(1988) 03 OHC CK 0018

In the Orissa High Court

Case No : Criminal Appeal No. 14 of 1982

Union of India (UOI) APPELLANT

Vs

Lankapali Pravakar Rao and Another RESPONDENT

Date of Decision : 07-03-1988

Acts Referred:

Gold (Control) Act, 1968 — Section 2, 37, 42, 8(1), 85(1)
Gold Control (Reforms, Fees and Miscellaneous Matters) Rules, 1968 — Rule 13

Citation : (1988) 65 CLT 729 : (1988) 18 ECC 299 : (1988) 36 ELT 584

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : R. Mohanty, Jayadev Panda and V. Subramanyam, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—In this appeal u/s 378, Criminal Procedure Code, the Union of India represented by the Collector, Customs and Central Excise, Bhubaneswar, assails the judgment of the Additional Sessions Judge, Cuttack, in Criminal Appeal No. 131 of 1980 reversing the decision of the Chief Judicial Magistrate, Cuttack in 2(c) C. C. Case No. 18 of 1974 and acquitting the respondents. The respondents were charged u/s 86(1)(ii) of the Gold (Control) Act, 1968 (hereinafter referred to as "the Act"), for having been found to be in unlawful possession of quantities of primary gold in contravention of Section 8(1) of the Act on the night of April 15, 16, 1974, in the running Madras-Howrah Mail at Cuttack Railway Station. The detection was made when the Superintendent (Preventive), Central Excise, Cuttack (PW-1) and the Inspector of Central Excise, Cuttack (PW-2) along with other officials of the Department rummaged the Madras-Howrah Mail at Cuttack Railway Station on getting information that contraband gold was being carried by the accused persons. As a result of the search, 2,344 grams of primary gold in six lumps were seized from the possession of Lankapali Pravakar Rao, respondent No. 1, and 4,586.100 grams of primary gold in twenty lumps contained in four packets were seized from the possession of Kolla Nanaji, respondent No. 2. By the time the search was over, the train had left the Cuttack Railway Station and, therefore, the respondents and their companions (discharged for want of evidence) were made to get down in the next railway stoppage, that is, Jaipur-Koonjhar Road. There, in the presence of two witnesses including Natabarlal Gambhir Das (PW-4), 4,586.100 grams of primary gold were seized from K. Nanaji under the seizure list (exhibit 11), 2,344 grams of primary gold were seized from the possession of accused L. Pravakar Rao under the seizure list (exhibit 6) and four railway tickets and one reservation ticket were seized from one of the companions of the accused persons, namely, P. Narasimha Rao, under the seizure list (exhibit 12). The accused persons as well as their companions gave their statements written out in their own hands in Telugu marked as exhibits 1 to 4. In their statements, both the accused persons admitted that they were carrying the gold recovered from their possession to Calcutta as per the direction of one P. Krishna Rao of Srikakulam, in the company of P. Narasihma Rao and P. Prakash Rao, but the latter two persons, in their statements, denied their knowledge about possession of gold by the accused persons. Since possession of gold by the accused persons was without any authority, a prosecution report, was submitted against them as also their two companions by Y. Puma Chandra Senapati, the Assistant Collector, Central Excise, Cuttack (PW-5), who was authorised by the Collector of Central Excise under the document (exhibit 5) to submit the said report. By order dated, April 9, 1975, the two companions of the accused persons, viz., P. Narasimha Rao and P. Prakash Rao, were discharged and the said order was upheld in revision by this court.

2. Both the accused persons admitted recovery of the specific quantities or gold from their respective possession, but they denied having committed any offence. Their defence as evident from their statements u/s 313, Criminal Procedure Code, was that the gold recovered from their possession belonged to sixteen goldsmiths of Srikakulam who had sent the accused L. Prabhakar Rao to Calcutta for die-casting and preparation of ornaments and that accused K. Nanaji was merely giving his company to the other accused persons. As regards the statements given by them in their own hand before PW-1, their plea was that the same were obtained under threat and coercion.

