(1997) 08 MAD CK 0018

In the Madras High Court

Case No : Criminal R.C. No. 416 of 1991

P. Vijayakumar APPELLANT

Vs

State by Assistant Collector, Central Excise Department, Coimbatore RESPONDENT

Date of Decision : 01-08-1997

Acts Referred:

Citation : (1997) 2 LW(Cri) 610

Hon'ble Judges : R. Balasubramanian, J

Bench : Single Bench

Advocate : K.M. Santhanagopalan, for the Appellant; P. Rajamanickam, for the Respondent

Final Decision : Allowed

Judgement

R. Balasubramanian, J.—The convicted accused in C.C. No. 531 of 1989 for having violated Sections 27, 41(a), 55 and 100 of Gold

(Control) Act whose conviction had been confirmed in C.A. No. 47/90 is the revision petitioner before this Court.

2. An interesting and important question of law arises in this case and it is as follows:-

Whether a certified goldsmith having been certified u/s 39 of the Gold (Control) Act 1968, is under any obligation to include in his return any of the

ornaments owned by his family or not?

To answer this question few facts are necessary and they are stated hereunder.

3. The accused is a certified goldsmith under Gold (Control) Act herein after to refer to as the Act. At 6 a.m. on 28.9.87 while he was traveling in

a bus, the bus was stopped and the passengers were searched which fact is not in dispute. The accused was one among the passengers in the bus at that time, and that he was also searched is also not in dispute. Ornaments packed in 10 small boxes which were later found to weigh 393.400

grams of 20 carat pure gold valued at Rs. 1,03,844/- were found in his and this fact is also not disputed. The seizure is in fact effected by P.W. 1

under Ex. Pl attested by P.W.3. P.W.2 is another certified goldsmith who was called for to ascertain the purity of the gold weight and its value.

P.W.4 is the Inspector of Central Excise. The accused gave a statement under Ex.P2 to P.W. 1 which was followed by a show cause memo in

Ex.P3 having been issued to the accused. Ex.P4 is the reply to the show cause notice given by the accused and Ex.PS is the order of the

adjudication. Ex.P6 is the authorisation given to the complainant. Incidentally it may be noticed that after the accused was searched, and the seizure

were made, his house was also searched and nothing incriminating was recovered in his house. Ex.P7 is the mahazar for house search. The

accused as already stated, did not dispute the house search but pleaded not only before the Court but also in Ex.P4 that he had not violated any of

the provisions of the Act. It is his further case, both in Ex. PI and in Court that he had converted old jewels of his wife into new ornaments which

he was taking for sale in Mysore since he was not able to meet body the ends. In support of his defence his wife had given evidence as D.W.I. In

her evidence she would state that there was a slump in her husband''s business. At the time of her marriage she was provided with 100 sovereigns

of jewels. She gave her jewels to her husband to tide over the crisis. Thus her husband converted her old jewellery into new small ornaments which

were the subject matter of the seizure. The trial Court went into the matter as put forth the prosecution and the defence and held that the offences

alleged against the revision petitioner have been made out and convicted him to undergo rigorous imprisonment for a period of two months

together with a fine of Rs.5000/- with a default sentence. However the Appellate Judge while confirming the conviction referred to above by the

trial Court, modified the sentence of imprisonment from two months to imprisonment till the rising of the court. Fine amount imposed by the trial

Court was maintained.

4. I may refer to the various relevant provisions in the Act to answer the question raised and framed by me in this revision. Certified goldsmith is

defined u/s 2(d) as follows:-

Certified goldsmith"" means a self-employed goldsmith who holds a valid certificate, referred to Sec. 39;

Under Section 39(1) of the Act, no person shall commence or carry on business as a goldsmith after the commencement of this Act, unless he

holds a valid certificate recognizing him as a goldsmith. The other sub sections of Section 39 are extracted here.

(2) The certificate referred to in Sub - Section (1) -

(a) shall be in such form as may be prescribed,

(b) shall be valid until the death of the holder, or the cancellation thereof, whichever is earlier and

(c) shall be valid subject to such conditions and restrictions as may be prescribed.

