to raise a doubt regarding the mental state of the accused, then it would not be held that the latter has been able to establish beyond reasonable doubt his own mental state of innocence. The extent of proof that is necessary to be adduced by the persons charged is to prove, as the only possible conclusion, his innocent state of the mind.

8. Keeping this view of law in the background, it has to be seen as to how far petitioner No. 1 represented by the licensed dealer, Dolagovinda Naik, has been able to rebut the presumption arising against him both under Sections 33 and 98B of the Act. The very statement recorded of him in exhibit 5 shows that he is an absentee from Cuttack being engaged in contractor's work at Paradip where he remains and that the business is carried on by his brother, petitioner No. 2, as manager and that he does not attend to the management of the business. It is also the admitted case of the prosecution that at the time the shop was raided or anywhere near about, petitioner No. 1 was not present in the locality. None of the witnesses examined on behalf of the prosecution also states such fact. Since the absence of the licensed dealer is an admitted fact and the management of the business had been left to his brother petitioner No. 2, it can be said that the presumption of mental state of petitioner No. 1 u/s 98B of the Act would not be available to be drawn against him and the only possible conclusion which can be

arrived at is that the gold which was discovered could not have been consciously kept by him in the premises and thus it must be held that the onus upon him of establishing his innocent state of mind has been discharged beyond reasonable doubt. Once such conclusion is reached, the presumption u/s 33 of the Act is also not available to be raised against him in the absence of proof, established by the prosecution, that the gold in question had-been kept by him in the premises. It must be fairly said that the prosecution has not led any evidence on such score and on the contrary, beyond relying upon the presumptions, there is not a scrap of evidence to connect Dolagovinda Naik with the offensive conduct at all. It is urged by Mr. A.B. Misra learned Standing Counsel for the Central Government appearing for the State, that inasmuch as petitioner No. 2 is the main person who is looking after the business, it must be held that though he is not the licensed dealer, yet responsibility can be attached to him by way/of a presumption u/s 33 itself and as such the consequential presumption u/s 98B would also apply to him. I have no hesitation to reject such contention outright since this being a criminal prosecution, vicarious liability would not be attached to a person beyond the provisions of the charging section and if the law does not attach any such presumption to, any one except the licensed dealer, such presumption would not be available to be drawn against other persons merely by way of inference. No other provision has been brought to my notice by Mr. Misra under which such an inference can be drawn against, or liability attached to other persons found to be in charge of the premises.

9. Once the presumptions under Sections 33 and 98B of the Act are not available to be drawn, the next question to be considered is as to whether the prosecution has been able to establish the possession custody or control of primary gold by either of the two petitioners as contemplated u/s 85(1)(ii) of the Act. The defence put forth by the petitioners is that the primary gold and the gold coins seized did not belong to the stock-in-trade of the shop but to the mother (D.W. 11) of the two petitioners. Some gold ornaments of the mother of the petitioners had been given to D.W. 9, a goldsmith, for melting for preparation of ornaments for the impending marriage of their sister and the gold coins had also been taken out of a gold necklace for the self-same purpose. The primary gold after melting and the gold coins were brought back late in the night to the house in a part of which the shop is located. The gold was weighed in the house and after that, since it was then very late in the night, D.W. No. 9, the goldsmith, declined to take back the gold and D.W. 4, a nephew of the mother, was entrusted with the gold who, taking the key of the shop from her, kept them inside a drawer in the shop. The gold was intended to be handed over to D.W. 9 in the morning for making of the ornaments. By the time the gold was kept, the petitioner No. 2 had already gone to sleep having no knowledge of the fact and it was only when the raid was going on and D.W. 4 arrived in the morning at the spot that on questioning him the real facts were ascertained and became known to him.

10. So far as the evidence of possession of gold by the petitioners Nos. 1 and 2 is concerned, the substantial evidence on which reliance has been placed on

behalf of the prosecution is exhibits 4 and 5, the two statements of the petitioners, and the statements of the witnesses in respect of discovery of the gold and seizure of it. To establish the defence regarding absence of any knowledge in petitioner No. 2 of the gold having been kept without his knowledge, the evidence of D.Ws. 1, 4, 9 and 11 besides that of D.W. 15 who is petitioner No. 2 himself is relevant. D.W. 1 is a nearby watch shop owner whereas D.W. 4 is the person who had kept the gold in the drawer and as previously stated, D.W. 9 is the goldsmith to whom gold had been entrusted for melting, D.W. 11 is the mother of both the petitioners. It is the statement of D.W. 1 that at the time of seizure, D.W. 4 had stated that D.W. 11 had given the gold without the knowledge of petitioner No. 2 and that he had kept the same in the shop premises without his knowledge. As a matter of fact, D.W. 1 is also a seizure witness, but has not been examined by the prosecution. D.W. 4 has also completely corroborated him. D.W. 9 has not only corroborated D.W. 1 but has further spoken of having maintained a register of gold entrusted to him and also of having entered the particulars of the ornaments entrusted to him for melting in the register. So also the version of D.W. 11 is in no way different. All the witnesses have categorically stated of the petitioner No. 2 having no knowledge of the gold having been kept inside the shop premises. It is interesting to note that even though the witnesses have stated particularly regarding such fact, yet absolutely no cross-examination has been directed in that respect and so practically the evidence goes unchallenged. It is well-settled that the witnesses examined on the side of the defence are entitled to as much credence as the witnesses examined by the prosecution and there is no inherent infirmity in accepting of the defence evidence. Such principle would apply with greater force when the burden is placed so heavily upon the accused as in the present Act. In view of such state of evidence, it could not be held that unauthorised possession of the petitioner No. 2 of the gold and the gold coins has been established u/s 85 of the Act, particularly when it is not in dispute that besides petitioner No. 2, other people also had access to the shop. It even appears from the evidence of P.W. 4, the Inspector of Central Excise, that by the time the seizure was made from the drawer inside the shop, it was found to be unlocked. Thus the possession of gold cannot conclusively be said to be with petitioner No. 2 and petitioner No. 1 being admittedly, absent, it cannot be said that the case against the petitioners has been established.

11. In the result, the order of conviction and sentence passed against the petitioners cannot be sustained and is hereby quashed and the revision stands allowed.

12. In view of the fact that no offence has been committed by the petitioners, the order of forfeiture of the seized gold lump passed by the learned Magistrate and confirmed in appeal is also quashed and the petitioners are entitled to return of the seized gold marked as M.O.I. M.O. II, M.O. III, M.O. IV, M.O. V. and M.O. IX forthwith.