

(1985) 05 OHC CK 0008

In the Orissa High Court

Case No : Original Jurisdiction Case No. 764 of 1978

Sri Nimal Charan Das

APPELLANT

Vs

Deputy Collector, Central Excise and Customs and Others

RESPONDENT

Date of Decision : 09-05-1985

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Gold (Control) Act, 1968 — Section 2, 8(1)

Citation : (1986) 23 ELT 38 : (1985) 2 OLR 56

Hon'ble Judges : G.B. Pattnaik, J;B.N. Misra, J

Bench : Division Bench

Advocate : B.B. Mohanty, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

B.N. Misra, J.—This writ application arises in the following circumstances. On 14. 11. 1970 the petitioner went to Bhadrak Post Office to collect a parcel. After he had received the parcel, Officers of the Central Excise Department asked him to open the parcel and in the presence of witnesses the officers seized 56 pieces of round gold welded rods weighing 1214. 500 grams in two packets covered with two Gujrati newspapers. A Panchnama was prepaed at the spot and handed over to the petitioner, vide Annexure-1. The statement made by the petitioner at the time of seizure is Annexure-2. His plea was that one of his friends in Bombay named Sangvi had sent gold ornaments to him and that he would make payment for the gold later on receipt of money from his grand-father. The Deputy Collector, Central Excise, Bhubaneswar, opposite party No. 1, asked the; petitioner to show cause why appropriate action should not be taken against him for contravention of the provisions contained in See. 8(1) of the Gold Control Act,196b (hereafter referred to as the "Act"-), vide Annexure-3 dated 29. 4. 1968. A similar show-cause, notice was also issued by opposite party No. 1 to the petitioner"s friend Sangvi at Bombay, vide Annexure-4. According to the petitioner, on 13. 10. 1972 a further notice was issued to him to show cause why

the" seized gold should not be confiscated u/s 71 and penalty imposed u/s 74 of the Act. The petitioner filed show-cause pleading that he had not contravened any of the provisions of the Act and that no offence as alleged had been committed by him; Accordingly he prayed for release of the gold ornaments in his favour. By order, dated 24. 8. 1973, Annexure-5 opposite party No. 1 held that Sangvi, the so called friend of the petitioner, was a fictitious person and that, the seized gold was "primary gold, under the Act. The gold was confiscated to the State u/s 71 of the Act. The petitioner appealed against the order of, opposite party No. 1, vide Annexure-6, the memorandum of appeal. The Collector of Central Excise, Calcutta, opposite party No. 2, dismissed the appeal, vide Annexure-8, the order dated 1. 8. 1975, The petitioner filed a revision before the Additional Secretary, Ministry of Finance, Department of Revenue and Insurance, Government of India, opposite party No, 3, vide the revision petition Annexure-9. Opposite party No. 3 rejected the revision application, vide Annexure-10, the order, dated 1. 7. 1977. The finding of the opposite parties is challenged by the petitioner mainly on the ground that there was no basis for them to hold that the seized bangles were never used as ornaments in the State of Orissa. It is also contended that the seized gold has been wrongly held to be "primary gold" within the meaning of the Act. The petitioner has accordingly prayed that the orders as per Annexures-5, 8 and 10 should be quashed.

2. In their counter the opposite parties have denied all the allegations of the petitioner. It is stated that during the inquiry the person described as Sangvi by the petitioner and whose address had been furnished by him could not be traced, thus leading to the conclusion that Sangvi was a fictitious person. The petitioner could not adduce any evidence to show valid acquisition of the seized gold. On proper scrutiny and examination the seized gold was held to be "primary gold" and not "ornaments" and as such rightly confiscated to the States.

3. At the outset it would be useful to refer to some of the relevant provisions" of the Act, Section 8(1) of the Act provides as follows :

"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."

The expression "primary gold" has been defined in Section 2(r) of the Act as follows :

"Primary gold" means gold in any unfinished or semi-finished form and includes ingot, bars, blocks, slabs, billets, shots, pellets, rods, sheets, foils and wires."

The expression "ornament" has been defined in Section 2(p) of the Act as

follows :

" "ornament" 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.

Explanation-For the purposes of this Act, nothing made of gold, which resembles an ornament, shall be deemed to be an ornament unless the thing (having regard to its purity, size, weight, description or workmanship) is such as is commonly used as ornament in any State or Union Territory."

