

Ramjilal Kundan Lal Vs. Collector of Customs and Central

Ramjilal Kundan Lal Vs. Collector of Customs and Central

SooperKanoon Citation : sooperkanoon.com/2224

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-04-1985

Reported in : (1986)(26)ELT737TriDel

Appellant : Ramjilal Kundan Lal

Respondent : Collector of Customs and Central

Judgement :

1. In this Third Member reference, it would be expedient to briefly notice the fact which gave rise to proceedings against the appellants, culminating in the Adjudication Order against them recorded by the Collector of Customs & Central Excise, New Delhi on 19-5-1983. These are, accordingly reproduced in so far as necessary for proper appreciation of the Third Member reference.

2. The appellants are a partnership firm consisting of father; Shri Prem Narain Gupta, and his two sons: Virendra Kumar Gupta and Rakesh Kumar Gupta, whose business premises is Shop No. 699, Bara Tooti, Sadar Bazar, Delhi. On a surprise visit by the Gold (Control) Officers of the Central Excise Collectorate, New Delhi, on 3-9-1982, at 11 AM, and after a check of the stock, a quantity of 1645.200 Cms (203 pieces) of gold ornaments, of 23 1/2 carat purity and 22 carat purity, valued at Rs. 2,68,167/-, was found in excess of the recorded balance. Since no statutory records were found to have been maintained in respect thereto, they were seized by means of a 'Panchnama', prepared at the spot on the same day, which was duly signed by one of the partners, Shri Virendra Kumar Gupta, and two Panch witnesses, in whose presence the search and seizure was made, on having been

summoned to the premises to witness the search by the concerned officers at 11 AM.3. Said Shri Virendra Kumar Gupta gave out in his statement that the seized gold ornaments were part of their stock in trade, which statement was recorded the same day; namely, 3-9-1982. This statement of Virendra Kumar Gupta remained uncontroverted by him although, even after the proceedings were initiated by means of a show cause notice, issued on 7-10-1982, i.e., more than a month after the search and seizure, and even during adjudication proceedings. However, Shri Prem Narain Gupta - the father - sent a communication on 8-9-1982 to the Collector of Central Excise, New Delhi, stating that the closing balance, as recorded in the GS-1? Register, on the close of 2-9-1982 was 544.600 Cms (77 pieces) of 22 carat purity and 438.200 Cms (79 pieces) of 23-carat purity, making a total of 982.800 Cms. He explained the excess of 203 pieces on the plea that, on the morning of 3-9-1982, he had purchased 192 new ornament pieces weighing 1256.150 Cms from M/s Talwar Jewellers, vide voucher No. 4 issued by the said jewellers, adding that the said ornaments had been obtained on approval. According to him, he had reached the shop with those ornaments at 10.30 AM and, thereafter, he received between 1030 - 1045 AM 14 pieces of ornaments, weighing 398 Cms, from three ladies who had left them for repairs to be collected in the evening and that his two sons reached the shop at 10.45 AM and, soon after, the said officers arrived wanting to search the premises. He conceded that the ornaments, bought on approval as well as those received for repairs, had not been entered by that time in the prescribed registers, but asserted that the voucher was in his possession and explained its non-production to the Central Excise Officers to the fact that he was suddenly taken ill being a chronic patient of diabetes, blood pressure and heart, and had to be hospitalised where he was taken by his younger son Rakesh Gupta with the result that only Virendra Kumar Gupta, his elder son, remained behind at the shop when the actual seizure was effected, and that since said Virendra Kumar Gupta was not in the know as to the manner and nature of receipt of the gold ornaments found in excess, he simply stated that excess ornaments were seized by the Department, 4. He asserted that the full explanation about the seized ornaments was only in his knowledge, and he remained in the hospital till 8-9-1982, and on the earliest opportunity, i.e., the same day, he was intimating the circumstances to the Department. He also

enclosed a copy of the discharge report of the hospital. He stated, however, that the ornaments covered by the voucher had come to the knowledge of his elder son Virendra Kumar Gupta on 4-9-1982 whereas the detailed knowledge of repair ornaments-was acquired by the other two partners only on 8-9-1982 on his release from the hospital and that his sons had not been able to inform about the ornaments covered by the voucher because of their pre-occupation with his illness. According to him, the only shortage which remained unexplained was that of 3 pieces of the weight of 8.950 Gms, which according to him may have been misplaced.

5. He asserted that the entire quantity 01 the seized goods in the present case was in the nature of third party goods and that their names had been fully disclosed, volunteering that affidavits of the concerned persons would also be submitted and that proper enquiries could be conducted in this connection. He explained the default by saying that since the seizure had been effected the same day when the ornaments had been received; there had been no time to make the necessary entries in the statutory records and, consequently, no offence under the Gold (Control) Act could be deemed to have been committed and, even if there was some technical offence, the goods in any case were not liable to confiscation on account of their being third party goods. He accordingly requested for release of the goods, after conducting requisite inquiries, if necessary.

