

(1979) 08 CAL CK 0015

In the Calcutta High Court

Case No : Civil Rule No. 2753-54 (w) of 1973

Madan Gopal De and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-08-1979

Acts Referred:

General Clauses Act, 1897 — Section 6, 8

Citation : 84 CWN 418

Hon'ble Judges : Chittatosh Mookherjee, J

Bench : Single Bench

Advocate : N.C. Banerjee and Mahitosh Majumdar, for the Appellant; S.N. Banerjee for Respondent Nos. 1 to 3 and 5, for the Respondent

Judgement

Chittatosh Mookerjee, J.—On April 30, 1965 a search was conducted in the shop-room of Ramsaran Dey (the petitioner in Civil Rule No. 2754(W) of 1973, a certified goldsmith of Bishnu-pur and gold ornaments weighing 213.300 gms., were seized. On the same date primary gold weighing 90 gms., was recovered on search of the body of Madan Gopal Dey (the petitioner in Civil Rule No. 2753 (W) of 1973) and the same was also seized. On August 9, 1966, the Assistant Collector of Central Excise, Asansol Division issued show-cause notices upon the said Ramsaran Dey and Madan Gopal Dey why penalty should not be imposed upon them under Rule 126L(16) of the Defence of India Rules, 1962, Part XIA, Gold Control. They were also asked to show cause why the said quantities of gold should not be confiscated under Rule 126M(1) of the said Rules. The petitioners had shown cause. On December 23, 1966 the Collector of Central Excise, West Bengal held that Ram-saran Dey and Madan Gopal Dey were guilty of the offences charged. He ordered confiscation of the gold and gold ornaments out of which the primary gold appearing 90 gms, was confiscated absolutely and for the rest, i.e., gold ornaments weighing 213.300 gms., be allowed under Rule 126M(8) of the said Rules an option to redeem the same on payment of a fine of Rs. 1,000/ only in lieu of confiscation. On 28th March, 1967 the appellants preferred appeals against the said order to the Administrator, Gold Control, New

Delhi.

2. On January 10, 1967 the President of India issued a proclamation revoking the emergency. On June 29, 1968 the President of India promulgated the Gold (Control) Ordinance, 1968. I shall hereinafter refer to the provisions of Section 117 of the said Ordinance which contained provisions for repeal and savings. The Parliament of India thereafter enacted the Gold (Control) Act, 1968 which received the assent of the President of India and was published in the Gazette of India on September 1, 1968. Section 116 of the Gold (Control) Act contained provisions relating to repeal and savings.

3. On May 31, 1973, the Administrator, Gold Control, dismissed the aforesaid two appeals preferred by Ram Saran Dey and Madan Gopal Dey against the order of the Collector of Customs and Central Excise, Calcutta dated 23rd December, 1966. The Administrator Gold Control however, having regard to the facts and circumstances of the case, reduced the amount of redemption fine in respect of the gold seized from Ramsaran Dey from Rs. 1.000/- to Rs 500/-subject to the said modification the order passed by the Collector was confirmed. The petitioners did not perfer any revision application to the Government of India, Ministry of Finance, but obtained these two Rules, inter alia, challenging the aforesaid orders of the Collector of Customs and Central Excise and the appellate order of the Gold Control Administrator.