3. The prosecution, in order to establish its case, examined six witnesses of whom PWs-1, 2, 3 and 6 were officers of the Department who conducted the raid and recovered the gold from the possession of the accused per-sons, PW-4 was the witness to seizure of gold as per exhibits 6 and 11 and PW-5 was the Assistant Collector of Central Excise who filed the, prosecution report. The prosecution also exhibited a large number of documents including exhibits 1 to 4, the statements given by the accused persons and their two companions, exhibits 6, 11 and 12, seizure lists and exhibits 8 and 10, the reports of the mint master who tested the sample of the gold seized.

4. On behalf of the defence, 18 witnesses were examined of whom DWs-1 to 8

and DWs-10 to 16 were said to be the 15 goldsmiths who, along with another goldsmith, P. Ananta Chari (since dead) entrusted the gold seized from the accused, Prabhakar Rao. PW-17 was a jewellery merchant of Srikakulam who proved the account books (exhibit H) maintained by the goldsmith, P. Ananta Chari, showing delivery of 506.600 grams of gold to accused L. Prabhakar Rao and also the account books (exhibits J to R) of DWs-1 to 8 and DW 18 was a resident of Calcutta who claimed to have received a letter from accused L. Prabhakar Rao in April, 1974, requesting to see him at Howrah Railway Station some time in April, 1974.

5. The trial judge, on scrutiny of the materials placed before him, came to hold that the accused persons were in illegal possession of primary gold of the quantities as alleged by the prosecution in contravention of Section 8 of the Act ; that they failed to satisfactorily account for the gold seized from their possession and as such they could not escape the mischief of Section 85 of the Act. On these findings, he held the accused persons guilty of the charge u/s 85(1)(ii) of the Act, convicted them thereunder and sentenced each of them to undergo R. I. for two years and to pay a fine of Rs. 3,000 in default, to undergo R. I. for a further period of three months. The court did not pass any order regarding disposal of the seized gold, as the order for its confiscation had been passed by the compe-tent authority in the adjudication proceedings against the accused persons:

6. On appeal, the learned Additional Sessions Judge, reversed the decision of the trial court mainly on the ground that the prosecution had not been able to establish that the material seized from possession of the accused persons was gold as defined in Section 2(j) of the Act and that the explanation offered by the accused persons that several goldsmiths had entrusted them with the gold for carrying the same to persons at Calcutta for the purpose of die-casting and preparation of ornaments was a reasonable one.

7. Learned counsel for the appellant contended that the finding of the learned appellate judge that it had not been established that the material seized from the accused persons was gold as defined in Section 2(j) was palpably erroneous and unsustainable in view of the evidence on record and the statements of the accused persons themselves admitting the fact that they were carrying the gold and the other finding that the plea of the accused persons that the gold seized belonged to several goldsmiths who had entrusted the same to the accused persons for carrying it to Calcutta and delivering it to persons for die-casting and preparation of ornaments was erroneous. Learned counsellor the respondents supported the judgment of the lower appellate court in its entirety.

8. Before proceeding to consider the contentions raised on behalf of the appellant, it will be helpful to notice a few provisions of the Act. u/s 2(d) of the Act, "certified goldsmith" is defined to mean a self-employed goldsmith who holds a valid certificate referred to in Section 39. Section 2(j) provides that "gold" means gold, including its alloy (whether virgin, melted or re-melted,

