

Jeevanlal K. Jain Vs. the Administrator, Gold Control

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-12-1984

Reported in : (1985)(21)ELT89Tri(Mum.)bai

Appellant : Jeevanlal K. Jain

Respondent : The Administrator, Gold Control

Judgement :

1. In this appeal against the appellate order of the Gold Control Administrator dated 27-7-1982, the only two issues that had been canvassed and pressed for our decision, by the learned counsel, Shri K.M. Desai are : (a) the levy of a penalty in a sum of Rs. 2500/- on the Appellant Shri Jeevanlal K. Jain; and (b) the confiscation of gold ornaments weighing 870.500 grams. 2.

The undisputed facts, in so far material, are- (a) The Appellant is a partner of M/s. Kapurchand Jethaji and Company. The other two partners are his father and his son, the Appellant in Appeal No. 4 of 1982.

(b) Consequent upon a search of the Licensed premises of the partnership firm on 7-10-1980, the unaccounted gold ornaments in question were seized, along with others, and a statement recorded from the son of the Appellant. (Appellant in Appeal No. 4 of 1982).

(c) The Appellant was, admittedly, not in station. He returned only in the last week of October, 1980.

(i) the circumstances in which his son was unable to account for the gold ornaments in question; and (ii) The names of the owners who had given him old ornaments (and their detailed particulars) for the making of new. They were his wife, his sister and two other relatives.

(e) Pursuant to the statement of the Appellant, the statements of the owners of the gold ornaments in question, as well as that of the goldsmith, Achrekar were all recorded on 4-11-1980.

(i) The four ladies claimed the ownership of the ornaments and prayed for their return; and (ii) Shri Achrekar, the Goldsmith explained the circumstances in which the gold ornaments were delivered to him, the entries he made in his own register and the return of the new ornaments by him on 7-10-1980.

(g) The Department, thereupon, issued notices on diverse dates to the four ladies requiring them to produce documentary evidence to support their statements, apart from seizing the G.S. 13 register from the goldsmith. All the ladies replied, they have none.

(h) Show cause notices dated 9-1-1981 were issued to the firm and all the three partners individually alleging contravention of Sections 31 and 36(2) read with Rule 13(1) of the Gold Control (Forms, fees and miscellaneous matters) Rules, 1968 and 55(3) of the Act and requiring them to show cause as to why the seized gold should not be confiscated and penalty under Section 74 levied. No show cause notice was, however, issued to the four ladies claiming to be the owners of the gold ornaments in question in terms of the mandatory requirements in Section 79 of the Act, as a prelude to an order for confiscation.

(i) In an adjudication of the aforesaid show cause notices, the Collector of Customs (Preventive), Bombay, had, (i) found contravention of Sections 31, 36 and 55 of the Act by the Appellant and his son (the Appellant in Appeal No. 4 of 1982). He exonerated the father of the Appellant on the ground of his old age and consequent inactivity in business; (ii) penalised the Appellant and his son (the appellant in Appeal No. 4 of 1982) in terms of Section 74 of the Act in a sum of Rs. 2500/- each; and (iii) Ordered confiscation of the gold ornaments in question under

Section 71 of the Act, subject to redemption on payment of Rs: 50.000/-.

(j) He had, however, given no reasons in his order as to how the gold, ornaments could be confiscated without a show cause notice to the four ladies in terms of Section 79 of the Act, although the point was specifically taken in the course of the arguments (unnumbered para 9 of his order).

(k) On appeal, the Gold Control Administrator, had, by his order dated 27-7-1982, confirmed the levy of penalty and confiscation. He modified the order, however, to the extent reducing the redemption fine to Rs. 25.000/-. He had also omitted to touch the question of the issue of show cause notice to the four ladies as a preclude to confiscation in terms of Section 79 of the Act.

(l) Contemporaneously, the Appellant and his son were prosecuted for the identical offences. The prosecution ended in the acquittal of the Appellant herein altogether and conviction of his son (the appellant in Appeal No. 4 of 1982) to simple imprisonment for a day and a fine of Rs. 3000/- not in regard to violation of any provision of the Act in relation to the gold ornaments in question but others weighing 263 grams which were also seized in the search aforesaid.

This order was dated 30-9-1982. An Appeal to the High Court, in Appeal No. 864 of 1982, resulted in the confirmation of the Additional Chief Metropolitan Magistrate's order on 10-2-1983.

3. By an application dated 9-3-1983, the Appellant sought to file a paper book containing the judgment of the High Court and the order of the Additional Chief Metropolitan Magistrate. This was pursuant to this Tribunal's notice dated 21-12-1982 and it was prayed that it may be taken on record condoning the delay. A copy of the paper book was forwarded to the Respondent by the office of the Tribunal on 14-3-1983.

No objection for the inclusion of the judgment of the High Court and Order in prosecution was made by the Respondent.

4. Notwithstanding that there was no objection from the Respondent for the inclusion of the aforesaid judgment and order in the prosecution case, Shri Krishan

Kumar for the Respondent made a futile bid to urge that they should not be looked into. We were unable to accede to the request seeing that- (a) they had conclusively decided the prosecution launched contemporaneously against the Appellant for contravention of the self same offences as are the subject-matter of the adjudication under Appeal.

(b) they could not have been filed earlier in the proceedings in adjudication or in appeal since they were subsequent to the order in appeal.

5. Nevertheless, the generally accepted principle of evidence is that the order of the criminal court is admissible to prove acquittal but not the conclusions drawn, since a decision in the criminal case is not binding in a civil case even in respect of the same cause of action. It is, however, a moot point how far a judgment of the criminal court is binding in a quasi-criminal proceedings like the case before us.

6. (a) Admittedly, the Appellant was not in station on 7-10-1980. This would appear from the statement of his son extracted in the annexure to the show cause notice (at page 29-32 of the paper book). There was nothing to the contrary anywhere in the proceedings.

(b) Although the show cause notice was issued against the firm as well as all its partners, neither the firm nor its senior partner was penalised either in the adjudication proceedings or the prosecution.

(c) (i) Acquisition of gold by a dealer, otherwise than as provided in the Act, prohibited in terms of Section 31 is one of the charges made against the Appellant. The other charges were for contravention of Section 36 read with Rule 13(1) of the Gold Control (Forms, Fees etc.) Rules, 1968, (issue of a voucher by a licensed dealer in relation to gold accepted by him) and Section 55(3) (Ownership or possession, custody or control of any licensed dealer, in his capacity as such of any gold not included in accounts).

(ii) Contravention of Sections 31 and 36 is found to have been established in the adjudication order, since the excess gold was not "reflected in the statutory account books" and has, therefore, been acquired from a source, other than the

one explained". Contravention of Section 55 was also found for the same reason. The essence of the findings against the Appellant is contravention of Section 55. In terms of the adjudication order, once the appellant had contravened Section 55 it followed that contravened Sections 36 and 31 as well, although, it was the contravention of Section 36 read with Rule 13 and Section 55(3) that was alleged against the appellant and not Sections 36 and 55.

(iii) It is the issue of a voucher in relation to the gold accepted or received that is made obligatory upon a licensed dealer in terms of Section 36 read with Rule 13 and not the making of the relevant entries in the account books. The failure to make entries in the accounts in regard to any gold in his possession, custody or control if it is in his capacity as a licensed dealer, is penalised in terms of Section 55 of the Act. A licensed dealer is not, therefore, obliged to enter in his accounts any gold received by him in a personal capacity.