4. On July 27, 1979 the petitioners had filed applications for amendment of their respective writ petitions but the said applications were not ultimately pressed and the learned Advocate for the petitioners submitted that the only object of making the said amendment applications was to obtain leave to urge the following grounds. In. course of hearing. I had verbally observed that the petitioners may urge additional grounds which do not require investigation of new facts. Mr. Banerjee Learned Advocate for the petitioners, thereupon had submitted that his principal submission was that u/s 116 of the Gold Control Act, 1968 action taken or penalty imposed or confiscation adjudged under the Defence of India Rules (in Part XIIA) shall be deemed to have been done imposed, ordered or adjudicated as if the Gold (Control) Act, 1968 was in force on 29th June, 1968 i.e. the date on which the Gold. Control Ordinance No. 6 of 1968 came into force. In other words, Mr Banerjee's contention is that the appellate authority ought to have applied the provisions of Section 79 of the Gold (Control) Act, 1968 and heid that according to the proviso to the said Section the Collector of Central Excise was bound to give to the petitioners notices to show cause within six months from the date of the seizure of the gold and gold ornaments from the two petitioners. In the tnsant case, the show cause notices were served upon the petitioners more than six months after the date of seizure and, therefore, the adjudication proceedings against the petitioners were not maintainable and the confiscation and penalty orders ought to have been set aside. In this connection, Mr. Banerjee has relied upon the decision of Pradyot Kumar Banerjee J. in Mahadeolal Khaitan Vs.--Union of India 1979 (11) Calcutta

5. The Rules contained in Part XIIA of the Defence of India Rules, 1962 did not prescribe any period of limitation for issue of show cause notice in respect of gold seized under Rule 126 (1) of the said Rules. It is admitted by the petitioners that on the date on which the show cause notices, annexure B to the W. Petr were issued i.e. on 9th August, 1966 also on the 23rd December, 1966 when the Collector of Customs and Central Excise made his order for confiscation with the provision for redemption in respect of the seized gold ornaments the Defence of India Rules, 1962 were still subsisting. During the pendency of the appeals preferred by the petitioners the Defence of India Rules, 1962 were repealed subject to the saving provisions contained in section 117 of the Gold (Control) Ordinance of 1968 (No. 6 of 1968). The said Ordinance in its turn was replaced by the Gold (Control) Act, 1968 (Act. XIV of 1968), Section 116 of which contained provisions relating to repeal and savings. The liability, if any, incurred by the petitioners in respect of the alleged breaches of the Rules contained in Part XIIA relating to Gold Control contained in the Defence of India Rules was undisputedly a matter of substantive law. The provisions relating to show cause notice, the order of penalty or punishment and investigation and legal proceedings in respect of the same were also not matters of mere procedure. In the instant case I have already pointed out that the adjudication proceedings had been commenced and completed before the repeal of the Defence of India Rules, 1962. The appeals preferred by the petitioners were pending when the Defence of India Rules were repealed. It is settled law that when a substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action began unless the new statute shows a clear intention to vary such rights, (vide Maxwell on the Interpretation of Statutes, 12th Edition, Pp. 220-221. At pages 221-222 Maxwell has quoted the observation of Lord Denning in *Att.-Gen. -vs.-Vernazza*, (1960) A.C. 965 which render as follows :

it was" clear that in the ordinary way the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of. litigants are generally to be determined according to the law in force at the date of the earlier proceedings. But it is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedure only.

Therefore, unless the legislature has expressed a different intention, the gold Control Administrator was bound to decide the two appeals preferred by the petitioners according to law existing at the date of the commencement of the adjudication proceedings under Part XIIA of the Defence of India Rules and not according to the provisions of the Gold (Control) Act, 1968.

6. I shall presently point out that the said legislation on the other hand, has clearly provided for savings substantially in the manner prescribed by Section 6 of the General Clauses Act. I may also observe that there is no absolute inflexible