6. The Department followed up the seizure with the show cause notice issued on 7-10-1982, under Section 79 of the Gold (Control) Act, 1968 (hereinafter referred to as the 'Act'), which after narrating the facts intimated the appellants that the explanation offered by means of letter dated 8-9-1982 was considered to be an after-thought for the following reasons:- (i) No receipt voucher was found to have been issued by M/s Ramjilal Kundan Lal in favour of persons from whom the gold is stated to have been received; (ii) at the time of checking by the Gold (Control) Officers, all the three partners, viz. S/Shri Prem Narain Gupta, Virendra Kumar Gupta and Rakesh Kumar Gupta, were present at the shop and none of them stated that the gold had been received by them in the manner as now stated in the said letter dated 8-9-1982; they rather confessed that the same were stock in trade; (iii) the plea of illness of Prem Narain Gupta is incorrect inasmuch as he

was quite hail and hearty at the time of visit of the Gold (Control) Officers at about 11.00 hrs. He was taken ill only after 14.00 hrs. when the excess of gold ornaments was detected in the stock; (iv) were the pleas true and correct they would not have waited for five days i.e. 3-9-1982 to 8-9-1982 for furnishing this information.

Holding this to be a case where contravention of the provisions of Section 8 and Section 55 of the Act, and Rule 13 of the 'Gold (Control) Forms Fees, Miscellaneous matters, Rules' appears to have been committed rendering the seized gold liable to confiscation under Section 71 of the Act, called upon them to show cause as to why the gold be not confiscated and as to why a penalty be not imposed upon them under Section 714 of the Act, for the aforementioned contravention.

7. In reply, the appellants reiterated the plea, as set-forth in Prem Narain's letter dated 8-9-1982, and further controverted the averment in the show cause notice that the seizure had been effected in the presence of all the three partners pleading that it was only Virendra Kumar Gupta who was left behind in the shop; Rakesh Kumar Gupta having accompanied the father to the hospital. They also repudiated the allegation that the plea of illness of Prem Narain Gupta was a false one and that he had been taken ill only after 2 PM, by which -time, the excess ornaments had been detected in the stocks; the plea being that the certificate of the doctor clearly established that the stand of Departmental Officers was incorrect. They explained the delay in transmission of correct information to the fact that Prem Narain Gupta was discharged from the hospital only on 8-9-1982, and the fact that he was taken ill at 11.30 AM on 3-9-1982 is supported by the affidavits of the two Panch witnesses, which affidavits they enclosed with the reply.

8. The Collector took note of all these pleas set forth-in reply to the show cause notice and the earlier letter of 8-9-1982 but held that the facts and circumstances on record falsify the explanation rendered, firstly, by Prem Narain Gupta's letter dated 8-9-1982 and, subsequently, in reply to the show cause notice, by observing that although the Department had not questioned the authenticity of the voucher from M/s Talwar Jewellers but expressed complete doubt about the timing when

this voucher could have come into existence, holding categorically that it would not have been there when the officers visited the shop and effected the search inasmuch as had it been there, the very first reaction would have been to state this fact and produce the voucher, and that even if the appellants' plea, that Prem Narain Gupta had taken ill at 11.30 AM, be accepted, even then he had had half an hour to produce the voucher, and his failure to do so leads to the inference that it was not in existence at that time and had been procured subsequently. He further took note of the fact that no lot of 192 new pieces of gold ornaments had been found as, according to the weighment memo, the lots of 359 pieces had been found to be of 115 pieces, 140 pieces, 90 pieces and 14 pieces. He also observed that M/s Talwar Jewellers had never come forward to claim their ownership, and that all these circumstances made the existence of any voucher from M/s Talwar Jewellers at the material time highly improbable. He also found the affidavits from three ladies as of no avail to the appellants inasmuch as in the first instance, the appellants were not found to be maintaining any repairs register with the result that whatever repair work they undertook, that was without maintenance of necessary records and, thus, in violation of the provisions of the Act, and the circumstances were improbable that three ladies, living as distant from each other as Ashok Vihar, Shakti Nagar and Hauz Quazi, would have reached the shop in Sadar Bazar in a short span of 15 minutes early morning. The Collector further observed that there had been no voucher issued to them and it is highly incredible that the three ladies would have left their valuable ornaments for repair without taking any receipt or other documentary evidence nor have they come forward before the Collector to prove the fact or claim the ornaments.

9. He, thus, held that all the seized gold has to be taken to belong to the appellants and, thus, liable to confiscation under Section 71 of the Act, and ordered its confiscation, giving option to the party to get it released on payment of redemption fine of Rs. 75,000/-. An order of imposition of a penalty of Rs. 10,000/- under Section 7k of the Act was further passed in view of the contravention of the provisions of the Act, on the part of the appellants.