wrought or unwrought), in any shape or form, of a purity of not less than nine carats and includes primary gold, articles and ornaments, u/s 2(m), "licensed dealer" means a dealer who holds a valid licence granted u/s 27 authorising him to carry on business as a dealer. "Primary gold" is defined u/s 2(r) to mean gold in any unfinished or semi-finished form and includes ingots, bars, blocks, slabs, billets, shots, pellets, rods, sheets, foils and wires. Section 8 of the Act enumerates restrictions regarding acquisition, possession and disposal of gold. Under Sub-section (1) thereof, it is laid down that save as otherwise provided in the 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 other-wise receive or agree to buy, accept or otherwise receive any primary gold. Sub-sections (2) and (3) deal with restrictions regarding acquisition, possession and disposal of ornaments, articles with which we are not concerned in the present case. Under Sub-section (6), provision is made that notwithstanding anything contained in the section, the administrator may, if he is of opinion that the special circumstances of any case or class of cases so require, authorise any person or class of persons to buy or otherwise acquire, accept or otherwise receive, or sell, deliver, transfer or ether-wise dispose of, any primary gold or article. Section 37, benefit of which was claimed by the respondents, provides that a licensed dealer may, in the course, and for the purpose, of manufacturing ornaments, send gold to any other dealer who possesses equipment for drawing wires or for die-casting or who is a specialist in stone-setting, engraving, enamelling, polishing or any other special process necessary for or ancillary to the making, manufacturing, preparing, repairing or polishing of such ornament and that the other dealer shall return such gold to the licensed dealer from whom he had received it after completion of the process for which it was sent to him. Under the provisions of Section 42 of the Act, a limit is imposed on the quantity of primary gold which a certified goldsmith may possess. The limit is standard gold bars not in excess of 100 grams or any quantity of primary gold (including standard gold bars) not in excess of 300 grams. u/s 43, the provisions of Section 37 are made applicable so far as may be to a certified goldsmith as they apply to a licensed dealer subject to the modification that every reference therein to a licensed dealer shall be construed as a reference to a certified goldsmith. Section 85(1)(ii) under which the respondents were charged provides that whoever in contravention of the provisions of the Act or any rule or order made thereunder owns or has in his possession, custody or control any primary gold shall, without prejudice to any other action that may be taken under the Act, be punishable with imprisonment for a term which may extend to seven years and with fine, if the value of the gold involved therein exceeds one lakh of rupees, and in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both. u/s 97(1), it is laid down that save as otherwise provided in Sub-section (2), no court shall take cognizance of any offence against the Act except on a complaint in writing made by a Gold Control Officer, not below the rank of a Collector of Central Excise or of Customs, haying jurisdiction over the area in which the offence is committed or any person authorised by him in writing in this behalf. Section 98B(1) provides that in any prosecution for an offence under the Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be open to the accused to prove the fact that he has no such mental state with respect to the act charged as an offence in that prosecution. As provided in the Explanation to Sub-section (1) of the said Section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. Section 99 of the Act makes a provision regarding presumption as to the ownership of gold. It is provided therein that any person who has in his possession, custody or control any primary gold, article or ornament shall be presumed, unless the contrary is proved, to be the owner thereof. Rule 13 of the Gold (Control) (Forms, Fees and Miscellaneous Matters) Rules, 1968, prescribes the conditions for acquisition, sale, etc., of gold by a licensed dealer or refiner. It reads as follows :

" 13(1). Every licensed dealer or refiner acquiring, accepting, selling, delivering, transferring or disposing of gold shall at the time of each such transaction, issue a voucher in relation to such gold and in a case where the transaction relates to sale, delivery, transfer or disposal of gold, such voucher shall accompany the gold :

Provided that no such voucher shall be necessary in relation to any gold which is transferred or delivered by a licensed dealer to his artisan for the purpose of making, manufacturing or preparing ornaments therefrom.

(2) Each voucher shall contain the following particulars, namely :

(a) serial number,

(b) date and time of issue of voucher,

(C) name and address of the dealer or refiner issuing the voucher,

(d) name and address and licence number, (if any) of the person to whom the voucher is issued,

(e) description, purity of gold content, gross weight and net weight of the article/ ornament or any other form of gold,

(f) whether gold was required to be declared u/s 16 and if so, it has been included in a declaration (to be filled by the seller or transferee of gold where the gold is brought or otherwise acquired by a dealer or refiner),

(g) signature of the deale//refiner issuing the voucher, (h) signature of the person to whom the voucher is issued,

(3) The voucher shall be in duplicate and serially numbered, new series of numbers being used for each financial year.

(4) The duplicate copy of the voucher shall be retained by the licensed dealer or

refiner issuing it and the original copy of the voucher shall be given to the person who sells, delivers, transfers or otherwise disposes of gold to, or who buys, accepts or otherwise receives gold from, such dealer or refiner, as the case may be.

(5) Books containing blank vouchers shall be presented to the proper officer for affixing his initials or stamp on each book before it is brought into use.