(iv) Again, it does not follow that, once the gold has not been entered in the accounts, it has necessarily been, acquired from a source other than one explained, and accordingly there has been a contravention of Section 31. Even more so, if there is no statutory obligation to enter into the accounts gold accepted in his capacity other than that of a licensed dealer.

(v) Indeed, it was the case of the appellant all along that the gold ornaments were received by him from his wife, sister and other relatives, not qua licensed dealer but in his personal capacity. It is too much to expect a licensed dealer to act as such even in regard to the gold accepted from his wife and near relatives. When the statute itself had exempted the entry in accounts, if the gold was accepted in his capacity other than that of licensed dealer, a conclusion of violation of Section 55(3) of the Act cannot be reached, unless it is affirmatively established and found that he was not acting in his personal capacity but as a licensed dealer.

There has been no such finding. Nor can any such finding be arrived at without investigating into the claim for ownership of the gold set up by the four ladies merely because no vouchers had been issued to them, if, as it would appear no voucher is required to be issued in terms of Rule 13.

(vi) Violation of Rule 13 cannot also sustain without a finding of violation of Section 55(3) notwithstanding that there is nothing expressly in the said Rule to indicate that it is inapplicable in a case where the licensed dealer is not acting in his capacity as such. If a licensed dealer is not obliged in terms of Section 55(3) to enter in his accounts any gold received by him in a capacity other than that of a licensed dealer, how is he, yet, to issue a voucher in terms of Rule 13 Can there be a voucher issued by a licensed dealer in respect of gold which he is not obliged to enter in his accounts in terms of Section 55(3) of the act? (vii) Nor is the licensed dealer obliged in terms of the proviso to Rule 13, to issue a voucher, even when he accepts gold in his capacity as a licensed dealer, when he is merely transferring the gold to his artisan for the purpose of making ornaments.

(viii) Similarly, in terms of the proviso to Section 31, there is no bar for the receipt of an ornament by a licensed dealer, unless, he knows or has reason to believe that such ornament was required to be declared but was not. Without proof of such knowledge or belief, a contravention of Section 31 cannot be brought home to a licensed dealer. While it is true that, in terms of Section 106 of the Evidence Act, the initial onus of explaining the facts of acquisition exclusively within his knowledge lies on the licensed dealer, the onus to prove the requisite knowledge or belief shifts on his adducing sufficient evidence to explain his receipt. Mere disbelief of the version of the dealer, without more, cannot take the place of proof of violation. No evidence sufficient to exclude the applicability of the proviso to Section 31 is brought on record and mere violation of Section 55, even if proved, does not, as already observed, necessarily lead to an inference of contravention of Section 31.

7. The learned Gold Control Administrator, in his order dated 27-7-82, did not also look into these aspects of the case. He largely proceeded on improbabilities, without investigating if the gold was received by the appellant in his capacity as a licensed dealer, or into the violation of Rule 13, notwithstanding the proviso to the said Rule, or contravention of Section 31 in despite of the proviso thereto.

8. In the premises, we have no hesitation in concluding that on the evidence brought on record, it is not possible to establish contravention by the appellant of

any of the provisions of the Act that he is charged with. Accordingly, the penalty levied upon him in a sum of Rs. 2500/- has to be set aside and the amount, if paid already has to be refunded to him.

9. In terms of Section 71 of the Act, confiscation of any gold can be ordered only if any provision of the Act or Rule or Order made thereunder has been contravened in respect of it. In the view we have taken, therefore, the order of confiscation cannot also sustain, since no contravention of any of the provisions of the Act or the Rules had been established.

10. Again, in terms of the proviso to Section 71 of the Act, there can be no confiscation if "it is established to the satisfaction of the officer adjudging the confiscation that such gold ... belongs to a person other than the person who has by any act or commission, rendered it liable to confiscation and such act or omission was without the knowledge or connivance of the person to whom it belongs". In the premises, satisfaction that the relevant criteria had been established for confiscation, necessarily, involves an enquiry not merely into the alleged contravention but also into the ownership as well as the knowledge or connivance of the owner in the contravention alleged. Even more so, in a case where, as in this case, the ownership is not merely claimed by others but unanimously supported by the licensed dealer as well as the goldsmith and the entries made in his G.S. 13 register seized. No one else apart from the ladies had claimed ownership. It is not a case of conflicting claims for ownership. Obviously, no such enquiry can take place without affording an opportunity to the persons claiming ownership" to prove it. Without any such opportunity to the claimants, it is not possible to arrive at a summary finding that "In the absence of any documentary evidence, it is difficult to accept the version of the ladies and consider the gold that has been seized from the licensed premises as the one that belongs to persons other than the person from whose custody that has been seized", (adjudication order).

There can be no documentary evidence in the shape of a voucher issued to the ladies in terms of Rule 13 as would appear from the discussion earlier on this aspect of the case.

11. The Act, indeed, provides for an opportunity to the owner of gold after the issue of show cause notice (Section 79 of the Act), informing him of the grounds on which it is proposed to confiscate the gold and giving him a reasonable opportunity of making a representation and of being heard. It is not as if the show cause notice in terms of Section 79 is to be issued only on being satisfied that he is the owner in terms of the proviso to Section 71 of the Act, since such satisfaction itself cannot be arrived at without giving an opportunity to the persons claiming the ownership to establish their title to it. On a show cause notice being given pursuant to the unanimous statement of the appellant, the claimants themselves and the goldsmith and supported by the entries in the seized register, it might have been possible for the claimants to establish not only their title to the gold, notwithstanding that no voucher had been issued to them by the appellant, but that they had neither known nor connived at the act or omission that rendered the gold in question to be confiscated. No such notice having, admittedly, been given, the order of confiscating the gold is vitiated.

12. In the premises, we hereby allow the appeal in toto, set aside the orders below of penalty and confiscation, and direct that : 13. S/Shri Jeevanlal K. Jain and Niranjanalal J. Jain have filed the appeals against the Order No. XVII (GC)-8-53-80, dated 14-5-1981 of the Collector of Customs (Prev.) Bombay, as modified by the Order No. 53/82 dated 27-7-1982 of the Gold Control Administrator under which gold ornaments weighing 1133.500 gms. and valued at Rs. 1,74,000/- have been confiscated and subsequently, allowed to be redeemed on payment of fine of Rs. 25,000/- and under which penalties of Rs. 2,500/-each have been imposed on Shri J.K. Jain and Shri N.J. Jain, Advocate Shri Desai who appeared on behalf of the appellants firstly discussed the facts of the case leading to the search of the appellants' business premises on 7-10-1980. He briefly reiterated that only Shri Niranjanalal J. Jain was present at the time of the search. The other partners S/Shri Jeevanlal and Kapurchand were out of Bombay and had gone to their native place.

Shri Desai further repeated that Shri Niranjanalal was only a college going student and he was not fully aware of the dealings of the shop.