The form of certificate issued u/s 39 of the Act to a certified goldsmith is to be in Form No. G.S. No. 9. This certificate is in accordance wide Sub

clause 3 of Rule 6 of Gold (Control) (Form etc.) Rules 1968. u/s 40 of the Act a certified goldsmith may make, manufacture, prepare, repair,

polish or process ornaments and may also repair or polish articles but shall not, unless authorised by the Administrator so to do, make,

manufacture or prepare any primary gold or article. Section 41 speaks about restriction on acquisition or sale of gold by a certified goldsmith

which is extracted hereunder:-""A certified goldsmith (a) may

(i) buy standard gold bars from a licensed dealer or refiner,

(ii) accept or otherwise receive any article, ornament or primary gold from a licensed dealer for the purpose of making, manufacturing, preparing or

repairing ornaments for such licensed dealer;

(iii) accept or otherwise receive, subject to the provisions of Sec. 8 from any other person any article or ornament for the purpose of making,

manufacturing of preparing ornament for such person or for the purpose of repairing or polishing such article or such article or ornament.

(b) shall not, save as otherwise provided in this Act, buy or agree to buy or sell or agree to sell any primary gold, article or ornaments.

Section 8(2) of the Act which is also relevant for this case is extracted here under:-

(2) Save as otherwise provided in this Act, a person may -

(a) (i) acquire or agree to acquire the ownership, possession, custody or control of, or

(ii) buy, accept or otherwise receive or agree to buy, accept or otherwise receive any ornament, unless he knows or has reason to believe that

such ornament, being required to be included in a declaration has not been so included;

(b) Sell, deliver, transfer or otherwise dispose of or agree to sell, deliver transfer or otherwise dispose of any ornament, but shall not do so if the

ornament, being required to be included in a declaration has not been so included.

The Act mandates that save as otherwise provided in Chapter V, that a declaration as to articles or ornaments shall be made by every person. The

relevant provision of Section 16 are Sub Sections 5, 6 and 7 for our case and are extracted here.

(5) No declaration referred to in sub-section (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 or 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 Cls. (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 the 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 Cls. (b) to (f)

and (h) to (m) of sub-section (2), unless the total weight of such ornaments, or both articles and ornaments, exceeds two thousand grammes.

(6) For the purposes of this Section, ""family"" shall be deemed to consist of -

(i) the husband, wife and one or more minor children, or

(ii) any two or more of them, but shall not be deemed to include any other person.

(7) Every licensed dealer or refiner shall make a declaration or further declaration as the case may be, in accordance with the provisions of this

section in relation to any gold owned, possessed, held or controlled by him in any capacity other than the capacity of a licensed dealer or refiner

and the provisions of sub-section (5) shall not apply to such gold.

Section 55 of the Act directs the certified goldsmith to maintain accounts audit is also extracted hereunder: -

(1) Every licensed dealer, every licensed refiner and every certified goldsmith shall keep, in such form and in such manner as may be prescribed, a

true and complete account of the gold owned, possessed., held, controlled, bought or otherwise acquired, or accepted or otherwise received, or

sold, delivered, transferred or otherwise disposed of, by him in his capacity as such licensed dealer or refiner or certified goldsmith as the case may

be, and different forms of accounts may be prescribed for different classes of licensed dealers, refiners of certified goldsmiths.

(2) Every licensed dealer, every licensed refiner and every certified goldsmith shall as and when he buys or otherwise acquires or accepts

otherwise receives, or sells, delivers, transfers or otherwise disposes of, any gold, enter in the accounts, referred to in sub-section (1) the

prescribed particulars of such gold and the prescribed particulars of the person from whom such gold was bought, acquired, accepted or

otherwise received or to whom such gold was sold, delivered, transferred or otherwise disposed of.

(3) No licensed dealer or refiner and no certified goldsmith shall, in his capacity as licensed dealer or refiner either own or have in his possession,

custody or control any gold which has not been included in the accounts referred to in sub-section (1).

The last section that requires to be extracted is Section 100 which speaks about precautions to be taken by a certified goldsmith etc. before

acquiring any gold.

(1) Every licensed dealer or refiner or certified goldsmith, as the case may be,

shall, before accepting, buying or otherwise receiving any gold from

any person, take such steps as are specified by the Central Government by rules made in this behalf, to satisfy himself as to the identity of the

person from whom such gold is proposed to be accepted, bought or otherwise received by him.