10. Feeling aggrieved by the Collector's Adjudication order, the present appeal was filed before the Tribunal which was heard by North Regional bench

comprising of my learned brothers: Shri M. Gouri Shankar Murthy, Member (Judicial), and Shri H.R. Syiem, Member (Technical). The Department had made an attempt during hearing before the Bench to produce a letter from the Superintendent, who was in the raiding party, to rebut the plea of the appellants that Shri Prem Narain Gupta had taken ill at 11.30 AM, i.e., just half an hour after the arrival of the Officers, but the request was declined by the Bench on the view that the Department should have envisaged the need for producing such an evidence because the appellant had come forward with this plea a few days after the seizure and that the request made at this late stage could not be entertained. Nevertheless, judgment for the Bench was first written by Shri H.R. Syiem who considered the explanation, put forward by the appellants, as being not worthy of any credence for the detailed reasons highlighted by him in his judgment recorded on 2-8-1984. However, when the proposed judgment went to the Learned Member Shri M. Gouri Shankar Murthy, he expressed his inability to agree, and after setting out the facts ad seriatum, he expressed the view that on a reading of the provisions of Section 71 including the proviso thereto, it was obvious that the ownership and title to seize goods had to be determined by the adjudicating authority which had to be in the nature of quasi-judicial determination, on evidence, and as a prelude to confiscation. He opined that once it is found that the gold belongs to a person other than the one by whose act or omission it had been rendered liable to confiscation, then the question that has to be determined is as to whether such act or omission was with or without the knowledge or connivance of the owner thereof. According to the learned Member, once this primary question of title and ownership of the goods was put in issue by the appellants and supported by the so-called sale voucher and the affidavits of the three ladies, the question of true owner could not be decided without affording them an opportunity to establish their title, however improbable, untenable, false and concocted it may appear to be, and failure to do so, would amount to "trenching upon the rule of audi alteram partem amongst the principles of natural justice".

11. He further observed that there may be many weighty circumstances to decide against the claims made, and to hold them to be spurious but these, by themselves, do not dispense with an enquiry into the question of title and ownership of the gold proposed to be confiscated, once this question had been

raised by the appellants. The requirement of such a notice, according to him, was obligatory in terms of Section 79 of the Act. The learned Member has pointed out another order passed by North Regional Bench in case of Hazarilal Gauri Shankar v. Collector of Central Excise 1985 (19) ELT 200 (Tribunal), whereby the Bench has passed Reference Order to the High Court on an identical issue. He thus held that the procedures could not be short-circuited due to any lapse on the part of the appellant and that order of confiscation could not be sustained in the absence of requisite notice under Section 79 of the Act to the owners disclosed by the appellants; particularly when no effort had been made by the Department to investigate the genuineness of the sale voucher from the books of M/s Talwar Jewellers so much so that in spite of directions by the Bench to obtain instructions in this regard, for which Shri Rakesh Bhatia, DR, had requested, but on the adjourned hearing, instead of Shri Bhatia another DR. namely, Shri K.C.Sachar, appeared who reported no instructions in this regard.

12. On the question of penalty, the learned Member expressed the opinion that in spite of the fact that confiscation was not sustainable at law in the absence of notice to the owners/claimants of the gold, but provisions of the Act do contemplate imposition of penalty independent of the liability or otherwise to confiscation of the seized goods, in case of contravention of any of the provisions of the Act and the Rules to established. Inasmuch as, admittedly, the statutory records were not maintained by the appellants which they, as 'licenced dealers' were under statutory obligation to maintain as required by Section 55 of the Act, a case of imposition of penalty was made out but, here again, the learned Member proposed proportionate reduction in the amount of penalty because, in his view, Section 8, which was in general terms and applied to persons other than dealers, could not be invoked and the violation of Rule 12, namely, failure to maintain a 'Repair Register' could also be not taken into account for determining the quantum of penalty as there was no charge in this regard in the show cause notice and that the end of justice required corresponding reduction of penalty which, according to him, could be 2/3rd of the amount of the penalty imposed by the Collector and upheld by the other learned Member and, thus, proposed a penalty of Rs. 7,000/-.