The show cause notice had made allegations regarding contraventions of Sections 31, 36(2) and 55(3) of the Gold (Control) Act, 1968. The department had then issued the show cause notice dated 9-1-1981 against all the three partners and the Collector in his order dated 14-5-1981 exonerated Shri Kapurchand on the grounds of his old age and his not attending to the work of his shop. The Collector confiscated the gold ornaments and levied penalties of Rs. 2,500/- each on S/Shri Jeevanlal & Niranjlanlal. The aggrieved persons concerned then filed an appeal with the Gold Control Administrator, who modified the amount of fine from Rs. 50,000/- to Rs. 25,000/- in his order dated 27-7-1982, but maintained the penalties. Thereafter, the Gold Control Officers filed a complaint in the Magistrate's Court on 21-7-1982 against S/Shri Jeevanlal and Niranjlanlal. The Court in the judgment dated 30-9-1982 acquitted Shri Jeevanlal as he was not in Bombay on the date of seizure and convicted Shri Niranjlanlal and sentenced him to one day's simple imprisonment and a fine of Rs, 6,000/-. The department filed an appeal against Shri Jeevanlal's acquittal to the High Court, but the High Court dismissed the appeal on 10-1-1983 upholding Shri Jeevanlal's acquittal and Shri Niranjlanlal's conviction. The learned counsel requested that he may be permitted to file copies of the Magistrate's and the Hon. High Courts' orders with a request that the same may be taken on record. He also repeated that Shri Jeevanlal's acquittal was upheld by the Hon. High Court on the ground that he was not in Bombay.

Since he was not in Bombay at the relevant time, there was no question of his being concerned for any of the violation of the Gold (Control) Act as mentioned in the show cause notice and therefore, he was not liable to any penalty to be imposed under Section 74. Shri Desai pleaded that the order of penalty on Shri Jeevanlal be annulled. As regards the confiscation of gold ornaments weighing 1133.500 gms. he submitted that ornaments weighing 263 gms. belong to the shop of M/s.

Kapurchand Jethaji & Co., while the remaining ornaments weighing 870.500 gms. belong to Smt. Ladibai Jeevanlal, wife of Shri Jeevanlal and other female relations of the partners. These four ladies had claimed ownership of the ornaments and the Collectors' order of confiscation of these ornaments under Section 71 without giving notice to the four ladies was bad in law and should be set aside. As regards

the contravention of Section 31, the learned Advocate referred to this Section and pointed out that Shri Jeevanlal had accepted the ornaments from the four ladies at his residence and therefore, there was no contravention of Section 31, by him or by Shri Niranjlanal or the shop.

Section 31 did not prohibit a partner of a dealer to accept the ornaments in his personal capacity at his residence for whatever action was called for in the matter. The learned Advocate then referred to Section 36 and stated that this has to be read with Section 55(2) of the Gold (Control) Act. He accepted that Shri Niranjlanal had contravened Section 36 read with Section 55(2) of the Gold (Control) Act. However, these contraventions were unwitting as Shri Niranjlanal was absent at the time when the gold ornaments were delivered at the shop by the goldsmith, Shri Achrekar to the Assistant Shri Pukhraj at the shop. Even when the Gold Control Officers visited the premises, Shri Niranjlanal was not available at the shop and he returned to the shop only thereafter. The learned Advocate argued that under Section 74, penalty could be imposed on any person who has done any act of commission or omission rendering the gold liable to confiscation. If, therefore, the person concerned was the firm, no penalties could be imposed on the appellants. In that case, the show cause notice should be issued to the firm. Only Shri Niranjlanal was present at the time of search and there was no abetment of the offence by Shri Jeevanlal.

Therefore, Shri Jeevanlal was not liable to any penalty under Section 74. Referring to Section 79, the Advocate stated that the four ladies who were the owners of the gold ornaments weighing 870-500 gms. were not given the opportunity of showing cause and therefore, the confiscation of the gold ornaments under Section 71 was bad. Even the Magistrate had accepted that the gold ornaments belonged to the ladies, but this was not accepted by the Collector who decided the departmental case. The Collector had not made any enquiries to come to the finding that the ladies were not the owners of the gold ornaments in question.

The Advocate submitted that the allegations in the show cause notice and the chargesheet against S/Shri Jeevanlal and Niranjlanal before the Magistrate were on identical grounds and therefore, the court's findings in this behalf should be

accepted by the department. The four ladies had given their statements that they were the owners of the gold ornaments and they were required to tell the truth under Section 63 of the Gold (Control) Act under which they were summoned to give evidence.

Similarly, Shri Achrekar's statement was also recorded under Section 63 and this should have been accepted by the Collector. In the end, the learned Advocate submitted that the order-in-original was bad so far as the confiscation of 870-500 gms. of gold ornaments belonging to the four ladies was concerned and that the penalty on Shri Jeevanlal was not justified. He requested that the gold ornaments belonging to the four ladies should be returned and the order of penalty on Shri Jeevanlal to be set aside. As regards the order of penalty on Shri Niranjanalal, he stated that the Magistrate had found him guilty and this was also upheld by the High Court. In view of this development, he would not press for any modification of the order of penalty with relation to Shri Niranjanalal.

14. The departmental representative has opposed the submissions. He has pointed that Section 77 permits other punishment besides confiscation of gold ornaments and personal penalty. As per this Section the prosecution of the offenders in a Court of law was quite justified. He requested that the orders of the Magistrate and the High Court were by way of additional evidence and he opposed their admission on the aforesaid grounds. He also submitted that the Tribunal should not be guided by the Magistrate's findings and that the orders of the Collector and the Gold Control Administrator should be upheld and the appeal should be dismissed.

15. I have examined the submissions on both sides. So far as the confiscation of gold ornaments weighing 870.500 gms. said to belong to the four ladies is concerned, it is seen that they would be saved from confiscation under Section 71 only if it is established to the satisfaction of the officer adjudging the confiscation that the gold ornaments belong to them and not to M/s. Kapurchand Jethaji & Co. or their partners. Therefore, only in that case a notice under Section 79 would be required to be given to the ladies before any order of confiscation can be passed. Examining this contention of the learned Advocate, it is seen that the explanation

offered by Shri Jeevanlal that these ornaments belong to his wife and three other ladies is not tenable. This claim was made after the search of the premises of the shop on 7-10-1980. It is seen from the panchnama of the seizure that the excess gold ornaments and the total stock of gold ornaments weighing 7679.800 gms. were all stocked together. If these ornaments belong to the four ladies, there was no reason why they should have been kept together with the normal stock of ornaments of the shop. In this view Shri Jeevanlal's claim in his letter dated 1-11-1980 that the gold ornaments belong to four ladies is not tenable. Besides, it is seen that Shri Niranjanalal in his statement dated 7-10-1980 at the time of seizure has stated under summons under Section 63 that the excess quantity of gold ornaments weighing 1133.500 gms. belong to the shop and they were not mentioned in the balance shown in the registers. It was for this reason that this quantity of ornaments was seized by the Gold Control Officers. Perhaps in view of the clear admission on the part of Shri Niranjanalal that 1133.500 gms. of gold ornaments belong to the shop that in the show cause notice dated 9-1-1981, the Supdt. Gold (Control), Bombay, has not taken recourse to the provisions of Section 99 G.C.A. It is thus seen that there were sufficient grounds for the adjudicating officer to accept that the gold ornaments in question belong to the shop of M/s. Kapurchand Jethaji & Co., and not to the four ladies in question and therefore, the four ladies were not required to be given a notice under Section 79 of the Gold Control Act.