rule that when a temporary law is repealed all rights and liabilities under such temporary legislation cease and become non est. The decision of the Supreme Court in the case of State of Orissa Vs. Bhupendra Kumar Bose, is a clear authority for the said proposition. An Ordinance made by the Governor of Orissa to validate the elections of Cuttack Municipality which had been declared to be invalid by the Orissa High Court by its earlier judgment was held to have been valid. The said Ordinance subsequently lapsed. The Supreme Court rejected the contention that the Ordinance was a temporary statute and as soon as it lapsed the invalidity in the Cuttack Municipal Elections which had been cured by it revived. The Supreme Court laid down that it would not be reasonable to hold that the general rule about the effect of the expiration of a temporary Act was inflexible and admitted of no exception. In the opinion of the Supreme Court what the effect of the expiration of a temporary Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon their character whether the said right and liability are enduring or not. The Supreme Court further held that having regard to the object of the validating Ordinance and to the rights created by the validating provisions, it would be difficult to accept the contention that as soon as the Ordinance expired, the validity of the elections came to an end and their invalidity was revived. According to the Supreme Court, in view of the said Ordinance the elections must be deemed to have been validly held under the Act and the life of the newly elected municipality would be governed by the relevant provisions of the Act and would not come to an end as soon as the Ordinance expired (Vide paragraphs 18 to 23 of the Report).

7. Sub-Section (3) of Section 1 of the Defence of India Act, 1962 while provides that the Act shall remain in force during the period of operation of the Proclamation of Emergency issued on 26th October, 1962 and for a period of six months thereafter expressly provided that the Act's expiry under the operation of the said sub-section shall not affect the matters specified in clauses (a) to (d) of sub-section (3) of Section 1 of the Act. These provisions substantially reproduced the provisions of section 6 of the General Clauses Act saving previous operation of anything duly done or suffered under the Act or the Rules, rights, privileges, obligations, liability acquired etc., penalty, forfeiture, punishment incurred and also investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid. Therefore, in terms of sub-sec. (3) of sec. 1 the appellate proceedings in respect of the appeals preferred by the appellants were to be continued and enforced as if the Defence of India Act had not expired. In view of these provisions I negate the contention of the petitioners that the Gold Control Admnistrative Tribunal was bound to dispose of the appeals preferred by them not according to the provisions of the rules relating to the gold control contained in the Defence of India Rules, but according to the provisions of the Gold Control Act, 1963. For the same reason I find that the petitioners are wrong in urging that the proviso to section 79 of the Gold (Control) Act which prescribes a time

limit for giving notices to show cause was applicable to the pending appeals by the petitioners. I am fortified in this view by the decision of the Supreme Court in the case of Superintendent, Central Excise, Bangalore Vs. Bahubali (Criminal Appeal No. 58 of 1972, decided on 5.10, 1978) reported in Superintendent, Central Excise, Bangalore Vs. Bahubali, . The Supreme Court in the said case revised a decision of the Karnatak High Court which held that the benefits of the provisions of the Probation of Offenders Act would be applicable in case of a person convicted of an offence under Rule 126 --P(2) (ii) of the Defence of India Rules. The Supreme Court held -that the bar imposed by Section 43 of the Defence of India Act read with Rule 126-P(2) (ii) of the Defence of India Rules was not removed even after the expiry of the Defence of India Act. Jaswant Singh, J. who delivered the judgement in the above Bahubali's case (Supra) referred to the clear and unequivocal language of clauses (a), (b), (c) and (d) of Sub-section (3) of sec. 1 of the Defence of India Act, 1962 which correspond to clauses (b), (c), (d) and (e) of section 8 of the General Clauses Act, the effect whereof is to keep alive all liabilities and penalties incurred during the operation of the Defence of India Act 1962. The Supreme Court pointed out in the said case that not only was the criminal liability in respect of the offences under Rule 126-P(2) (ii) of the Defence of India Rules incurred by the respondent before the Defence of India Act came to an end but the penalty or punishment prescribed therefor was also incurred or imposed on him while the Defence of India Act was very much in force, the benefit of the aforesaid provision of the probation of Offenders Act could not be invoked by the respondent by filling a revision in the High Court. In my view, the above decision clearly applies to the present case where not only the petitioners incurred liability under the relevant provisions of the Defence of India Rules but they were also punished by the Collector of Central Excise and Customs while the said rules were still subsisting. A subsequent repeal of the said Rules cannot entitle the petitioners to claim that the penalty imposed upon them had become invalid by reason of Section 71 of the Gold Control Act, 1968.