13. In view of the differences, it was felt to be a case fit for reference to Third Member in terms of law and the file was submitted to the President for Third Member reference. It was resubmitted after formulating points of difference as required by Sub-Section 5 of Section 129C of the Customs Act, 1962, as made applicable to the provisions of this Act vide Section 81B. (1) Whether the order for confiscation of gold in terms of Section 71 of the Gold (Control) Act, 1968, was illegal for failure to afford an opportunity to the claimants to it to prove their ownership thereof as well as the transgression of the provisions of the Act without their knowledge or connivance, in terms of the proviso to the said Section? (2) Whether the notice contemplated in Section 79 of the Gold (Control) Act, 1968, has, necessarily, to be issued to the claimants so as to enable them to "establish to the satisfaction of the officer adjudging the confiscation" that the gold sought to be Confiscated belonged "to a person other than the person who has, by any act or omission rendered it liable to be confiscated" in terms of the proviso to Section 71? (3) (a) Whether, in the fact and circumstances of the case, there is evidence on record to controvert the sale voucher No. 74 issued by M/s Talwar Brothers to the appellant in regard to a portion of the gold seized and the affidavits sworn by the 3 ladies claiming ownership of the rest? (4) Is the order of confiscation of the gold seized sustainable' in the facts and circumstances of the case? (5) Does the transaction with M/s Talwar Brothers invest the appellant with the title to the gold brought on approval basis, in terms of Section 24 of the Sale of Goods Act, 1930? (6) Is it proved in the facts and circumstances of the case, that the appellant had transgressed both or any of Section 8 and 55 read with Rule 13 of the Gold Control (Forms, Fees and Miscellaneous Matters) Rules, 1968? 15. The President was pleased to entrust this Third Member reference to me and, after giving notice of the same to both the sides, detailed hearings were conducted, with the appellants being represented by Counsel Shri K.K. Jain, Advocate, and the respondent by Shri K.C.Sachar, DR. The arguments were heard with reference to the points of difference, ad seriatum, and it is proposed to dispose of them in the same order.

1. The learned Counsel for the appellants vehemently canvassed the point that the order of confiscation of the gold in terms of Section 71 of the Act was wholly unsustainable inasmuch as there had been no opportunity to the claimants to

prove their ownership in respect thereto and as there was nothing on record that the act or omission on the part of the present appellants in respect to seized gold was, in any manner, with the knowledge or connivance of the said claimants; the proviso to Section 71 was clearly attracted and, as such, the order of confiscation was liable to be set aside on this account. Shri Jain placed emphatic reliance on a judgment of Delhi High Court in the case of Sushil Kumar and Ors. v. Collector of Central Excise & Others reported in 1983 ELT 687, where it was held that in the absence of notice to the owner of the seized goods informing him of the grounds on which it was proposed to confiscate the same, which notice had to be given within 6 months in terms of Section 79 of the Act; the gold seized was liable to be returned to the persons from whose possession it was seized. He also relied on a judgment of Kerala High Court holding a similar view in a matter decided on 8-2-1972 in O.P. No. 2108 of 1971 in case of K. Chellappari Achari v. Assistant Collector of Central Excise & Others, a photo copy of which order is placed on record, where also in the absence of notice under Section 79 to the claimants, confiscation under Section 71 was held to be bad. He further quoted a Reference Order passed by another Bench of the Tribunal in the case of M/s Hazarilal Gauri Shankar v. Collector of Central Excise, Kanpur 1985 (19) ELT 200 (Tribunal) to which the Learned Brother Shri Vi. Gauri Shankar Murthy has also made reference, urging that there also the Bench had agreed that absence of such a notice raised an important point of law having a bearing on the legality of order of confiscation.

17. The learned Counsel further argued that shortly after the seizure, and in circumstances fully explained by Shri Prem Narain Gupta, full facts were intimated to the authorities and even the number of the voucher, alleged to have been issued by M/s Talwar Jewellers, was mentioned in the communication dated 8-9-1982 and a copy of the said voucher was supplied with reply to the show cause notice, as also the affidavits with full particulars and addresses of the three ladies who had left the ornaments for repairs, and that without any evidence having been brought on record to controvert these pleas on facts, appellants have to be deemed to have succeeded in establishing that the owners of the seized gold were persons other than the appellants. He thus summed up his arguments urging that in the circumstances, the order of confiscation of gold was bad and unsustainable,

as it was a fit case where the proviso to Section 71 of the Act was attracted.

18. The learned Counsel also cited 'AIR 1962 Allahabad 439' in support of his contention that position of affidavits was that of a statement on oath, and where allegations were not controverted by counter-affidavits, nor deponent called for cross-examination; the only conclusion at which Court could arrive was that the allegations, remaining uncontroverted and unchallenged by cross-examination, must be accepted.

19. He also placed reliance on an observation made in Supreme Court judgment, reported as AIR 1956 SC 554, arising out of a matter relating to the Income Tax Appellate Tribunal to the effect that the decision of the Tribunal must not rest on suspicion but on legal testimony and, further, that as held in AIR 1977 SC 1724; a party's admission in a case dispenses with all necessity for further proof, and that inasmuch as in this case the Collector 'himself has recorded in the Adjudication Order that authenticity of the voucher has not been disputed by the Department, there was no need for any further evidence to be produced by the appellants and that the Collector had erred in discounting the value of this voucher regardless of the fact that the Department, in spite of opportunity to do so have not done it by examining the record of M/s Talwar Jewellers or proprietors thereof to determine the correctness of the assertions of the appellants and, thus, the facts as set out by the appellants having gone un-rebutted and uncontroverted, there was no reason to discredit the entire defence of the appellants nor any justification for dispensing with notice to the owners disclosed by the appellants.