(2) If on an enquiry made by a Gold Control Officer the person from whom a licensed dealer or refiner or certified goldsmith is purported to have

accepted, bought or otherwise, received any gold is not found at the address mentioned by the licensed dealer, refiner or certified goldsmith or at

any other address ascertained from the first mentioned address, the Gold Control Officer may call upon such dealer, refiner or certified goldsmith,

as the case may be to establish that he had taken the steps specified by the rules made under subsection (1)-

(3) If such dealer, refiner or certified goldsmith, as the case may be, omits or fails, when called upon so to do, to establish that he had taken steps,

specified by rules made under sub-section (1) it shall be presumed, until the contrary is proved, that such gold was accepted, bought or otherwise

received by such dealer, refiner or certified goldsmith as the case may be, in contravention of the provisions of this Act.

(4) Nothing in this Section shall apply to the acceptance, purchase or other receipt by way of petty transactions, in the course of a day, of gold up

to a quantity of one hundred grammes, by a licensed dealer or refiner or certified goldsmith, as the case may be.

Explanation - In this Section ""petty transaction"" means a transaction in which the total weight of any primary gold, article or ornament which is

accepted, bought or otherwise received from the same person in the course of a day, does not exceed twenty-five grammes.

The relevant Rule, Rule 11 of the Gold Control (Forms etc.) Rules 1968 states that the account of gold referred to Sec. 55 of the Act shall be kept

by the certified goldsmith in Form G.S.No.13. Form G.S.13 is also extracted here:

Form No. G.S. 13

(See rule 11(1))

Stock account of certified goldsmith

Name and address of goldsmith

Certificate No.

Sl. No. Date of Receipt

Name and address of person from whom received

Brief description of article ornament or primary gold.

Weight in grammes

Manufacture

Description of article/ornaments manufactured and primary gold left over

weight in grammes

Date of return

Notes: 1. The entry in each column shall be completed as and when each transaction takes place.

2. Gold as well as ornaments received by certified goldsmith in accordance with the provisions of Sec. 42 of the Gold (Control) Act, 1968 (XLV

of 1968) shall also be accounted for in this. Where a certified goldsmith possessing equipment for drawing wires or for die- casting received gold

obtained by melting old ornaments, he shall specify the quality of such gold in col. 4.

5. Let me new decide by referring to the above extracted provision of law whether a certified goldsmith is under any obligation to include his family

jewels in his return in Form G.S. 13. Section 39 of the Act states that no person shall commence or carry on business as a goldsmith unless he

holds a valid certificate granted to him under the Act. Therefore it is clear when a goldsmith wants to carry on business as a goldsmith it is

necessary for him to obtain a valid certificate under the Act. This certificate to be issued to a certified goldsmith is in Form No. G.S. No. 9. This

certificate does not entitle the holders to carry on the business of buying or selling the ornament in terms of exemption made u/s 109 of the Act.

Though u/s 16 of the Act every person has to make declaration as to articles or ornaments in his possession, yet it is not an absolute duty. Section

16 of the Act itself starts with the words ""save as otherwise provided in this chapter"". The saving provisions are contained in Sub-Section 5 of the

said Section. According to sub Section 5 no declaration referred to in sub section (1) or (3) shall be required to be made by family which possess

ornaments unless the total weight of ornaments exceeds 4000 grammes. Under

Sub-section 6 of the said Section ""family"" shall be deemed to

consist of (i) husband, wife and one or more children or (ii) any two or more of them. In this case the revision petitioner comes within the definition

of family and it is not also disputed by the department and therefore if up to 4000 grammes of ornaments the family of the revision petitioner owns

and possess, then there is no legal obligation on them to file any declaration and it is protected under the Act itself. The revision petitioner may be a

certified goldsmith but unless there is any provision compelling him to make declaration in respect of his family jewels, it cannot be stated that the

revision petitioner must necessarily declare his family jewels. Simply because a person becomes a certified goldsmith he does not lose his identity

as a member of the family as defined in the Act. It may not be out of context at this juncture to notice that under sub section 7 of Section 16 of the

Act every licensed dealer or refiner shall make a declaration or further declaration as a case may be, in accordance with the provisions of this

Section in relation to gold owned, possessed, held or controlled by him in any capacity other than the capacity of a licensed dealer or refiner and

the provisions of sub section 5 shall not apply to such gold.