Since the claim of the four ladies is not supported by any evidence like the issue of vouchers by M/s. Kapurchand Jethaji & Co., it is quite legitimate for, the Collector of Customs (Prev.) to believe that these ladies were not the owners of the gold ornaments in question and there was, therefore, no need for the issue of the show cause notice to them under Section 79, and therefore, the order of confiscation of the gold ornaments under Section 71 is quite legal and correct. It is also seen from the panchnamas that the quantities like 37 rings, 9 nangalsutras, 16 chains, 8 pendants are not such as can reasonably be ascribed to the ownership of the four ladies. On the other hand the ornaments in question were located as excess over the recorded balance and recovered from the shop premises. There is no explanation forthcoming as to why the ornaments were kept in the shop when they did not belong to the stock-in-trade of the shop. Both the gold dealers firm, M/s.

Kapurchand Jethaji & Co., and the goldsmith Shri Achrekar would have been well aware of the provisions of the Gold Control Act and they would have hesitated to keep the personal ornaments in the dealer's premises of the firm. In case, the ornaments have been kept in the firm, they have taken a risk and they could not escape the consequences. The Advocate has also urged that we should accept the learned Magistrate's and the Hon. High Court's decision that the gold ornaments belong to the four ladies. With due deference of the Hon.

High Court and the Magistrate, I observe that the rules of evidence in the Court of law are different from those prevailing in the departmental adjudication. The findings arrived at in criminal proceedings are not binding in the civil proceedings. There is a clear admission on the part of Shri Niranjnlal that the excess ornaments belong to the shop. In view of this admission, it is not possible for me to accept the Advocate's contention that I should go by findings of the Hon. High Court and the Magistrate. Since these ornaments are in excess of the recorded balance, I hold that the contravention of Section 36 read with Section 55 is established. The ornaments are, therefore, liable to confiscation under Section 71 and they have been correctly confiscated accordingly. I, therefore, find that the orders of the Collector of Customs (Prev.) and the Gold Control Administrator are legal and correct. Accordingly, I am of the view that the same are maintainable. So far as the order of penalty of Rs. 2,500/- on Shri Jeevanlal is concerned, it is seen that Shri Jeevanlal was not in Bombay on 7-10-1980 when the search of his shop took place. As per the statement dated 7-10-1980 of Shri Niranjnlal, Shri Jeevanlal had been away from Bombay for about one month. There is no evidence to show any act of commission or commission of Shri Jeevanlal which would render the gold ornaments in question as liable to confiscation under Section 71. There is, therefore, no question of levy of penalty of Rs. 2,500/- on him under Section 74. In view of these circumstances, I hold that the penalty is not leviable on Shri Jeevanlal and that the order of penalty should be set aside.

16. This appeal arises out of and is directed against Order No. 53 of 1982 dated 27th July, 1982 passed by the Gold Control Administrator by which he confirmed the order of confiscation of the gold ornaments weighing 1133.500 grams passed by the Collector of Customs (Prev.), Bombay in his Order No. XVII (GC)-8-

53/80/1588 dated 14-5-1981 but reduced the redemption fine from Rs. 50,000/- to Rs. 25,000/-.

17. This appeal was originally heard by Shri M. Gouri Shankar, Member (Judicial) and Shri K.S. Dilipsinhji, Member (Technical) who then constituted the West Regional Bench. By reason of difference of opinion between the two members, the President in exercise of his power under Section 129-C(5) of the Customs Act referred the matter to me for disposal. Accordingly I heard the arguments of Shri K.M. Dcsai, the learned Advocate for the appellant and Shri Krishan Kumar, the learned departmental representative.

18. The facts necessary for the disposal are found in the judgment of my learned brothers Shri M. Gouri Shankar and Shri Dilipsinhji and therefore, I do not propose to set them out again in detail.

19. The appellant is one of the partners of a partnership firm M/s.

Kapurchand Jethaji & Co. On 7-10-1980 the Gold Control Officers conducted a search of the firm's premises and during the search they found gold ornaments weighing 1133.500 grams valued at Rs. 1,74,000/- unaccounted for in the statutory documents. They, therefore, seized the excess gold ornaments. The Collector of Customs who held the enquiry ordered confiscation of the gold ornaments but allowed redemption on payment of fine of Rs. 50,000/-. He further imposed a penalty of Rs. 2500/- on the appellant and a penalty of Rs. 2500/- against another partner who is no other than the son of the appellant. Against the order of the Collector the firm and the two partners preferred an appeal before the Gold Control Administrator and as stated earlier the Gold Control Administrator confirmed the order of confiscation but reduced the fine in lieu of confiscation from Rs. 50,000/- to Rs. 25,000/-. Feeling aggrieved, by the order of the learned Gold Control Administrator the present appellant and his son filed two different appeals namely Appeal No. 3 of 1982 and Appeal No. 4 of 1982 before the Tribunal. It appears the son of the appellant did not press his appeal in so far as it related to the personal penalty imposed on him and therefore that appeal was dismissed.

20. In the show cause notice issued to the partnership firm and the partners it was alleged that they contravened the provisions of Sections 31, 36(2) read with Rule 13(1) of the Gold Control (Forms, Fees and Miscellaneous Matters) Rules, 1968 and Section 55(3) of the Gold Control Act. The Judicial Member Shri Gouri Shankar Murthy held that there had been no contravention of any of the provisions specified in the show cause notice. The reason assigned by the learned Judicial Member for holding that the appellant did not contravene any of the provisions referred to in the show cause notice are found in paragraphs 6 to 11 of his order. The learned Judicial Member came to the conclusion that the licensed dealer is not obliged to enter in his account any gold received by him in his personal capacity. He further held "it does not follow that once the gold has not been entered in the account it has necessarily been acquired from a source other than one explained and accordingly there has been a contravention of Section 31.

Even more so if there is no statutory obligation to enter into the accounts, gold accepted in his capacity other than that of a licensed dealer." The learned Judicial Member also held that there was no finding that the appellant did not receive the gold in his personal capacity. The learned member then held that such a finding cannot be arrived at without investigating the claim of ownership of gold set up by the 4 ladies. He also held that the licensed dealer is not obliged to issue a voucher in terms of the proviso to Rule 13 in respect of the gold which he accepted in his personal capacity and not as a licensed dealer. In the view that he has taken the learned Judicial Member set aside the personal penalty imposed upon the appellant and directed refund. In so far as confiscation of the gold is concerned the learned Judicial Member held that the confiscation is bad in law inasmuch as the persons who claimed ownership were not given an opportunity to establish their claim during the enquiry. The learned Judicial Member further held "The Act, indeed, provides for an opportunity to the owner of gold after the issue of show cause notice (Section 79 of the Act), informing him of the grounds on which it is proposed to confiscate the gold and giving him a reasonable opportunity of making a representation and of being heard. It is not as if the show cause notice in terms of Section 79 is to be issued only on being satisfied that he is the owner in terms of proviso to the Section 71 of the Act, since such satisfaction itself cannot be arrived at without giving an opportunity to the person claiming ownership to

establish their title to it. On a show cause notice being given pursuant to the unanimous statement of the appellant, the claimants themselves and the goldsmith and supported by the entries in the seized register, it might have been possible for the claimants to establish not only their title to the gold, notwithstanding that no voucher had been issued to them by the appellant but that they had neither known nor connived at the act or omission that rendered the gold in question to be confiscated. No such notice having admittedly been given, the order confiscating the gold is vitiated." 21. In the result the learned Judicial Member allowed the appeal in toto, set aside the orders passed by the learned Collector and the learned Gold Control Administrator.