20. Shri Sachar's reply to this contention was apart from pointing out that the Single Bench judgment of the Delhi High Court had been reversed by a Division Bench of the said Court as reported in 'AIR 1983 Delhi 307'; otherwise also, there was abundant evidence on the record itself to come to conclusion that the plea, set out by the appellants by way of explanation to the seized gold, was patently false and made up subsequently. He placed reliance in this regard on the observations made by the Collector in regard to the veracity of the explanations offered by the appellants and that of the order recorded by the Learned Technical Member, Shri H.R. Syiem, adding that the evidence furnished by the appellants

has been fully appreciated on merits and that the learned Judicial Member, while recording his dissent, has not adverted to the merits of evidence, and has proceeded on the assumption that third party ownership to the seized gold has to be accepted on the basis of the averment set out by the appellants; firstly, in the communication from one of the partners and, thereafter, in reply to the show cause notice. Shri Sachar also contended that the facts of all the reported cases on the subject were wholly distinguishable from the case in hand and the appellants could not draw any support from the ratio of the Reference Order passed in the case of *Hazarilal Gauri Shankar v. Collector of Central Excise, Kanpur* 21. Since so much turns on this issue, I have given my earnest consideration to this aspect of the matter. It would be expedient to analyse the wording of proviso to Section 71, which is re-produced as below:- Any gold in respect of which any provision 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: 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.

22. On a plain reading of this proviso, it becomes manifest that it is only when 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 ... rendered it liable to confiscation..." (Emphasis supplied), that provisions thereof would come into play.

23. It is, thus, clear that in plain terms of Section 71, whenever any gold is found in possession of a person or dealer in respect of which any provisions of this Act or Rules framed thereunder have been contravened, the same becomes liable to confiscation unless it is shown to the satisfaction of the adjudication officer that the real owner of the gold was someone other than the one who was guilty of the

contravention. The tenor of the wording of the proviso is such that the burden of satisfying the Adjudication Collector about the ownership of some other person, is on the one; from whose possession the gold had been seized or who was found to have contravened provisions of the Act or relevant rules.

24. The initial presumption of ownership is placed by Section 99 of the Act on the person who had gold in his possession, custody or control including gold ornaments. This was pointed out in an earlier 'Third Member' reference recorded by me in the case of Shri Sat Narain and Ors. v. Collector of Customs, Delhi, Appeal Nos. 1/80-NRB, 2/80-NRB, 6, 7 and 9/80-NRB; Order No. A-62-66/84-NRB dated 19-4-1984.

25. It is noteworthy that, on the facts and circumstances of that case, it was found to have been established on the basis of the entries in the register, that had been duly checked by an Inspector of the Department late in the evening of the date preceding the day of recovery, that the explanation offered in regard to the said gold was plausible and worthy of credence so as to hold that the gold attributed to the six customers was not liable to confiscation.

26. Reference to the aforesaid order has been made to pin-point the fact that the initial burden of establishing ownership of a person other than from whose possession the gold was seized is on such a person himself, and the satisfaction has to be that of the Adjudication Officer who has to assess and appreciate the plea put forward, or explanation offered, in the light of the circumstances of the individual case.

27. I would, therefore, hold that unless appellants had succeeded in establishing, to the satisfaction of the Collector, their plea in regard to the seized gold being either on approval with them from 'M/s Talwar Jewellers or entrusted for repairs' by the three ladies; the proviso to Section 71 would not come into play.

28. The only material before the Collector was a letter dated 8-9-1982, sent by Shri Prem Narain Gupta, making a reference to the voucher issued by M/s Talwar Jewellers. No doubt, with reply to show cause notice, a copy of the voucher as well as affidavits from the three ladies were annexed, which remained

uncontroverted but that fact, by itself, will not detract from the findings of the Collector inasmuch as proceedings before him were not in the nature of 'bi-party', and he had, only as a quasi-judicial authority, to appreciate evidence placed before him. He has given cogent reasoning for not putting any credence on the explanation offered, which have been endorsed by the Learned Member (Technical). Learned Member (Judicial), who recorded the dissent, has not adverted to the merits of this evidence but has raised the issues on first principles; namely, on points of law. It appears that these points proceed on the assumption that the ownership of third persons had been established but, on a totality of circumstances, that is not so.