(6) Separate voucher books shall be maintained in respect of receipts and issues.

(7) The voucher referred to in Sub-rule (1) shall be preserved for a period of not less than five years immediately following the close of the year to which it relates."

9. P. Krishna Rao (PW-1) was the Superintendent, Central Excise, Cut-tack, when the incident occurred. He stated that he knew the accused persons since 1954 as they were carrying on business in contraband gold in between Srikakulam and Calcutta. On April 15, 1974, the witness accompanied by D.N. Patnaik, Inspector, and others searched a three-tier compartment of the Madras-Howrah Mail and located the accused persons. The witness stated that he found accused L. Pravakar Rao and K. Nanaji hiding the gold over their bellies which looked distended and bloated. On feeling portions of their bodies, he found existence of some hard substance. On being questioned, they gave out that the material was gold and it was being taken to Calcutta. The witness narrated in detail the manner of search and the quantities of gold seized from the two accused persons. According to the witness, the gold seized from the accused persons was kept in two boxes wrapped in paper and duly labelled. M. O.I . was the cloth bag in which six gold pieces (M. Os. II to VII) seized from accused Pravakar Rao were kept and similarly M. O. VIII was the cloth bag in which 20 pieces of gold (M. Os. IX to XXVIII) seized from accused Nanaji were kept. The witness asserted that all the M. Os. were primary gold. He further stated that only 300 grams of such gold could be kept by a goldsmith. In cross-examination, the witness denied that the statements given by the two accused persons in their own hand were obtained under threat of arrest. He also denied the suggestion that the accused Pravakar was carrying the gold, being entrusted by different goldsmiths. It is significant to note that not even a suggestion was made to the witness whether the articles seized were gold or not.

10. PW-2, D.N. Patnaik, was present with PW-1 at the time of the search and the seizure of the articles from the accused persons. He has given in detail how the search was made in the running train, the Madras-Howrah Mail, and the articles were found to have been hidden in the waist portion of the two accused persons. The witness stated that on being questioned, the accused persons said that they were carrying the gold to Calcutta. The witness took 10.250 grams of gold as sample from each piece and sent the same to the mint for examination as per exhibit 7. The report received from the mint master has been marked as exhibit 8. This witness stated that he took a further quantity of 11.700 grams from 20

pieces marked M. Os. IX to XXVII as samples and sent the same to the mint master under exhibit 9 for analysis. The report of the mint master is exhibit 10. Nothing material was elicited in the cross-examination of this witness to cast any doubt about the credibility of his evidence. In the cross-examination, the witness stated that all the accused persons gave their statements in Telugu. He denied the suggestion that the said statements were obtained under threat, coercion or compulsion. It is in the statement of this witness that accused L. Pravakar Rao did not state at the time of search and seizure that the gold he was carrying belonged to 16 goldsmiths.

11. PW-3, Nilamani Misra, was the Inspector, of Central Excise, Cuttack, and was declared Gold Control Officer under the Act. He had accompanied PWs-1 and 2 at the time of incident. His evidence substantially corroborates, the statements of PWs-1 and 2 regarding the manner of search in the train, detection of the accused persons and seizure of gold from them. In cross-examination, the witness stated that the document marked X-8 was recovered from accused Narasingha Rao when he was outside the train. Nothing noteworthy was elicited in cross-examination of the witness.

12. PW-4, Natabarlal Gambhir Das, a resident of Jaipur Road, was one of the witnesses to the seizure of the gold. The gold seized was weighed by him. In cross-examination, he stated that he was a dealer in silver. In his presence, the accused persons were interrogated in the office of the Assistant Station Master. The interrogation was done by the departmental officers while the witness was weighing the gold.

13. PW-5, Y. Purna Chandra Senapati, was the Assistant Collector, Central Excise, attached to the Office of the Collector, Calcutta. He stated that Shri Hiralal Banerjee was the Collector at Calcutta and exercised jurisdiction over the State of Orissa. He further stated that he was authorised in writing by the Collector to file the complaint in the case and on getting an authorisation letter, he filed the complaint. In cross-examination, the witness stated that both Shri Banerjee, the then Collector and he (the witness) have since retired from service. He further stated that certified goldsmiths could take gold ornaments from one place to another for specialised work, but not for re-manufacturing or die-casting.