6. Thus the legislative intention is very clear as far as the licensed dealer or refiner is concerned. By this provision referred to above irrespective of

the dual capacity a licensed dealer or refiner may have, yet he is compelled to make a declaration of the gold owned or possessed by him in any

capacity other than the capacity of a licensed dealer or refiner. There is no such provision as far as the certified goldsmith is concerned. When the

Act has not contained such a provision for a certified goldsmith, it has to be held that the legislature intentionally avoided to frame such a regulation

for a certified goldsmith. Therefore the intention of the legislature as far as certified goldsmiths are concerned, is very clear from the omission to

make a similar provision as contained in sub section (7) of Section 16 of the Act with reference to them also. Why the legislature failed to make

such a provision is within their wisdom and not for mis Court to go into it. The Legislature was conscious about the fact that the certified goldsmiths

shall also be made subject to such conditions and restrictions as may prescribed and it is found in Section 39(2)(c) of the Act. In these

circumstances I am of the firm opinion that when the Legislature has not made any specific provision for a certified goldsmith to include in his return

jewels or ornaments owned or possessed by his family, then the Court would not be right in saying that he is under a legal obligation to do so.

7. The case of the defence is that the new small ornaments found in the possession of the accused, are nothing but ornaments made by converting

the old jewels of his wife. The statement of the accused in Ex.P4 and evidence of his wife as D.W.I before the Court is on the lines stated above.

Solely because D.W.I was not in a position to show any receipts evidencing the purchase of the jewels stated to have been given to her at the time

of her marriage and what were the jewels provided to other two brothers by her mother. The trial Court doubted her version. To insist on a receipt

in cases like jewels being provided to a daughter by her mother at the time of marriage would not be in order on the facts and circumstances of the

case. Jewels belonging to the family come to daughter at the time of marriage and such provision of jewels to daughter is seldom evidenced by any

receipts for having purchased the same in any shop. Therefore to insist on a receipt as done by the trial Judge would be asking for some thing

which the mother of D.W. 1 would not have even expected when she provided the jewels to her daughter. The learned trial Judge wanted

corroboration on this aspect from independent source. But I feel, when provision of jewels and ornaments to a daughter at the time of marriage is

an usual practice, the Court can safely accept the evidence of the daughter herself without looking for any further corroboration. If at all any

corroboration would come, it will always come from the mother or father and when such corroboration comes, it is always open to attack on the

ground that the evidence is interested. Thus it is only the quality of the evidence that counts and not the quantity. From a reading of the evidence of

D.W. 1. I am satisfied that her evidence is true and can be acted upon. However the approach of the learned trial Judge, that even assuming D.W.

1 had jewels on her own and they were given for conversion to her husband, even then her husband, who happens to be a certified goldsmith has

to comply with the requirement of Section 55 of the Act is not supported by any legal reasons or by any provisions in the Act itself.

8. Section 55 directs a certified goldsmith to maintain in such form as may be prescribed, a true and complete account of gold owned, possessed

etc. in his capacity as a certified goldsmith. My reading of Section 55 read with Section 39 of the Act makes it clear that only when a certified

goldsmith is doing business and as such comes to own, possess etc. etc. gold, then he is bound to comply with the maintenance of the records as

provided for in Section 55 of the Act and not otherwise. When a certified goldsmith, who happens to be a member of the family and takes old

jewels of his wife, which is protected u/s 16(5)of the Act, for converting into new ornaments, then he is not doing any business as a certified

goldsmith. The ornaments belong to his family and therefore there is no transfer from one source to another source. In other words, possession of

ornaments seized from the accused cannot be said to be exclusively in his capacity as a certified goldsmith but it can be definitely said his

possession was in his capacity as a member of the family. Section 41(b) prohibits a certified goldsmith from buying or agreeing to buy or sell or

agreeing to sell any primary gold, article or ornaments. On the facts of this case, it cannot be said that when the accused took the jewels of his

wife, he had bought or agreed to buy any ornament of his wife. No consideration in terms of money would pass between the husband and wife.

Unless consideration passes, when ornament is transferred, it cannot be brought u/s 41(b) of Act. The words used in sub section (b) of 41 are ""but

or agree to buy, sell or agree to sell"".