8. Section 117(1) of the Gold (Control) Ordinance, 1963 also expressly provided that from the commencement of the said Ordinance the provisions of part XIIA of the Defence of India Rules, 1962 shall stand repealed and upon such repeal Section 6 of the General Clauses Act" 1897 shall apply as if the said part were a Central Act, In my view, the ratio of the decision in the case of State of Orissa Vs. Bhupendra Kumar Bose (Supra) applies to the facts of the two cases before me use the intention of the said Ordinance to provide for saving in the manner laid down in section 6 of General Clauses Act, of actions taken, proceedings held and penalties imposed or incurred etc. not only during the time the Defence of India ordinance remained In force but the said saving provision was to endure and last even after the expiry and repeal of the Defence of India (Gold Control) Ordinance, 1968.

9. The provisions of Section 117 of the Gold Control Ordinance and of Sec. 116 of the Gold (Control Act) 1968 have been interpreted by the Supreme Court in

Jayantilal Amrathlal Vs. The Union of India (UOI), . In this case (Jayantilal Case) gold bars etc. were seized in November-December, 1964. An Assistant Collector issued show-Cause Notice on 5th June, 1965 requiring the appellant to show cause why the gold under seizure should not be confiscated under Rule 126-M of the Gold (Control) Rules and why Penalty under Rule 126-L (16) of the said Rules should not be imposed. The Collector by a subsequent notice dated December 6, 1968 informed the appellant that the previous notice was confined to show cause as to why the gold seized should not be confiscated. While the Writ petition filed by the appellant was pending in the High Court, the Emergency was revoked and thereafter the Gold (Control) Ordinance, 1968 repealed the Part XIIA of the Defence of India Rules. The Supreme Court in Jayantilal's case (supra) after referring to section 117(1) of the Ordinance observed that in view of section 117 of the Gold (Control) Ordinance the notice issued on June 5, 1965 initiating proceedings for forfeiting the gold seized must be deemed to have continued. The provisions in the Rules relating to the forfeiture were not inconsistent with any of the provisions of the Gold (Control) Ordinance, 1968. P.K. Banerjee, J. in his judgement in Mahadeolal Khaitan v. Union of India (Supra) pointed out that in Jayantilal's case (Supra) the show cause notice was issued within six months from the date of the seizure. But I consider the subsequent observations of the Supreme Court relating to the scope of Section 116 are more relevant for deciding the present case. The Supreme Court in Jayantilal's case (Supra) rejected the contention that in view of section 116(2) of the Gold Control Act, 1968 the Show Cause notice dated 5 June 1965 can no more operate because in the Gold Control Act, 1968 there is no provision for making a declaration relating to possession of primary gold. It was urged that the provisions in the Rules requiring a declaration to be made in respect of the possession of primary gold were inconsistent with the provisions of the Gold (Control) Act and therefore the notice issued under the Rules cannot be considered as being continued under the provisions of the Gold (Control) Act, 1968. The Supreme Court held that the said contention was untenable. There was no provision in the Gold (Control) Act, 1968 which were inconsistent with Rule 126(1) (10) of the Rules. That being so, action taken under that rule must be deemed to be continuing in view of section 6 of the General Clauses Act, 1897. It is true that Gold (Control) Act, 1968 does not purport to incorporate into that act the provisions of section 6 of the General Clauses Act. But the provisions therein were not inconsistent with the provisions in Section 6 of the General Clauses Act. Hence, according to the Supreme Court, the provisions of Section 6 of the General Clauses Act are attracted in view of the repeal of the Gold (Control) Ordinance, 1968. As the Gold (Control) Act does not exhibit a different or contrary intention, proceedings initiated under the repealed law must be held to continue. The Supreme Court further held that the Defence of India Rules must be deemed to be an Act of Parliament. Hence on the repeal of the Rules and the Gold (Control) Ordinance, 1968 the consequences mentioned in Section 6 of the General Clauses Act, follow. In order to see whether the rights and liabilities under the repealed law have been put to an end and to by the new enactment, the proper approach is not to enquire if the new

enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question (Vide Jayantilal's case pages 1195-96), I respectfully follow the above decision and hold that the legislature in enacting the Gold (Control) Act did not manifest any intention that the rights and liabilities incurred under the Defence of India Rules even after adjudication shall cease and that appeals from adjudication orders are to be decided not according to the repealed Rules but according to the provisions of the Gold (Control) Act, 1968.