22. The learned Technical Member, however, was of the view that notice under Section 79 would be required to be given only if the adjudicating authority was satisfied that the 4 ladies are the owners of the seized gold. After appreciation of the evidence he did not accept the appellant's contention that gold ornaments weighing 870.500 grams belong to the 4 ladies. The learned Technical Member held that there were sufficient grounds for the adjudicating officer to accept that the gold ornaments in question belong to the shop of M/s. Kapurchand Jethaji & Co. and not to the ladies and therefore the 4 ladies were not required to be given notice under Section 79 of the Gold Control Act.

He also held that confiscation of gold ornaments under Section 71 was legal and correct. He further held "since these ornaments are in excess of the recorded balance, I hold that the contravention of Section 36 read with Section 55 is established." He, however, did not record any finding as to the contravention of Section 31. The learned Technical Member, however, set aside the personal penalty on the appellant on the grounds when the search was conducted the appellant had been away from Bombay for about one month and there was no evidence to show any act of commission or omission of the appellant which would render the gold ornaments in question as liable for confiscation under Section 71.

23. It is thus seen that both the members have set aside the personal penalty imposed on the appellant. The learned Judicial Member had held that there had been no contravention of the provisions of Section 31 of the Act. The learned

Technical Member did not hold that there had been a contravention of Section 31. In the said circumstances it has to be said that there is no difference of opinion between the two members with regard to the imposition of penalty and contravention of Section 31 of the Act. Therefore, all that is required to be considered by me is : (1) Whether there had been contravention of Section 36(2) of the Gold Control Act read with Rule 13 of the (Forms, Fees and Miscellaneous Matters) Rules, 1968 and Section 55 of the Act.

(2) Whether on the facts and in the circumstances of the case the authorities below were unjustified in ordering confiscation of the unaccounted gold ornaments. The two other identical questions that arise for consideration are.

(3) Whether show cause notices ought to have been issued to the 4 ladies who claimed ownership of the gold ornaments.

(4) Whether confiscation of gold ornaments without giving a notice in terms of Section 79 of the Act is vitiated.

24. Before considering the above questions it is necessary to reiterate certain of the facts found in the order of my learned brothers and clarify certain other aspects.

25. Admittedly the gold ornaments seized by the Gold Control Officers on 7-10-1980 were found in the licensed premises of the licensee.

26. Admittedly, the seized ornaments were not accounted in any of the statutory document. The appellant's defence related only in respect of 870.500 grams which according to him belong to 4 ladies and not in respect of the entire quantity of 1133.500 grams.

27. On the date of seizure the appellant was not present but his son Niranjnall J. Jain the appellant in Appeal No. 4 of 1982 was present.

Immediately after the seizure the statement of Niranjnall Jain was recorded. He had admitted that the seized gold belong to the partnership firm and that they were not entered in the Statutory registers.

28. Though the seizure took place on 7-10-1980, neither Niranjanal Jain nor the 4 ladies brought to the notice of the Gold Control Officers that out of the gold ornaments seized, the gold ornaments weighing 870.500 grams belong to the ladies. As a matter of fact the 4 ladies did not at any time made or put forward their claim independently.

29. It was only in the statement of Jeevanlal namely the present appellant recorded on 1-11-1980 he claimed that gold ornaments weighing 870.500 grams belong to 4 ladies. The 4 ladies to whom summonses were issued under Section 63 in their separate statements recorded on 4-11-1980 stated that they had given certain ornaments to the present appellant for getting new ornaments prepared.

30. On his own showing the appellant returned to Bombay on 27-10-1980.

Only after he received the summons under Section 63 and in the statement recorded under that Section the appellant stated that 870.500 grams belong to the 4 ladies.

31. Niranjanal who has been carrying on the business in the absence of the appellant was unaware of the ornaments having been given by his father to the goldsmith Vijaya Raghunath Achrekar. Niranjanal was also not present when Achrekar returned the new ornaments. The salesman Pukhraj Chunilal who received the new ornaments did not inform Niranjanal nor was he present when the Gold Control Officers searched and seized the excess gold.³² The return of the gold ornaments by the goldsmith was also on 7-10-1980. The goldsmith returns the ornaments not to Niranjanal but to Pukhraj and does not receive any voucher or receipt. The goldsmith delivered the ornaments in the shop and not in the residence.

33. The goldsmith had maintained the statutory register and entries have been made regarding the receipt of gold ornaments and preparation of new ornaments.

34. The Gold Control Act was enacted to provide, in the economic and financial interest of the community, for the control of the production, manufacture, supply, distribution, use and possession of, and business in gold ornaments, and article of

gold and for matters connected therewith or incidental thereto.

35. Section 27 of the Act prohibits persons other than the licensee from commencing or carrying on business as a dealer. Section 33 prohibits keeping of any primary gold, article or ornaments by the licensed dealer in the premises where he carries on business as such dealer which is not a part of his stock-in-trade or held by him in his capacity as a dealer. It, further, provides that every primary gold, ornament or article found in the premises where the licensed dealer carries on his business shall be deemed to be a part of the stock-in-trade of such dealer or held by him in his capacity as a dealer. Section 36 makes it obligatory for the licensed dealer to make every acquisition, acceptance, sale, delivery, transfer or disposal of gold in accordance with such conditions, limitations and restrictions as may be prescribed in this behalf. Section 55 enjoins on the licensed dealer to keep, in such form and 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. Sub-section (3) of Section 55 prohibits a licensed dealer to own or have in his possession, custody or control any gold which has not been included in the accounts.

36. Section 71(1) of the Act reads "Any gold in respect of which any provisions of this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, together with any package, covering or receptacle in which such gold is found, shall be liable to confiscation.

37. Provided that where it is established to the satisfaction of the officer adjudging the confiscation that such gold or other thing belongs to a person other than the person who has, by any act or omission, rendered it liable to confiscation, and such act or omission was without the knowledge or connivance of the person to whom it belongs, it shall not be ordered to be confiscated but such other action, as is authorised by this Act, may be taken against the person who has, by such act or omission, rendered it liable to confiscation." The rest of the Section is not relevant for our purpose.

38. Section 78 reads "Any confiscation may be adjudged or penalty may be imposed under this Act- (a) without limit, by a Gold Control Officer not below the rank of a Collector of Central Excise or of Customs; (b) subject to such limits as may be specified in this behalf, by such other Gold Control Officer, not below the rank of a Superintendent of Central Excise, as the Central Government may, by notification, authorise in this behalf.

39. Section 79 provides "No order of adjudication or confiscation or penalty shall be made unless the owner of the gold, conveyance, or animal or other person concerned is given a notice in writing- (i) informing him of the grounds on which it is proposed to confiscate such gold, conveyance or animal or to impose a penalty; and (ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and if he so desires, of being heard in the matter. The rest of the sections are not relevant for our purpose.