9. The learned counsel for the respondent argued that in form No. G.S. No. 13 itself, there is a provision for accounting gold as well as ornaments

received by certified goldsmith in accordance with Section 42 of the Act. On these lines, as indicated above, the counsel argued that the

possession of gold ornaments by the family has also to be included in the returns. Section 42 speaks about the possession of primary gold by a

certified goldsmith not exceeding certain limit. In mis case we are not concerned with the primary gold. In any event when the Legislature had made

a specific provision for a certified goldsmith to file his return not only the account of gold referred to in Section 55 but also that would be received

by him under the provisions of Section 42, men the omission to include a provision compelling a certified goldsmith to include his family jewels in

form G.S. 13 gives a clear answer to the case of the prosecution that he is bound to include his family jewels also in form No. G.S. 13. Chapter 8 of the Act deals with certified goldsmith. That Chapter contains 5 sections namely Sections 39 to 43 . The learned counsel for the respondent drew

my attention to sub section (iii) of clause (a) of Section 41 which provides a certified goldsmith may accept or otherwise receive subject to the

provisions of Section 8 from any other person any article or ornament for the purpose of making etc. etc. According to learned counsel for the

respondent the word ""any other person"" referred to above would include his wife and therefore once such ornaments from his wife changes hand

to him, then they are treated as ornaments in his hand in his capacity as a certified goldsmith, and therefore form G.S. 13 would apply. I am afraid I

cannot agree with him because clause (iii) of sub section (a) of 41 states that it is ""subject to the provisions of the Section 8"". Again Section 8 of

the Act also provides that the requirement of that section would apply save as otherwise provided in the Act. The saving provision is in sub Section

(5) and (6) of Section 16. Therefore I am of the opinion that the family jewels that come to the hands of husband, who incidentally is a certified

goldsmith like this petitioner, are saved by sub section (5) read with sub section (6) of Section 16 of the Act. For the reasons already stated by me

I am of the opinion that the family jewels of the certified goldsmith need not to be included in the return in Form No. G.S.13.

10. On facts also, let me consider whether the prosecution has made out its case beyond doubt. As already referred to by me, the reasons given

by learned trial Magistrate doubting the evidence of D.W.I, is wholly unsustainable. Learned trial Judge proceeded to state that even assuming that

it is a family jewel of the accused, yet he must have complied with Section 55 of the Act, which may not be correct for the reasons already stated

by me in this appeal. The Appellate Court did not even consider the evidence of D.W. 1 and either accepted it or rejected it. The Appellate Judge

also proceeded to state that even assuming, without admitting, that the accused converted his wife''s jewels as new ornaments, yet he must comply

with the requirements of Sections 41,55 and 100 which is again illegal.

11. I have already stated that there is no element of sale in this case between the wife and the husband, namely the accused. Therefore Section

41(b) is not at all attracted to the facts of this case. Section 100 of the Act also speaks about precautions to be taken by the certified goldsmith before buying or otherwise receiving, accepting any gold from any person to satisfy himself as to the identity of the person from whom such gold is

proposed to be accepted, bought or otherwise received by him. Once again, for the reasons already stated by me I am of the opinion that

requirement of Section 100 of the Act also should be complied with by a certified goldsmith only when he received any gold in his capacity as a

certified goldsmith and not otherwise. To accept the argument of the department that a certified goldsmith should include in his return in form No.

G.S. 13 his family jewels would amount to defeating the exemption granted to him under Sub Section (5) of Section 16 of the Act. The Courts

have always interpreted the enactment to see that all the provisions of the Act should survive. If the argument of the learned counsel for the

Government based on Section 55 of the Act is accepted regarding the obligation of a certified goldsmith to include in his return the jewels owned

by his family when it is saved under the other provisions of the Act, then it would offend sub sections (5) and (6) of the Section 16of the Act. In

this view of the matter I am of the opinion that a certified goldsmith need not include in his return in form No. G.S. No. 13 the jewels owned,

possessed by his family within the limits prescribed under sub sections (5) and (6) of Section 16 of the Act. I am also satisfied in this case from the

evidence available that the ornaments seized from the revision petitioner in this case are ornaments made out of conversation of the old jewels of

his wife.

12. Under this circumstances I find all the arguments advanced on behalf of the revision petitioner by his learned counsel deserves acceptance and

the revision is therefore allowed. The conviction and sentence of imprisonment imposed on the petitioner by judgment dated 15.2.90 in C.C. No.

531 of 89 on the file of Chief Judicial Magistrate, Coimbatore, which is confirmed by judgment dated 4.7.91 in C.A. No. 46 of 90 on the file of

Additional Sessions Judge, Coimbatore is hereby set aside. The accused is acquitted of all the charges leveled against him. The fine amount if any

paid by him shall be refunded to him.