Reference may next be made to a decision reported in *Sumanlal Parekh and Others Vs. Collector of Central Excise and Customs, W. Bengal and Others*, wherein it was held :

"On a construction of the scheme of the Act and having particular reference to the definition of "primary gold" and "ornament" which I have set out above, it seems to be that an essential precondition for assumption of jurisdiction u/s 8(1) of the Act is that the article in question must be primary gold. It is undoubtedly for the Gold Control Authorities to decide that collateral question of fact, namely, whether the article in respect of which the proceedings are sought to be initiated is "primary gold" or not within the meaning of the Act. It is only upon a correct finding of that "collateral fact that the authorities can assume jurisdiction to invoke the provisions of Section 8(1) of the Act for the purpose of initiation of proceeding thereunder. This fact as to whether the article in question is "primary gold" or not is in ray view clearly a jurisdictional fact, that is to say, a collateral fact upon a correct finding of which the assumption of jurisdiction by the authorities u/s 8(1) of the Act will depend. It is well-settled that if the authorities assume jurisdiction on a wrong finding of the collateral fact, the Court in exercise of its high prerogative jurisdiction can correct that error. In other words, in examining the correctness of the finding of a jurisdictional " fact the Court issuing a writ of certiorari really acts as a Court of Appeal."

Keeping in view the statutory provisions and the principles enunciated in the decision noted above, the facts of the case may now be examined.

4 There is no dispute that 50 pieces of gold articles weighing 1214.500 grams were seized from the petitioner by the Customs Officers on 14.11.1970. In the Panchnama, Annexure-1, the seized gold, is described as. gold round (circular) welded rods in the appearance of chudis. In the show-cause, Annexure-3, the said seized gold is described in the following manner :

"The contents were found to be fifty pieces of crude churis of very high purity and it appears that the said churis were found to be primary gold in appearance of churis in crude form."

In Annexure-5, opposite party No. 1 has held :

"The gold in question namely 50 pieces of gold churis were found to be of pure gold. It is noticed that although there are some heavy designs on the seized churis of gold in question the same could be easily bent being made of pure gold and as such are not fit for daily use. The joints of these round articles also are not evenly made, thus the seized items are not primarily designed as ornaments. "These have been given the shape of bangles/churis only to circumvent the provisions of Gold Control Act, but these actually fall within the purview of primary gold under Gold Control Act."

5. In appeal opposite party No. 2 has held that the extreme malleability of the churls, their weight and workmanship rendered them unfit for personal adornment or to be used as ornaments and that they have been rightly treated by the adjudicating officer as primary gold. The revisional authority came to hold that the petitioner's plea that the seized gold were ornaments (churis) meant for his family members was not acceptable as such heavy and pure gold churis are never used as ornaments in the State of Orissa. As already noted in the panchnama (Annexure-1) the seized gold pieces are described as gold round (circular) welded rods with the appearance of churls. In common parlance rods and churis do not mean the same thing. The former is a straight stick and the latter is a round object. It is not understood how the seized gold pieces were described both as rods and churis. It is pointed out in the order of- opposite party No. 1 that there are heavy designs on the seized churls. This aspect does not seem to have been kept in view by opposite parties 2 and 3. Opposite party No 1 found that the seized gold pieces were made of pure gold and as such not fit for daily use. "Daily use" as ornaments is not the same thing as "commonly used" as ornaments. Opposite party No. 2 found that the weight and workmanship in respect of the seized gold pieces rendered them unfit for personal adornment or to be used as ornaments, while the revisional authority came to hold that such heavy and pure gold churis were never used as ornaments in the State of Orissa. Thus the reasons assigned by opposite parties 1, 2 and 3 are at variance. It is common knowledge that ornaments are capable of almost infinite variations. Prima facie" churis are ornaments unless having regard to their purity, size, weight, description or workmanship it is found that they are not commonly used as ornaments in any State or Union Territory. In the orders of opposite parties 1 and 2 there is no finding that the seized churis are not commonly used as ornaments in Orissa; only the revisional authority has found that churis of the kind which were seized are never used as ornaments in the State of Orissa. However, the revisional order does not indicate on what basis or material this finding is based. Expert opinions of well-known jewellers of Orissa in the matter have not been taken in course of inquiry though such opinions could have been of great assistance.

6. Opposite parties 1, 2 and 3 are all agreed in their conclusion that the seized gold is "primary, gold". Here again, except the conclusion, the orders are silent as to whether the seized gold pieces were in any unfinished or semi-finished form. According to the definition, only: gold in any unfinished or semi-finished

form is "primary gold". In the impugned orders there is no indication regarding the form or state of the seized gold pieces. The Panchnama as per Annexure-1 and the notice to show cause as per Annexure-3 also do not mention that the seized gold pieces were in any unfinished or semi-finished state.

7. In view of the infirmities and defects pointed out above the impugned orders as per Annexures-5, 8 and 10 must be set aside. It is necessary that the matter should be readjudicated by opposite party No. 1 in accordance with law.

8. In the result this writ application is allowed. The impugned orders as per Annexures-5, 8 and 10 are hereby quashed. The case is remitted to opposite party No. 1 for readjudication and disposal in accordance with law after due notice to the petitioner. In the facts of this case parties shall bear their own costs.

G.B. Pattnaik, J.

9. I agree.