

(1987) 10 PAT CK 0004

In the Patna High Court

Case No : Civil writ jurisdiction Case No. 381 of 1982

Suresh Prasad and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-10-1987

Acts Referred:

Gold (Control) Act, 1968 — Section 17(1), 8(1), 8(4)

Citation : (1987) PLJR 13

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Ram Balak Mahto A.G. and Harendra Prasad, for the Appellant;
Mahendra Prasad Pandey For the Union of India, for the Respondent

Judgement

S.B. Sinha, J

1. This writ application is directed against the order dated 16.1.1946 passed by the Collector, Central Excise, Patna as contained in Annexure 1 to the writ application, order dated 29.7.1977. passed by the Gold Control Administrator, New Delhi as contained in Annexure 2 to the writ application and the order dated 23.12.1980 passed by the Central Government through the Special Secretary, Government of India, Ministry of Finance as contained in Annexure 3 to the writ application. The facts of the case lie in a very narrow compass.

2. The original petitioner no. 1, since deceased, was father of the petitioner nos. 2 and 3. The original petitioner no. 1, admittedly, was a certified goldsmith having his shop in Rajgir bazar. Allegedly, the petitioner no. 1 was ailing and the petitioner nos. 2 and 3 began to look after the work of their father. It is admitted that on 25.10.1974 the premises of the petitioners were searched by the Customs and Central Excise authorities; as a result whereof although no primary gold or gold ornament was recovered, but certain exercise books and loose sheets showing transactions made by the petitioners with outsiders were recovered.

3. Thereafter, the respondent no. 4 initiated an adjudication proceeding as against the petitioners. In the said adjudication proceeding the petitioners were charged for the contravention of the provisions of sections 8 (1), 8 (4), 17 (1), 40 and 41 of the Gold (Control) Act, 1968 (hereinafter referred to for the sake of brevity as the said Act). The respondent no. A gave an opportunity to the petitioners to file their show cause and the petitioners filed two different show causes i. e. one by the petitioner no 1 and the other by petitioner nos. 2 and 3. The petitioners were also given an opportunity of personal hearing and during the said hearing the petitioners were represented by one Sri S.N. Singh. Advocate.

4. The respondent no. 4 upon a perusal of the exercise books and the loose sheets of the petitioners, found that the transactions were recorded therein in respect of gold and gold ornaments as also found the manufacture and transaction of Asharfees (gold article) recorded in the exercise books; the details whereof are as follows:--

A. "Transactions recorded in the Exercise Books in respect of gold and gold ornaments:--

Book No.

Period to which the transactions relate

Qty. of gold & gold ornaments recorded sold

Value of gold, gold ornaments shown in Col. (3)

1.

2.

3.

4.

1.

1971-72. (from 2.10.1971,

3213.745 Gm.

Rs. 70,135.04.

2.

1972-73

2568.494 Gm.

Rs. 77,095.27.

3.

1973-74 (upto18.8.1974)

2772.914 Gm.

Rs. 129,124.79.

Total-

8555.213Gms.

Rs. 2,76,355.10.

B. Transactions recorded in the loose slips account (20 sheets)

Qnty. of gold and gold ornaments sold

Value of gold and gold ornaments

Total (A)+(B) Transaction of gold and gold ornaments

929176. Gms. 8555.213. Gms. 923.175. Gms.

Rs. 31,435.85Rs. 2,7635510 Rs. 31.435.85.

9,473.388. Gms.

Rs. 3,07,790.95

C. Manufacture and transactions of Asharfis (Gold) Articles recorded in the Exercise Books.

Name of customers.

Date of order.

No. of pieces.

Weight T.A.R.

Recorded in

1.

2.

3.

4.

5.

1. Harihar Singh, Sahalpur

25.3.72

9

8142

Book No. 1

2. Sita Ram Singh, KamalBigha

9.1.74.

11

1000

3. Kameshwar Singh, NayaPokhar.

30.4.74

7

333

Book No. 3

4. Barho Singh, Rajgir

24.2.74

7

373

5. Balram Singh, Sithuria.

22.4.74

9

1000

6. Bindi Singh, Sithaura.

27.5.73

7

391

Book No. 2.