40. With this I shall now proceed to consider the questions that have been set out earlier. I shall in the first instance take up for consideration the questions (3) and (4). Shri K.M. Desai, the learned Advocate for the appellant vehemently contended that under the proviso to Section 71(1) of the Act the officer adjudging the confiscation is prohibited from ordering confiscation if it is established to his satisfaction the gold ornaments which became liable for confiscation by reason of the act or omission on the part of the licensed dealer belong to a person other than the licensed dealer and that person did not have the knowledge or connived with the act or omission of the dealer. Shri Desai urged that the satisfaction contemplated in the proviso is the satisfaction of the officer adjudging confiscation and not the satisfaction of the investigating officer or the officer who held the preliminary enquiry. Shri Desai posed a question how the officer adjudging confiscation could be satisfied as to the ownership of the gold is by perusal of the investigation records or the law requires him to issue notices to the person who claimed ownership. Shri Desai himself answered the question by contending that satisfaction of ownership should be on the basis of the evidence adduced by the owners and therefore the Act made it obligatory to issue a show cause notice to

the owner or else according to Shri Desai there is every possibility of miscarriage of justice. He illustrated his argument by submitting that a licensed dealer who is not the owner can successfully deprive the owner of the gold ornaments by contravening the provisions. Shri Desai contended the scheme of the Act envisages protection to all and this protection is possible only if show cause notices are issued simultaneously to the owners as well as to the dealers of gold and having regard to the scheme of the Act there is no scope to issue show cause notices at different stages to the dealers and owners of gold. In that connection Shri Desai pointed out the practice prevailing in the Customs Dept. namely issue of show cause notices to all concerned, however remotely connected with the seized goods. Shri Desai, further, urged the principles of natural justice also require that the party adversely affected has to be heard and not any person who has not been authorised by that party to decide the ownership. Shri Desai contended if show cause notices were issued to the 4 ladies they would have had an opportunity to adduce independent evidence and also to cross-examine such of the witnesses on whose evidence the department relies. He, therefore, contended that the whole proceedings of the adjudicating authority is vitiated by not following the requirement of law and as such the conclusion of the learned Judicial Member Shri Gouri Shankar Murthy is totally correct and is in accordance with law.

41. Shri Krishan Kumar, for the respondent Collector, however, contended that the Act has not made it obligatory to issue show cause notices to persons who claim ownership of the seized gold simultaneously with the issue of show cause notice to the dealers or others who contravened the provisions of the Act and thereby render the gold or gold ornaments liable for confiscation. Shri Krishan Kumar submitted giving of opportunity to the owner arises only after the adjudging officer was satisfied as to the ownership. This satisfaction can be on the basis of the statements or during the enquiry to which the owners need not necessarily be a party.

42. I have carefully considered the submissions made on both sides. I have set out the provisions of Sections 71 and 79 of the Act.. Section 71(1) is declaratory in nature. It makes the gold liable for confiscation if in respect of that gold any provision of the Act or Rule or Order made thereunder has been or is being or is

attempted to be contravened. The proviso, however, requires the officer adjudging the confiscation not to confiscate the gold in respect of which any provision of the Act or Rule or Order had been contravened if he was satisfied that the gold belongs to a person other than the person who has by any act or omission rendered the gold liable for confiscation and that the other person did not have any knowledge or connived with the contraventions of the provision of the Act or any Rule or Order.

43. Section 71 does not contemplate of giving any notice much less show cause notice to any person not even to the person whose act or omission rendered the gold liable for confiscation. 44. Section 79, however, requires the officer adjudging confiscation or penalty to give a notice in writing to the person concerned or to the owner informing the person or owner of the grounds on which he proposes to confiscate the gold and impose a penalty and the officer shall also give that a person or the owner a reasonable opportunity of making a representation in writing within such reasonable time as the officer may specify in the notice against the confiscation or imposition of penalty mentioned in the notice and if the person or the owner desired of being heard to hear the person or the owner in the matter. The combined reading of two sections namely Sections 71 and 79 make it clear primarily show cause notice shall have to be issued to the person whose act or omission rendered the gold liable for confiscation. This is because the persons concerned should have an opportunity to establish that his act or omission did not result in the contravention of any of the provisions of the Act or any Rule or Order made under the Act. It also gives an opportunity to that person to plead that even if his act or omission resulted in contravention of any provisions of the Act or any Rule or Order the gold in respect of which contravention took place shall not be confiscated for the reason that the contravention is not such requiring confiscation of the gold or that the gold in respect of which contravention had taken place belongs to some other person. During the enquiry if the adjudicating officer comes to the conclusion firstly the person to whom a show cause notice was issued has contravened any provisions of the Act or any Rule or Order made under the Act and secondly if he comes to the conclusion that contravention is such requiring him to adjudge confiscation of gold in respect of which there has been contravention and if during such an enquiry the officer adjudicating was satisfied

that the gold in respect of which the contravention has taken place belongs to person other than the person from whose possession or custody it had been seized he shall have to give notice contemplated under Section 79 of the Act to the owner of the gold and not otherwise. To put it differently if in an enquiry the adjudicating officer arrives at a finding that the act or omission of the person to whom the show cause notice was issued did not result in contravention of any provisions of the Act or any Rule or Order made under the Act but comes to the conclusion that contravention is not of such a nature requiring confiscation of gold then the adjudicating officer is not required to issue any notice to the owner or to hear the owner. In order to find out whether there has been a contravention of any provision of the Act or Rule or Order made under the Act issue of notice and personal hearing if requested shall have to be given only to the person whose Act or omission rendered the gold liable for confiscation and at that stage the officer is not required to give any notice to the owner of the gold. The owner comes to the picture only after the officer adjudicating the confiscation decides that the gold is liable for confiscation. The notice is required to be given to the owner because under Section 71 the officer adjudging confiscation cannot order confiscation of the gold in respect of which contravention had taken place if he was satisfied that the gold belongs to a person other than the person who has rendered the gold liable for confiscation and without recording a finding that the person to whom the gold belongs had either knowledge of the contravention or connived with the person who contravened the provisions. Such a finding could be arrived at only after giving the notice contemplated under Section 79 and the opportunity of being heard provided under the said Section. The Act does not make it obligatory for the adjudicating officer to issue show cause notice simultaneously to the person from whose custody or possession the gold is seized and to the real owner of the gold. I am unable to agree with the contention of Shri Desai that in order to get himself satisfied as to the ownership of the gold the owner should be given an opportunity by issuing a show cause notice even before the enquiry commences. It is necessary to bear in mind the expression used in Section 71 is "While it is established to the satisfaction of the officer adjudging the confiscation". This satisfaction could arise only during the enquiry and not earlier to the enquiry but then the show cause notice contemplated to the persons concerned shall have to