29. It would seem, in the first instance, as observed by the Collector and the Learned Member (Technical), that neither M/s Talwar Jewellers nor any of the three ladies came forward before the Collector staking claim to the seized gold. They, therefore, cannot be deemed to be 'claimants' before the Adjudicational authorities for the simple reason that no claim has been put forward by them at any stage. The voucher, or the affidavits, have only been handed over by them to the appellants who, in turn, annexed them with their reply to the show cause notice.

The authorities relied upon by the Learned Counsel clearly indicate that either ownership had been accepted by the adjudicating authorities or the claims had been put forward by the persons concerned themselves.

For instance, in the Delhi case of Sushil Kumar v. Collector of Central Excise (supra), it is clearly recorded by the Hon'ble Judge in para 35 at page 695 that they (the adjudication authorities) have all found the will to be genuine, which finding was either express or implied. The ownership by the persons had been claimed through the said will, and one of the heirs - petitioner before the High Court - had even filed a revision against the order of confiscation. It was in this context that it was held that notice to such an accepted heir, as owner was necessary. Even if we ignore the fact that this order was reversed by a Division Bench on a different reasoning, it is apparent that adjudication authorities had not thrown any doubt on the genuineness of the will. Similarly, in the case decided by

Kerala High Court, a photo copy whereof has been filed by the Learned Counsel of the appellants, there was a claim lodged immediately after the time of seizure by the petitioner therein who was one of the four gold-smiths present at the shop of the certified gold-smith from where the gold had been seized and he had, even at the time of the search, claimed ownership of part of the gold on his behalf as well as on behalf of one E.V. Raghvan, which oral claim had been followed up by a written claim. Thus, the alleged owners were themselves the claimants before the authorities.

30. I, on my own, have looked up some of the other authorities to which there is reference in the Single Bench judgment of the Delhi High Court; namely, AIR 1972 S.C. 689', 'AIR 1972 Gujarat 126', and 'AIR 1968 Calcutta 28', and in all these cases, the persons to whom notice within the statutory period was held to be necessary were the persons themselves from whose possession the gold had been seized. Even in the case covered by the Reference Order of the Tribunal 1985 (19) ELT 200 (Tribunal), it is apparent from the facts as stated in para 3 of the said Order that all the customers, to whom the new gold ornaments were stated to have belonged, had lodged their respective claims before the Adjudicating Officer, even before the issue of any show cause notice, in addition to the affidavits filed by them. These cases, therefore, cannot be said to be laying down the principle, as seems to be suggested in the dissenting order of the Learned Member (Judicial) that bare mention of a name, as third party owner, will be enough to attract proviso to Section 71 of the- Act. On the other hand, it appears that the person from whose possession the gold has been seized has to satisfy the Adjudicating Officer that there were persons other than him who were owners of the seized goods.

31. Point No. 1, in my opinion, has to be replied in the negative to the effect that the order of confiscation of gold could not be bad in this case on account of failure to afford an opportunity "to the claimants to prove their ownership", inasmuch as there were no claimants before the Adjudicating Officer.

32. So far as satisfaction of the Adjudication Officer is concerned, the reasoning recorded by him in this regard sets out cogent and logical facts which weighed

with him in coming to the conclusion that the version given by the appellants - firstly, through letter dated 8-9-1982 and, afterwards, in reply to show cause notice - was not worthy of reliance. Learned Member (Technical) has endorsed this finding for reasons recorded in his order, but to the same effect.

Learned Member (Judicial) has not adverted to merits of this evidence, but has been swayed by the wording of Sections 71 & 79 which, with all respects, in my view, arise for consideration only on certain facts having been established.

33. I also endorse the finding of fact, recorded by the Learned Collector and the Learned Member (Technical), in so far as it relates to discrediting the theory of the seized gold belonging To persons other than the appellants.

34. I may add that Rule 13 of the Gold Control (Forms, Fees and Miscellaneous Matters) Rules, 1968, enjoined upon every licensed dealer -acquiring, accepting, selling, delivering, transferring or disposing of gold -at the time of each transaction to issue a voucher in relation to such gold; the only exception being that, if the licensed dealer, or the refiner, hands over gold temporarily to his artisan, then no such voucher may be prepared. Sub-rule (3) of Rule 13 requires that the voucher shall be in duplicate, and serially numbered - new series of number being used for each financial year. Further requirement, in terms of Sub-rule (4), is that the duplicate copy of the voucher is to be retained by the licensed dealer issuing it and the original copy of the voucher has to be given to the "person who sells, delivers, transfers or otherwise disposes of gold...". Another formality contemplated by Sub Rule (5) is that the books containing blank vouchers have to be presented to the proper officer for affixing his initials or stamp on each book before it is brought into use, and that [according to Sub-rule (6)] separate voucher-books shall be maintained in respect of receipts and issues. This requirement shall come into play, read with Section 55 of the Act, whenever the gold is acquired in any manner, because after specifying certain known transactions of purchase and sale, the Section contains expressions such as "otherwise acquired or accepted" or "otherwise received"....