7. Nageshwar Singh, Rajgir.

2.5.73

9

4100

Book No. 2

8. SukhdeoUpadhya,

20.4.73

7

200

Book No. 2

66 pieces 4721 or 549.837. Gms

(D) Accounts of refining of gold

Date

Name of the party from whom gold received for refining.

Description received for refining.

Weight of gold refined

3.1.73

Dwarika Pd. Hassanpur.

Bal:--2 Pieces

O. 9.2 or 6,925Gms.

B.A.P.

p/23

of

Book no. 2."

5. During the aforementioned hearing the learned advocate appearing on behalf of the petitioner conceded that the petitioners used to buy gold ornaments from the customers and supplied the same to the other customers on making new ornaments against payment of value of gold. The respondent no. 4 in his impugned order dated 16.1.1976 recorded the aforementioned statements by an order dated 16.1.1976 as contained in Annexure 1 to the writ application which reads as follows:--

As regards the supply of gold to customers and making the ornaments be stated hat his clients used to buy gold ornaments from the customers and supplied the same to other customers on making new ornaments against payment of value of gold. He stated that his clients did not have any accounts to show the purchase of such gold ornaments.

6. The respondent no. 1 in the aforementioned order found that the petitioners are guilty of violation of various provisions of the said Act, as referred to hereinbefore, and imposed a penalty of Rs. 1,00,000/- (one lakh) upon the original petitioner no. 1 and 50,000/-(fifty thousand) each on petitioners nos. 2 and 3.

7. The petitioners thereafter preferred an appeal purported to be under sub-section (1) of section 80 of the said Act before, the respondent no. 3. The appellate authority also gave a personal hearing to the petitioners. During the said hearing the petitioner no. 1 as also his advocates, G.A. Shah and one Sri S.P. Tarun were present. Before the appellate authority also a concession was made by the learned counsel appearing on behalf of the petitioners. The said concession has been recorded in the order passed by the appellate authority as contained in Annexure 2 to the writ application which is in the following terms:--

During the hearing before me it has been admitted that because Sri Basant Lal was continuously ill his two sons were carrying on the business. It has also been admitted that small quantities of gold and gold ornaments were being purchased and sold. It has also been conceded that for making heavier ornament some small quantity of gold used to be added and the price of the same used to be charged from the customer along with the manufacturing charges.

8. The appellate authority found that the petitioners have contravened the provisions of section 41 (b) of the said Act but with regard to the other charges he came to the conclusion that the same were not proved for want of sufficient evidence.

9. The appellate authority, however, while passing the order dated 29.7.1977 as contained in Annexure 2 to the writ application reduced the quantum of penalty imposed upon Basant Lal (since deceased) to Rs. 25,000/- from Rs. 1,00,000/- (one lakh) and also reduced the penalty imposed upon the petitioners nos. 2 and 3 from Rs. 50,000/- to Rs. 10,000/- each.

10. The petitioner thereafter preferred an appeal before the Government of India but the same was dismissed by an order dated 24th December, 1980 as contained in. Annexure 3 to the writ application.

11. The petitioners thereafter filed a mercy petition before the President of India which was also dismissed by an order dated 24th November, 1981 as contained in Annexure 4 to the writ application.

12. Mr. Ram Balak Mahto, learned senior counsel appearing on behalf of the petitioners, raised three-fold contentions. Firstly, he submitted that the purported concessions made by the counsels are not binding upon the petitioners. He further submitted that the said purported concession being on facts; the same could not have been relied upon by the respondents no. 2 to 4 while passing the impugned order as contained in Annexures 3, 2, and 1 respectively.

Secondly, he submitted that the appellate authority having found that the petitioners have merely contravened the provisions of section 41(b) of the said Act, the petitioners no. 2 and 3 could have been imposed with any penalty by the respondent no. 3 while exercising his purported jurisdiction u/s 78 read with section 80 of the said Act.

Learned counsel lastly submitted that in any event the petitioner no. 1, who was

a certified goldsmith having been imposed a personal penalty by the impugned orders, the same cannot be given effect to after his death.

13. Mr. Mahendra Prasad Pandey, the learned counsel appearing on behalf of the respondents, in reply, submitted that the adjudication proceedings in terms of sections 78 of the said Act being a civil proceeding the concession made by a counsel is binding upon the petitioners. He further submitted that the petitioners cannot escape from their liabilities by contending that they are not bound by the concessions made by their counsels in view of the fact that they did not challenge the said concessions before the authorities, before whom such concessions were made.