14. PW-6, B.P. Nandi, was a member of the preventive party, which went out for detection on April 16, 1974, when the instant case was detected. He stated that in connection with the seizure of gold, an adjudication proceeding was started. He produced a carbon copy of the order passed in that proceeding duly signed by the Collector, Central Excise and Customs. The document was marked as exhibit 13.

15. Coming to the witnesses examined on behalf of the defence, as noticed earlier, DWs-1 to 8 and 10 to 16 claimed to be certified goldsmiths who claimed to have entrusted different quantities of gold to accused L. Pravakar Rao for preparation of ornaments at Calcutta. Perusal of their evidence shows that the

statements are similar in all material aspects. On a scrutiny of their statements, the following common features emerge : Each of them claimed to be a certified goldsmith ; accused L. Pravakar Rao served as goldsmith under his maternal uncle one P. Biswanatham, but held no licence as a goldsmith ; the witnesses stated that they received the gold from their customers in the shape of ornaments, melted it and handed over the same to accused L. Pravakar Rao ; they did hot keep any sample of the gold since it was pure gold of 24 carats ; the witnesses further stated that they had not given any instruction to Pravakar Rao regarding the particulars of the ornaments to be prepared at Calcutta ; indeed, it is in their statements that even the customers had not given any instruction for preparation of any specific type of ornament; excepting producing their account book showing delivery of quantity of gold to Pravakar Rao, no other document was produced to show that the transaction was made in accordance with the provisions of the Act and the Rules, particularly Rule 13 ; in most of the cases, the quantity of gold said to have been handed over by the witnesses to Pravakar Rao was in excess of 300 grams ; some of the witnesses stated that after seizure of the gold, accused Pravakar Rao took the account books from them, and produced them before the Income Tax authorities ; many of the witnesses also stated that the transaction with Pravakar Rao was their first ; the other accused Nanaji had a pan shop in the area where these goldsmiths were said to be carrying on their business. From the substance of the statements of these witnesses discussed above, it is patent that there was absolutely no doubt that the commodity seized was "pure gold" of 24 carats which was handed over to accused Pravakar Rao in the shape of blocks, thus satisfying the requirements of "primary gold" as defined u/s 2(r) of the Act. There is also no doubt that the transactions between the witnesses claiming themselves to be certified goldsmiths and the accused, even if accepted, were not done in the manner prescribed under the Act and the Rules. It is surprising that the witnesses who did not have any previous transaction with accused Pravakar Rao would entrust to him substantial quantities of gold belonging to their customers without taking the basic safeguards like retaining a sample of gold and determining its purity. If the purpose of the transactions was preparation of ornaments at Calcutta, then it was reasonable to expect that the witnesses while sending accused Pravakar for the purpose would have given him clear instructions regarding the types of ornaments to be prepared, their design and weight, etc. In the normal course, the customers must have handed over the gold for preparation of specific types of ornaments and in such circumstances, the entire matter would not have been left to the discretion of accused Pravakar. The documentary evidence in the shape of entries in the account books of the witnesses on which much reliance has been placed by the lower appellate court because they were produced from the custody of the Income Tax authorities, does not, in my view, improve the case of the defence. Admittedly, these are documents of witnesses and the entries in, question were made by them. DW-9, the Income Tax Inspector, who produced these documents clearly stated in cross-examination that he had not examined the account books and could not say whether any officer of the department had ever inspected the said books. The witness could not even say if the 16 persons concerned with the account books were certified goldsmiths or not and whether they were Income Tax assessees. The witness also could not say if any enquiry had been made regarding the entries made in the account books. The fact that the documents came to the court from the custody of the Department is not of much relevance and significance. The trial court gave cogent reasons for casting any doubt about the genuineness and correctness of these documents, particularly when the case that the gold seized from the two accused persons belonged to several certified goldsmiths was never made out by the accused persons at the earliest point of time, that is, at the time of search and seizure by the Central Excise authorities.