precede the enquiry because he should have an opportunity to establish that he did not contravene any of the provisions of the Act or any rule or order made under the Act and as such the gold seized from his possession is not liable for confiscation. Under the provisions of the Act all that the owner is required to establish is that he has no knowledge of the contravention of the provisions of the Act rendering the gold liable for confiscation by the other person in his act or omission which rendered the gold liable for confiscation. The discharge of this burden on the part of the owner arises only after the adjudicating authority comes to the conclusion in an enquiry that the gold is liable for confiscation. There is no merit in the contention of Shri Desai that an unscrupulous dealer could successfully deprive the owner of the gold ornament by not disclosing the ownership. This proposition in the first instance is hypothetical. If a dealer does not disclose the ownership of gold the owner's remedy under the common law is not taken away. Even without contravening the provisions of the Gold (Control) Act an unscrupulous dealer could deprive the owner of the gold by misappropriation and therefore, on that ground it cannot be argued that even before an enquiry by the adjudicating officer a show cause notice should be issued to the owners. There may be cases where immediately after the seizure the owner may come forward and claim the seized gold and the investigating agency at that stage were satisfied that the claim put forward is genuine a show cause notice may be given to the owner why the gold should not be confiscated or penalty should not be levied but the Act does not make it obligatory to issue such a show cause notice at that stage of the proceedings. Now it may be pointed out that issue of show cause notice at this stage may be redundant because the adjudicating officer at the stage of enquiry or adjudication may come to a conclusion either that there had been no contravention of any provisions of the Act or rule or order made under the Act or even after coming to a conclusion that there has been a contravention but contravention is not such requiring confiscation of gold. In the said situation no purpose is served by issuing a show cause notice to the owner. To my mind it looks that the Act envisages enquiry at two stages by the adjudicating officer. At the first stage the adjudicating officer is required to determine as to whether an act or omission of a person resulted in contravention of any of the provisions of the Act, or any rule or order made under the Act; further to determine whether the

contravention is such requiring confiscation of gold in respect of which the contravention took place and if he is satisfied as to the contravention of the provisions of the Act and further comes to the conclusions that the gold in respect of which the contravention took place requires to be confiscated then he is obliged to issue the notice to the owner contemplated under Section 79. In the second stage of the enquiry the owner has to be heard for the purpose of determining whether the owner had the knowledge of contravention or whether the owner connived with the other person in the contravention which rendered the gold liable for confiscation.

45. No prejudice whatsoever will be caused to the owner if the owner is not heard for the determination of ownership of the gold, because the nature of proceedings provided under the Act for confiscation of gold is summary and any decision arrived at in such a proceeding as to the title or ownership of the gold could not bind the person who are not parties to the proceedings. Even in respect of the persons who are parties to the proceedings the remedy by way of suit for establishment of title or ownership does not get barred by the findings of the adjudicating officer as to the title or ownership.

46. For the reasons stated above I am unable to accept the contention of Shri Desai that show cause notice to the owners should precede the adjudication proceedings or that the officer adjudging confiscation was required to issue a notice to the owner before he get satisfied as to the ownership. I also respectfully disagree with the view expressed by Shri Gowri Shankar Murthy that satisfaction as to the ownership cannot be arrived at without giving an opportunity to the person claiming the ownership.

47. Coming to the merit of the case, my learned brother Shri Gowri Shankar Murthy proceeded on the footing that Jeevanlal, the present appellant, received gold ornaments from 4 ladies in his house and gave those gold ornaments to the goldsmith Achrekar and therefore, he is not obliged either to make entries in the statutory records or to issue vouchers as the transactions are not carried out in his capacity as a licensed gold dealer but as a member of the family and in his personal capacity. On the other hand, my learned brother Shri Dilipsinhji

proceeded on the footing that the evidence on record established that the seized gold did not belong to the 4 ladies and it formed part of the stock in trade of the partnership firm and, therefore, the learned Collector was justified in ordering confiscation since there had been a contravention of Section 36 read with Rule 13(1) of the Rules and Section 55(3) of the Act. In view of the difference of opinion between the two learned members it is necessary for me to consider afresh as to whether the appellants' contention that out of 1133.500 grams gold, 870.500 grams gold belong to the 4 ladies has been satisfactorily established. Shri Desai learned Advocate for the appellant pointed out that admittedly the appellant and his father who are the senior partners of the firm were away for nearly 2 months. The appellant's son was only a student and was looking after the business. He did not have sufficient knowledge as to the maintenance of accounts and therefore, 263 grams of gold which were given to the goldsmith for preparing new ornaments were not entered in the registers. Shri Desai further pointed out that Shri Niranjanlal was also unaware of the handing over of the gold ornaments by his father to the goldsmith. He further submitted the version given by the appellant not only found corroboration from the statements of the 4 ladies but also from the statement of the goldsmith and the register maintained by the goldsmith. Shri Desai, however, made it clear that the confiscation of gold of 263 grams was justified since the firm have admittedly not maintained accounts in respect of the said quantity. Shri Desai further contended that there was overwhelming evidence in support of the defence put forward and there was no contra evidence whatsoever and in the said circumstances the learned Collector was not justified in ordering confiscation of the entire quantity of gold seized in the case. Shri Desai further contended it is not sufficient if the defence put forward by Jeevanlal is disbelieved and it is necessary to establish that the ownership claimed by the ladies is not true. He contended that the learned Collector did not record a finding that the ownership claimed by the 4 ladies is either false or not true. Shri Desai also submitted since the gold ornaments were given to Jeevanlal in his residence Shri Jeevanlal was not required to maintain accounts or to issue vouchers as the receipt of the old gold ornaments by Shri Jeevanlal is not in his capacity as a dealer and as such there has been no contravention of either Section 36 or Section 55(3).

48. Shri Krishan Kumar for the respondent Collector however contended that the date of seizure was 7-10-1980. It was effected in the presence of one of the partners Shri Niranjanalal. His statement was also recorded immediately after seizure. Shri Niranjanalal admitted that the excess gold ornaments unaccounted belong to the shop. Shri Krishan Kumar further pointed out that under Section 33 of the Act licensed gold dealers are prohibited from keeping gold other than the stock-in-trade and that section also raised a presumption that the gold found in the premises of the licensed dealer shall be deemed to be a part of the stock-in-trade of such dealer and that presumption has not been rebutted. He also submitted that the defence of Shri Jeevanlal comes after a lapse of nearly 23 days after the seizure by which time there was enough time to concoct a story. Shri Krishan Kumar further submitted that no reliance can be placed on the statement of the goldsmith or on the statements of the ladies or even on register maintained by the goldsmith. He, therefore, prayed for the dismissal of the appeal.

49. Before proceeding to consider the contentions raised on both sides, I may usefully refer to the findings of the learned Collector who adjudged the confiscation and the Gold Control Administrator. After considering the contentions raised on behalf of the appellant herein this is what the learned Collector observed "if the situation is analysed it comes down to the following sequence of events.

50. Shri Jeevanlal Kapurchand received the ornaments at his residence from 4 relations, gave them to a certified goldsmith without the knowledge of the other partner, Shri Achrekar, goldsmith made the ornaments and returned to shop without the knowledge of any of the partners, and the servant who had the knowledge of the receipt of the ornaments did not bother to bring it to the notice of the partner. It, therefore, boils down that the only person who has the knowledge of the receipt of the ornaments has abstained himself from bringing it to the notice of the dealer. According to the provisions of Section 33 of the Gold (Control) Act, 1968 a dealer is expected to keep only his stock belonging to the business in the licensed premises. For one thing he should not have received the ornaments as a licensed dealer at his residence. For another he should have issued the receipt voucher to the goldsmith. He has not done any of these obligations. When the department tried to confirm whether the ladies have really tendered any gold to the

dealer they have all replied saying that they have not got any evidence except their own statement to claim the gold. In the absence of any documentary evidence, it is difficult to accept the version of the ladies and consider the gold that has been seized from the licensed premises as the one that belongs to persons other than the person from whose custody that has been seized. The excess gold that has not been reflected in the statutory account books has, therefore, been acquired from a source, other than one explained, in contravention of the provisions of Sections 31 and 36. Now, it is seen that the learned Collector did not accept the defence because of the improbabilities in the story and also on the grounds that the licensed dealer was prohibited from keeping the gold in his premises and even if he had received he should have issued voucher to the goldsmith. He disbelieved the versions of the ladies because they did not produce any documentary evidence. The reasoning of the learned Collector that because the ladies were not able to produce the documentry evidence their version should be disbelieved is not sound. Similarly, the other reason given by the learned Collector that Section 33 prohibits a licensed dealer from receiving the ornaments in his premises or the Act requires issue of receipt or voucher in respect of gold received from the relations also do not appears to be correct. If the relations themselves had handed over the gold ornaments to the goldsmith the Act or Rules do not require them to issue vouchers. So if the licensed gold dealer on behalf of the relations had delivered the gold ornaments to the goldsmith not in his capacity as a licensed dealer but in his private capacity, in my opinion the law does not require to issue any voucher. But then the finding of the learned Collector that there are improbabilities in the defence appears correct. I shall deal with this aspect later while considering the contentions urged on behalf of the appellant by his learned Advocate Shri K.M. Desai.