35. A cumulative reading of all these provisions makes it abundantly clear that it was as much an obligation of Prem Narain Gupta to issue a voucher in favour of

M/s Talwar Jewellers while receiving the gold on approval as that of M/s Talwar Jewellers to issue one while handing over the same. The appellants have, no doubt, been able to procure some voucher from Talwar Jewellers who themselves did not, as pointed out by the Collector, come forward to lodge any claim in respect thereto, but apart from the fact that this voucher, had it been in existence at that time, as pointed out by the Collector, must have been produced there and then before the Excise Officers, the alleged illness of Prem Narain Gupta or the timing thereof notwithstanding; the most pertinent circumstance which detracts from the version given by the appellants is the fact that no voucher-book, containing copy of the voucher which Prem Narain Gupta was under obligation to issue in favour of M/s Talwar Jewellers while receiving the gold ornaments on approval, was found at the shop nor produced: It is apparently for the reason that none existed at the time search was made, and the gold seized. Such a voucher-book, for obvious reasons, could not have been subsequently made up as premises had been raided, and inventory of every thing found, including Books and records maintained at the shop, prepared; whereas a single voucher from some other party, who themselves have kept away from the proceedings, and whose books of account were not under scrutiny, could easily be procured. Even that voucher remains a dubious document in the absence of any evidence to corroborate credible value thereof, and Talwar Jewellers having at no stage come forward to stake a claim to this comparatively large quantity of gold ornaments.

36. For all the foregoing reasons, my conclusion would be that, on the facts of this case, proviso to Section 71 of the Act would not come into operation and, as such, the confiscation of the gold ornaments cannot be treated as illegal, for failure to afford opportunity to the alleged owners.

37. Point No. 2. This point has been substantially answered during discussion on the preceding point. I can only add that Section 79 of the Act, in the circumstances of this case, does not arise for consideration for the short reason that there were no claimants (emphasis added) before the adjudicating authority. 'Claim', according to ordinary dictionary meaning, means 'to demand as a right' and 'a claimant': 'one who makes a claim' - Chambers Twentieth Century Dictionary, Sixth Reprint 1981.

38. Apart from the dictionary meaning, even the meaning attached to this expression by way of judicial interpretation is: 'Right', e.g., 'lay claim to' - Aiyar's Judicial Dictionary, 9th Edition, at page 218 - and 'claimant' has again been defined as "one who makes a claim". The Law Lexicon (Vol. I) 1982 Edition, by T.P. Mukherjee, at page 353 again describes this term 'claim' as "signifying a demand made of right or supposed right". Similarly, in the Encyclopaedia Law Dictionary, Second Edition, by Biswas, at page 143 the term 'claim' has been defined to be 'A demand for something due or believed to be due'.

39. Nozley and Whitley define this term (Ref: Law Dictionary, Ninth Edition, by John B. Saunders, at page 61): "A challenge of interest in anything that is in the possession of another, or at least out of the possession of :the claimant." 40. All this pre-supposes some claim having been lodged with the adjudicating authority so as to vest the so called owners with the character of a 'claimant'. Inasmuch as in this case, neither M/s Talwar Jewellers nor the three ladies who had allegedly left some gold ornaments for repairs, lodged any claim at any stage with the seizing or adjudicating authorities, there were no 'claimants', within the meaning of law, to whom it was obligatory to give notice under Section 79 of the Act. This point is answered accordingly.

41. Point No. 3(a). It has already been discussed that there were abundant circumstances to detract from the credibility of the appellants' case as to sale voucher purported to have been issued by M/s Talwar Jewellers; the foremost circumstance being, that the copy of the voucher subsequently annexed to reply to show cause notice was not found either with the said ornaments nor in the premises when the search and seizure was made. Learned Member (Technical) has rightly commented that everything has been shown to have proceeded like a scheduled time-table and the Collector has also observed that, even if party's version that Prem Narain had taken ill at 11.30 AM be believed, in view of the fact that as an experienced Licensed dealer and as head of the family, he ought to have visualised, as soon as the search party arrived at the shop, that this huge quantity, which had been allegedly brought on that very morning, was bound to attract conspicuous notice; the very first thing in normal course of human conduct that he would have done, had such a voucher been in existence at that time, was

to produce the same and offer the explanation, which he subsequently did.