With regard to the second contention raised on behalf of the petitioners, Mr. Pandey submitted that the petitioners no. 2 and 3 are vicariously liable under the provisions of sections 21(b) of the said Act as admittedly they have been acting for and on behalf of the petitioner no. 1 (since deceased).

In reply to the third contention raised on behalf of the petitioners, Mr. Pandey submitted that although the penalty imposed is in the nature of personal penalty, the effect thereof is not wiped off only by reason of the death of a person upon whom such penalty had been imposed. According to the learned counsel the amount said penalty can be realised of the from the properties belonging to the deceased even after his death.

14. In relation to the first contention raised by the learned counsel appearing on behalf of the petitioners has taken me through the various paragraphs of the impugned orders as contained in Annexures 1 and 2 to the writ application and submitted that from the said orders themselves it would appear that the definite case of the petitioners before the respondents no. 4 and 8 was that they have not contravened any provisions of the said Act. According to the learned counsel both before the respondent no. 4 as also before the appellate authority, the petitioners definitely contended that they had not carried out any transaction in contravention of the provisions of the said Act and as such question of making any purported concession by the counsels appearing on their behalf does not and cannot arise. In this connection, learned counsel has referred to a decision of Calcutta High Court reported in S.C. Mitter Vs. The State, .

In the aforementioned decision the Division Bench of Calcutta High Court While dealing with a criminal appeal held that the law makes no provision for an admission by counsel in a criminal case. It was further held there in that no admission by counsel can relieve the prosecution of the duty of satisfying the court by proper evidence.

In my opinion, the aforementioned decision is plainly distinguishable. In criminal case an admission made by an accused is not admissible in evidence and as such any admission made on behalf of an accused by his counsel will also not be admissible in evidence.

It is a cardinal principle of law that in a criminal trial, the prosecution has to prove the guilt of the accused on the basis of the evidence led by it. The confession of an accused is inadmissible in evidence and can be relied upon by the prosecution only in a certain exceptional circumstances in terms of the provisions of the Evidence Act.

15. An adjudication proceeding, however, although is a penal proceeding but the same cannot be equated with a criminal trial. A proceeding before the adjudicating authority in terms of the provisions of the said Act as laid down in Chapter XIV of the said Act is a Code by itself. The same provides for an appeal u/s 80 of the said Act to the Collector from the order passed by the authority empowered to initiate such proceeding and a further appeal before the appellate tribunal and also provides for a reference to the High Court and the Supreme Court in certain circumstances. The said provisions provide for the power to the concerned authorities as also the manner in which the hearing of the proceeding is to be conducted.

16. Further from the narration of the facts as referred to herein before, it is evident that atleast before the respondent no. 3, the petitioner no. 1 was himself personally present along with his lawyers. The counsels, therefore, must be presumed to have been acting under the instructions of the petitioner no. 1 and made the concessions, as referred to hereinbefore, under his instructions.

Although, in the writ application it has been stated that the petitioners in the memo of appeal filed before the respondent no. 3 stated that no concession was made by their counsel before the respondent no. 4; from a perusal of Annexure 2 to the writ application it does not appear that the said point was even pressed before the respondent no. 3.

17. In Markanda mahapatra Vs. Varada Kameswar Rao Naidu and Others, a Division Bench of this Court has held that concessions made by the lawyers for the parties at the trial, in so far as they may be said to be no question of rules, are not binding on the parties; but in so far as they are estimates of the evidence on record, they may be said to be conclusions on questions of fact.

Further, the Supreme Court in Bank of Bihar v. Mahabir Lal and others reported in 1964 B.L.J.R. 1 held that if a concession recorded erroneously by the High Court it was proper for the parties to prefer an application for review before the said court after the judgment was pronounced or if the judgment is read out in the court immediately draw the attention of the court to the error in the statement. Obviously nothing of the kind has been done.

The Supreme Court again in State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, after taking into consideration various earlier decisions held that the judge's record is conclusive. It has further been held therein that neither lawyer nor litigant may claim to contradict it, except before the judge himself but no where else.

18. In view of the aforementioned authoritative pronouncements of the Supreme Court there cannot be any doubt that the concessions made by the counsels representing the petitioners are binding upon them and they cannot be permitted to resile therefrom.