10. P.K. Banerjee, J. in Mahadeolal Khaitan v. Union of India, (Supra) although he referred to the Supreme Court's decision in Jayantilal's case (Supra) did not apply the said decision on the ground that the question raised before him had not been mooted before the Supreme Court. P.K. Banerjee, J. had further observed that it was not necessary for him to go into the question whether in case of any inconsistency between the Gold (Control) Act and the Defence of India Rules the said Gold (Control) Rules under the Defence of India Rules cannot be enforced (Vide pages 18 & 19). In Mahadeolal Khaitan's case (Supra) although the show-cause notice had been issued on 10th. March, 1967 the adjudication order was made on 18th. November, 1970. P.K. Banerjee, J. further found that in the said case seizure had not been made under the Gold (Control) Rules but under the Customs Act. The decision of P. K, Banerjee, J. is, therefore, distinguishable on facts, I may respectfully point out that in case of any inconsistency between the views of P.K. Banerjee, J. in Mahadeolal Khaitan's case (supra) and the law laid down by the Supreme Court in Jayantilal's case (Supra) and in Bahubali's case (supra) I am bound to follow the latter. I have already pointed out that the present case is fully covered by the aforesaid two decisions of the Supreme Court.

11. Accordingly, the Gold Control Administrator did not commit any error jurisdiction by not applying the provisions of section 79 of the Gold Control Act, 1968 to the facts of the two appeals before him. It was totally irrelevant that the adjudication orders by the Collector had merged in the said appellate order. The Supreme Court in the case of Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, considered at some length the principles relating to merger of judgements. The moot points before me is not whether the Collector's order had merged in the appellate order of the Controller but whether the provisions of Part XII-A of the Defence of India Rules relating to gold control govern these appeals or the provisions of the Gold (Control) Act, 1968, in particular section 79 thereof, were attracted. It may also be pointed out that the said point was not also mooted in the appeals before the Gold Control Administration. I have already pointed out that the substantive rights and liabilities of the parties in the pending appeals were rightly decided according to the state of law which prevailed when the alleged liabilities of the petitioners under the Defence of India Rules relating to Gold control were incurred. Therefore, I need not further consider the question of

merger of judgements.

12. Mr. Banerjee, learned Advocate for the petitioner, at one stage of his argument tried to submit that the seizures were effected not under the relevant provisions of the Defence of India Rules but under the Customs Act and, therefore, the entire adjudication proceedings were invalid. The same is mixed question of law and fact and it was not mooted either in the departmental proceedings or in the Writ Petition. The affidavit in reply filed by the petitioners did not also contain such assertion. Therefore, by taking any additional ground at this belated stage the petitioner can not be permitted to make out a new case on facts. I need not further consider the submission of Mr. S.N. Banerjee on behalf of the respondents that the officers of Customs and Central Excise Department were authorised to make seizures of gold under the Defence of India Rules. A copy of the judgement delivered by the Division Bench in Criminal Revision Case No. 1228 of 1977 was filed. Again, the facts that the conviction and sentence passed by learned Sub-Divisional Judicial Magistrate upon Madan Gopal Dey was set aside and quashed is irrelevant for determining the jurisdiction and the authority of the Collector or of the Gold Control Administrator to adjudicate the proceedings impugned in these two Rules.

For the foregoing reasons the Rules are discharged without any order as to costs.

Operation of this judgement be stayed for five weeks.