51. The findings of the learned Gold Control Administrator is found in paragraph 4 of the order. The learned Gold Control Administrator came to the conclusion that the entire defence seems unbelievable. In support of his conclusion the learned Gold Control Administrator had pointed out that the appellant Jeevanlal who received the gold ornaments and who gave the same to the goldsmith could have atleast informed Niranjnlal while leaving the station, secondly, that even Shri Pukhraj the employee who received the gold ornaments would have come forward

soon after the seizure and explained the position with regard to the ornaments. Thirdly, that the goldsmith also did not come forward soon after the seizure, fourthly, that the seizure took place on 7-10-1980 and Jeevanlal's defence came on 1-11-1980, there is considerable time lag for the appellant to built up the defence.

Fifthly, that the G.S. 13 Register of the goldsmith is not worthy of reliance as the same has been brought into the proceedings late and that there was intrinsic evidence in the register itself. That the entries are not true. In that connection the learned Gold Control Administrator pointed out that between 8-9-1980 and 28-9-1980 there was no other transactions which appears rather strange. The learned Gold Control Administrator finally came to the conclusion that defence as a whole is based on far too many coincidences and the conclusion is inevitable that it has been contrived and built up to support the defence story.

52. I am inclined to accept the conclusion of the learned Gold Control Administrator that the defence as a whole is based on far too many coincidences and unbelievable.

53. Now it is established that the seizure of the excess and unaccounted gold was made on 8-10-1980 in the presence of one of the partners. The partner Niranjnall in his statement recorded immediately after seizure though unable to explain the reasons why accounts were not maintained admitted that the seized gold form part of the stock-in-trade of the shop. If the seized gold did not form part of the stock-in-trade there was no reason for Niranjnall to make such a statement. The version of the goldsmith was to the effect that on the date of seizure itself at about 2 P.M. he delivered the gold ornaments to Shri Pukhraj an employee of the firm. The total quantity of gold ornaments delivered to Shri Pukhraj weighed 1133.500 grams. Whether it is likely that a certified goldsmith would deliver that quantity of gold ornaments to an employee and would not even obtain a receipt or voucher or an acknowledgement from Pukhraj. Neither the goldsmith nor the appellant gave any reason why the goldsmith should have handed over the ornaments to Shri Pukhraj when the appellant or his son was not in the shop. It was not the case of the goldsmith that there was urgency for delivering gold to Pukhraj. Now, what is the

conduct of Pukhraj He does not inform Shri Niranjanalal before leaving the shop as to the receipt of gold ornaments from the goldsmith. Subsequent to the seizure also he does not inform Niranjanalal about the receipt of gold ornaments. The necessary inference to be drawn is that Pukhraj did not receive any gold ornaments from the goldsmith and the story of the goldsmith that he handed over the ornaments to Pukhraj is a got up one for the purpose of this case. It is also difficult to accept the explanation of the appellant that his son was unaware of his handing over of the old gold ornaments to the goldsmith. When the appellant was to be away from the town for a period of a month or two he would have left instructions with his son as to the conduct of the business and would have certainly told his son that old ornaments were given to the goldsmith. The very fact that Niranjanalal was unaware of the handing over of old gold ornaments and delivery of new ornaments by the goldsmith again establish that there is no truth in the defence put forward by the appellant. As has been pointed out by me earlier even though the appellant returned to Bombay on 27-10-1980, he does not address any letter to the Gold Control Officers that the seized gold belongs to the 4 ladies. It was only in his statement under Section 63 on 1-11-1980 the appellant has stated that the 4 ladies had given old gold ornaments with him for getting new ornaments prepared.

54. When the Gold Control Officers have seized and taken away gold ornaments weighing 1133.500 grams valued at Rs. 1,74,000/- one would have expected Niranjanalal to inform about this to the members of his household which include his mother. If really the mother of Niranjanalal had given certain gold ornaments with her husband for getting new ornaments prepared, the mother on coming to know of the seizure would have informed Niranjanalal and in that event Niranjanalal would have brought to the notice of the Gold Control Officers who seized the gold ornaments. From the conduct of the ladies it could be safely inferred that the defence of the appellant cannot be true. Admittedly the seizure had taken place on 7-10-1980 the ladies would have known the seizure because Niranjanalal lives with his mother. There was no reason for those ladies to wait for the appellant to return to make a claim.

As a matter of fact there was no claim by them. It is only when the Gold Control Officers recorded their statement on 4-11-1980 they came forward with a theory of ownership. This belated claim apparently put forward at the instance of the appellant cannot be in the circumstances believed or accepted.

55. Coming to the documentary evidence namely the register maintained by the goldsmith the learned Gold Control Administrator has rightly pointed out that the register does not contain any entry between the dates 8-9-1980 and 28-9-1980. It is rather difficult to believe that the certified goldsmith did not receive any gold ornaments during that long interval from any other person.

56. On careful consideration of all the material and the circumstances proved in this case I hold that the appellant's defence that the seized gold ornaments belong to 4 ladies is unbelievable and I further hold that the claim made by the 4 ladies is also not true and made only to help the appellant to get back the gold ornaments seized by the Gold Control Officers. The evidence coupled with the statutory presumption establish beyond doubt that the gold ornaments seized from the shop formed part of the stock-in-trade of the firm and were unaccounted and as such the learned Collector as well as the learned Gold Control Administrator were justified in holding that there had been contravention of the provisions of Sections 36 and 55 by the firm.

57. In the result, and for the reasons stated above the appeal is allowed in part. The penalty imposed upon the appellant is set aside.

The order of confiscation as well as redemption fine imposed by the Gold Control Officer is confirmed.

58. The matter shall now go back to the West Regional Bench for passing appropriate order in the appeal in the light of the opinion' expressed by the majority of the Members.

59. By reasons of difference of opinion between the two members who constituted this Bench, the matter was referred to the third member by the Hon'ble President under Section 129-C(5) of the Gold Control Act.

The third member has recorded his finding allowing the appeal in part.

The penalty imposed upon the appellant be set aside. The order of confiscation as well as redemption fine imposed by the Gold Control Officer was confirmed.

60. Following the majority decision we allow this appeal in part and set aside the penalty imposed upon the appellant. We, however, confirm the confiscation and the fine imposed in lieu of confiscation.

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