Further, the very fact that concession by the counsel was made both before the respondent no. 4 as also before the appellate authority i. e. respondent no. 3, there cannot be any doubt that such concessions were made at the instance of and or under the instruction of the petitioners. As noticed hereinbefore, before the appellate authority the petitioner no. 1 himself was present and as such there is no doubt that the counsel appearing on behalf of the petitioners made the concession aforementioned after having been instructed in that regard

19. Further, from a perusal of the impugned orders as contained in Annexures 1 and 2 to the writ application, it is evident that the findings were arrived at by the respondents no. 3 and 4 also after taking into consideration the other evidences placed before them i. e. seized documents. The inferences drawn by the respondents no. 4 and 3 while passing the orders as contained in Annexures 1 and 2 respectively being based on evidence cannot be said to be and are not perverse.

Further, there had been concurrent findings of fact and nothing has been brought to my notice to the effect that such findings of fact are either based on no evidence or are based on extraneous considerations. The findings of fact recorded by the respondents no. 1, 2 and 3 in their impugned orders are binding upon this Court.

20. So far as the second contention raised by the learned counsel on behalf of the petitioner is concerned, it appears to have some substance.

Section 41 (b) of the said Act provides for imposition of penalty only upon the certified goldsmith. Section 41, therefore, cannot be resorted to for the purpose of imposition of any penalty upon a person who is not a certified goldsmith. The provisions of the said Act do not create any constructive liability nor such a constructive liability in absence of clear and unambiguous provisions in the statute cannot be inferred.

It is a well settled principles of law that a penal provision has got to be construed strictly. Section 41 (b) of the said Act being a penal provision also requires strict interpretation. As by reason of the said provision penalty can only be imposed upon a certified goldsmith for contravention, if any, made by him no such penalty evidently can be imposed on a person who is not a certified goldsmith.

In this view of the matter, it must be held that the imposition of penalty upon the petitioners no. 2 and 3 is bad in law.

21. Mr. Mahto further submitted the imposition of penalty upon the petitioner no. 1 purported to be for contravention of section 41 (b) of the said Act is also erroneous in law as the respondent no. 3 has clearly found that the charges

made as against the petitioners under section 8 (1), 8 (4), 17 (1) and 40 of the said Act have not been proved. According to the learned counsel the charges u/s 41 (b) is linked with the charges made under the other provisions of the said Act as referred to herein-before, and once it is held that the charges under the said provisions have not been proved by the respondent; the charges u/s 41 (b) automatically fails. The submissions of the learned counsel, in my opinion, is wholly misconceived. Sections 8, 17 and 40 deal with the different situations and do not operate in the same field covered by section 41 of the said Act.

Section 41 deals with restriction on acquisition or sale of gold by a certified goldsmith and under the said provisions he is forbidden to buy or agree to buy or sell or agree to sell any primary gold, article or ornament.

22. The petitioners, in view of the afore-mentioned findings of fact arrived at by the respondents no. 2 to 4 clearly contravened the provisions of the said Act in buying ornament from one person and selling it to there (sic) after adding some primary gold therein. Nothing has been brought on record to show that the petitioners were entitled to carry out the aforementioned transactions under the provisions of the said Act or they have been possessing the primary gold or other articles within the limits prescribed u/s 42 thereof.

In this view of the matter, I am of the opinion, that although imposition of penalty upon the petitioners no. 2. and 3 was bad in law. The imposition of penalty upon the petitioner no. 1 was permissible in terms of section 41 (b) of the said Act.

23. So far as the third contention raised on behalf of the petitioners is concerned, in my opinion, the same has also no force. The penalty imposed under the provisions of any penal statute is always personal in nature. Such penalty, when imposed is to be realised in the manner laid down under the statute. The learned counsel could not bring to my notice any provision of law or any precedent in support of his aforementioned contentions.

24. Having considered the submissions made on behalf of the petitioners and on behalf of the respondents, I am of the view that penalty once imposed upon any person under the provisions of the said Act survives the death of such person. Such penalty can be recovered from the assets and/or other properties left by him. In the result, this writ application is allowed in part and the impugned orders as contained in Annexures 1, 2 and 3 are hereby quashed whereby penalty was imposed upon petitioners no. 2 and 3. The order imposing penalty upon the original petitioner no. 1, is, however, upheld.

In the circumstances of the case there will, however be no order as to costs.