16. DW-17 who claimed to be a certified jeweller stated that the 16 goldsmiths, obviously referring to DWs-1 to 8 and 10 to 16, prepared, ornaments as per his demand. He claimed, to be acquainted with the handwriting and signature of P. Ananta Chari and proved exhibit-H as his account book. As per the entry in the book (exhibit-H/a), the said P. Ananta Chari had given 500.600 grams of gold to accused Pravakar Rao on April 15, 1974. The entry further showed that P. Ananta Chari received the gold from his customer G. Musal Naidu. It is significant to note that not a single customer has been examined in the case to state that he had handed over the gold to the goldsmith for the purpose of preparing ornaments at Calcutta.

17. DW-18, a resident of Calcutta, stated that he had received a letter from accused L. Pravakar Rao in April, 1974, intimating him that he was coming to Calcutta with gold and requesting the witness to receive him at Howrah Railway Station. The witness had not preserved this letter. In cross-examination, the witness stated that he was born at Anakapali, but had been residing at Calcutta for about 40 years. He admitted that he was a commission agent under Nataraj Jewellers.

18. The accused persons, in their statements recorded u/s 313, Criminal Procedure Code, admitted that specified quantities of gold as stated by the prosecution were seized from them by the officers of the Central Excise Department on the night of April 1 5/16, 1974. They had made no statement questioning the fact that the commodity seized was gold or that it was primary gold. The only explanation offered by them was that the gold belonged to several goldsmiths who entrusted the same to them for die-casting and preparation of ornaments at Calcutta

19. On the evidence discussed above and the plea taken by the defence, there is no manner of doubt that the commodity seized from the possession of the accused persons was "gold" as denned u/s 2(j) of the Act arid that it was "primary gold" as defined u/s 2(r) of the Act. Further, the prosecution has also proved the report of the mint master (exhibit-8) which clearly established that the gold seized from the accused persons was of more than 9 carats purity. Indeed, the fact gains support from the evidence of the defence witnesses

themselves. On the materials on record, there can also be no doubt that the accused persons had no legal authority for possession of the gold and such possession was unauthorised. The explanation offered by the accused persons was palpably unacceptable in view of the various infirmities in the statements of the witnesses discussed earlier. The reasons given by the lower appellate court that the transaction was in the course of mercantile business was not material. When the statute prescribed the particular manner in which a transaction was to be carried out, in the absence of proof to show that it was so carried out, the entire transaction must be taken to be illegal and unauthorised.

20. An argument was advanced on behalf of the respondents that the prosecution was not backed by legal and proper sanction. The contention has no merit The Act makes no provision that a prosecution u/s 85(1)(ii) is to be preceded by sanction. Section 97(1) provides that save as otherwise provided in Sub-section (2), no court shall take cognizance of any offence against the Act except on a complaint in writing made by a Gold Control Officer, not below the rank of a Collector of Central Excise or of Customs, having jurisdiction over the area in which the offence is committed or any person authorised by him in writing in this behalf. Sub-section (2) has no application to the present case. In the present case, admittedly, the Collector of Central Excise did not file the complaint. It was filed by the Assistant Collector of Central Excise (PW-5). The said witness categorically stated that he was authorised by the Collector, Central Excise, Calcutta, who exercised jurisdiction over Orissa in writing to file the complaint and the document was marked as exhibit Z. Therefore, the requirements of Section 97(1) were satisfied in the case and there was no infirmity on that score.

21. On an analysis of the materials on record discussed in the foregoing paragraphs and for the reasons stated therein, it is clear that the trial court rightly convicted the accused persons of the charge u/s 85(1)(ii) of the Act and sentenced them thereunder. The lower appellate court was clearly in error in reversing the said decision and acquitting the accused persons. Accordingly, the appeal is allowed, the judgment of the learned Additional Sessions Judge, Cuttack, acquitting the respondents is set aside and the judgment of the learned Chief Judicial Magistrate, Cuttack, convicting them u/s 85(1)(ii) of the Act and sentencing each of them to undergo rigorous imprisonment for two years and to pay a fine of Rs. 3,000, in default, to undergo rigorous imprisonment for a further period of three months is restored.