42. It is also remarkable that the next partner - the elder of his two sons - gave an unequivocal statement that all the unaccounted for gold-ornaments were their stock in trade. Had those come in the morning in the manner now stated by Prem Narain, the only natural statement would have been that he was not aware and that his father, who had suddenly taken ill, was in the know of things, and that in the previous evening, all this stock of gold-ornaments was not at the shop, and that it was acquired by the father before he and his brother had reached the shop. Collector's observation that none of the gold-ornaments (203 pieces) were found in one bundle which would have been normally the case had they been brought together, is also noteworthy; apart from the fact that no corresponding voucher; which, as discussed while replying point No. 1, Shri Prem Narain Gupta was also under statutory obligation to issue, was found nor subsequently produced nor M/s Talwar Jewellers themselves came forward to make any claim to this huge quantity of ornaments nor Virendra Kumar Gupta retracted or corrected his statement, given on 3-9-1982, at any stage, though it had been admitted that he came to know of the exact position on 4-9-1982. The explanation that this was owing to his pre-occupation with father's illness does not inspire confidence because he had seemingly been transacting business so much so that the appellant firm is shown to have delivered some old ornaments to M/s Talwar Jewellers on 7-9-1982, i.e., a day before his father's alleged discharge from hospital, supposedly in return for the new ornaments seized by the authorities.

43. It is rather queer that instead of following the normal remedy of informing M/s Talwar Jewellers about the seizure and their lodging claim with the authorities which could be duly proved from their books of accounts, this dubious method of process of return in instalments through old ornaments started soon after the seizure. There is nothing to connect the four vouchers, produced by the appellants, of old ornaments shown to have been delivered to M/s Talwar Jewellers, with the gold-ornaments allegedly covered by Voucher No. 74, nor does this voucher by itself carry conviction inasmuch as neither any details of the ornaments nor the nature thereof nor individual weight nor other necessary particulars have been given in the said voucher. I, therefore, have no hesitation in

saying that there is internal evidence, from the record itself, to controvert the plea as to ownership of M/s Talwar Jewellers in regard to 192 pieces of gold ornaments.

44. Similarly, the version in respect to other ornaments (apart from the fact that the numbers do not tally) is far from satisfactory and lacking of statutory proof because, here also, apart from the circumstance, as pointed out by the Collector that it is hard to believe that all the three ladies from different parts of the city would have come to the shop within a short span of 15 minutes early morning; otherwise also, these transactions also lack statutory proof because, under the rules as pointed out, they also had to be issued vouchers and, in case Prem Narain Gupta had received different pieces of gold ornaments in due course for repairs while sitting at the shop, there was no reason for him not to have issued signed vouchers to them as enjoined upon him by the rules. These ladies except for handing over affidavits of stereotype nature to the appellants, too did not come forward to lodge any claim in respect to these ornaments before the authorities. It is, thus manifest that this version also stands disproved from the facts patent on record.

45. Point No. 3(b). Does not arise in view of the above finding as to the plea of third party ownership being not credible or proved.

46. Point No. 4. In view of the discussion on points No. 1, 2 & 3, the order of confiscation of the seized gold ornaments is fully sustainable. This point is answered accordingly.

47. Point No. 5. It is true that under Section 2k of the Sales of Goods Act, the title to the goods brought on approval is not complete till the approval is conveyed within the stipulated period but, here again, it would be presuming that that this version, as to the gold ornaments having been brought on approval from M/s Talwar Jewellers that very morning, was proved which, in the light of discussion on the preceding points, does not seem to have been established, in a satisfactory manner. This point, therefore, becomes non est.

48. Point No. 6. In view of the answers to the specific points - particularly points No. 1 to 4 - it can certainly be said that the appellants have transgressed the provisions of Section 55 of the Act read with Rule 13 of the Gold Control (Forms, Fees and Miscellaneous Matters) Rules, 1968, though Section 8 in terms, may not apply inasmuch as Section 55 of the Act and Rules 12 and 13 of the aforesaid Rules laid down specific procedure in relation to licensed dealers regarding transactions conducted by them in the course of their business. I, therefore, am of my considered view that the order of confiscation of the seized gold ornaments should stand, as passed by the Collector, vide impugned Adjudication Order, subject to payment of redemption fine, already determined by him. Inasmuch as the appellants, in spite of being regular licensed dealers, have failed to maintain the statutory records, including 'Repair Register', as enjoined by Rule 12, they were also liable to pay a penalty under Section 74 of the Act. In view of the fact that they have had to pay redemption fine of Rs. 75,000/-, a penalty of Rs. 7,000/-, as proposed by learned Brother Shri M. Gouri Shankar Murthy, Member (Judicial), would adequately meet ends of justice.

49. I answer the Reference accordingly and the file be now sent to the Learned Brothers who constituted the Bench, for issuance of orders of the Bench, in accordance with the requisite procedure.

In terms of the above order dated 4-6-1985, the appeal is disposed of as under.

The order of confiscation as well as the levy of penalty are sustained but quantum of penalty is reduced to Rs. 7,000/- from Rs. 10,000/-. The order of the Collector is otherwise upheld.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com