

Collector of Central Excise Vs. Subhash Chandra

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-27-1987

Reported in : (1987)(13)ECC137

Appellant : Collector of Central Excise

Respondent : Subhash Chandra

Advocate for Def. : Shri. L.C. Sikka

Judgement :

On 2-1-1982, the Gold Control Officers of Central Excise Collectorate, New Delhi visited the licensed premises of M/s. Prem Nath Jewellers, Krishan Nagar, Delhi .where they noticed the appellant Shri Subhash Chander found sitting in the shop. On enquiries from him by the Gold Control Officers he stated that he was carrying in his brief case gold ornaments, (nose pins). His brief case was examined in the presence of two witnesses and nose pins weighing 292.700 gms. (fixed on two pieces of card-board) and small parts of nose pins weighing 5.400 gms. (wrapped in a piece of paper) were recovered. On enquiry the appellant admitted that he did not possess any voucher or permit for the acquisition, possession, custody or control of the said ornaments. The same were, therefore, seized under Section 66 of the Gold Control Act.

The appellant in his statement before the Gold Control Officers stated that he is certified goldsmith and had come to Delhi from Amritsar the previous day; that he had manufactured these nose pins himself after melting the gold ornaments of his

family; that he worked with his father Shri Ram Lal who was also a goldsmith; that he had brought those nose pins to Delhi for sale to various dealers as he expected higher price.

Subsequently, in his letter dated 3-2-1982 posted from Amritsar, the appellant stated that he helped his father who is a certified goldsmith and who manufactured nose pins after taking gold from various dealers; that the appellant fixed the nose pins on car-boards; that he had come to Delhi for the purpose of procuring orders for the nose pins from various dealers after showing them the nose pins; that the nose pins were manufactured by his father; that his father had received gold for the manufacture of nose pins from M/s. Surinder Singh Om Parkash, gold dealers of Amritsar vide their issue voucher No. 7; that his father had entered the said gold in his GS-13 register. The appellant also enclosed a photostat copy of issue Voucher No. 7 issued by the said gold dealer, M/s. Surinder Singh Om Parkash.

2. Original authority, Deputy Collector (Gold) has discarded the pleadings made subsequent to the seizure and statement dated 2-1-1982 vide his letter dated 3-2-1982 on the ground of afterthought. The learned Deputy Collector has relied on the appellants statement dated 2-1-1982 given at the time of seizure to the Gold Control Officers wherein as mentioned above, it has been stated that he brought the nose pins for sale to Delhi. The appellant obviously did not have a gold dealers licence. Accordingly, the learned Deputy Collector has upheld the contravention of Sections 8 and 27 of the Gold Control Act. He has, therefore, confiscated the nose pins, a brief case and two card-board jewellery boxes under Section 71 of the Gold Control Act, 1968. A penalty of Rs. 8,000/- was also imposed on the appellant under Section 74 *ibid*.

3. Learned lower appellate authority in an appeal filed by the appellant herein has held as follows :- "As the facts stand, it can at best be said that the appellant had brought the goods with an intention of selling them because there is nothing to indicate that he had made an offer to anyone to sell them. The advocate correctly points out that Section 27 would only be attracted when the person has commenced business as a gold dealer and that there was considerable distance for the appellant to travel before he could be considered to have commenced

business. I am in agreement with this and I must hold that the provisions of Section 27 will not be attracted. The provisions of Section 8 would also not be attracted." Learned lower appellate authority, therefore, set aside the order-in-original passed by the Deputy Collector (Gold).

4. Department in its appeal has taken up the ground that the quantity of nose pins clearly suggests that the same were brought to Delhi from Amritsar for trading purposes. The word 'dealer' as defined under Section 2(h) of the Gold Control Act means "a person who carries on directly or otherwise the business of ...selling, supplying, distributing... gold... ". The word used is 'selling' not 'sale', 'supplying' not 'supplied' etc. An attempt to sell and an attempt to supply would be covered under the above definition because only then their sale has to take place. If this interpretation is not accepted, a very curious situation would arise because a person can open a shop putting all the ornaments in shop and still claim that he has not contravened the provisions of Section 27 of the said Act since he was not found actually selling the ornaments to some customers. Therefore, according to the appellant-Collector, the business of a dealer has commenced by his attempt to sell and the circumstances of this case show that the respondent herein intended to sell the gold nose pins.

5. Learned SDR appearing for the appellant-Collector has reiterated the grounds in appeal memorandum as stated above.

6. Learned advocate, Shri L.C. Sikka appearing for the respondent has, inter alia, stated that Section 27 would be attracted only when there would have been an actual act of selling the nose pins. It is clear from the panchnama as well as the statement dated 2-1-1982 of the appellant and that of Prem Nath of Prem Nath Jewellers that the appellant was merely found sitting in the shop of Prem Nath Jewellers.

The appellant was not found in either displaying the goods to Prem Nath Jewellers or offering them for sale. In the absence of any such circumstance, leave apart actually selling the goods, even an attempt at selling would not be established. The mere intention of selling, even if it is assumed to be so, would not constitute an offence under Section 27 of the Gold Control Act. After making the intention to

sell the nose pins, the appellant could change his mind and might not have sold or attempted to sell the goods. He urges strongly that the order passed by the learned lower appellate authority is based on correct appreciation of law and facts of this case. He relies on Madras High Court's judgment in *Kanya Lal Chander Kumar v. Union of India* (1979 CENCUS 74D). It has been held therein by the Hon'ble High Court that possession of unaccounted gold ornaments by pawnbroker may amount to an offence under Section 6(2) but does not automatically follow that such a pawnbroker is a dealer in gold. He has also relied on the judgement of Punjab and Haryana High Court in the case of *Gian Chand Kapoor and Ors. v. Union of India and Ors.* [para 6, page 43 of CENCUS Manual of Gold Control (corrected upto 1-1-1982)]. It has been held therein that "the words 'carry on business' as postulated in Sub-section (7) of Section 27 of the Act would be considered in relation to dealer who is in fact selling that gold... because it is only by selling that a profit is made and the business culminates in its finality." 7. I have carefully considered the pleas advanced on both sides and I am inclined to agree with the findings of the learned lower appellate authority. It has been rightly found on the basis of evidence on record relied upon by the Deputy Collector (Gold) in the order-in-original that the appellant (respondent ?) was merely found sitting in the shop of Prem Nath Jewellers. He was not found offering the goods for sale to the said jewellers. Similarly, the statement of Prem Nath of that Jewellers firm corroborates the statement of the appellant (respondent ?). Merely because a large quantity of nose pins has been found with the appellant (respondent ?), it does not mean that he was selling or attempting to sell them to attract Section 27 and Section 71 of the Gold Control Act. I also observe that the appellant-Collector in his grounds of appeal as reproduced in detail above, is himself confusing between the term 'attempt' and 'intention'. He appears to equate the two words as is apparent from the last sentence in ground (v) of the appeal. It is common knowledge that there is a world of difference between the word 'intention' and the word 'attempt'. It is well-known that there are four stages in commission of an offence - (i) intention, (ii) preparation, (iii) attempt, (iv) actual commission of an offence.

A mere intention to commit an offence is far removed from an attempt to commit an offence. "Intention has been defined as "the fixed direction of the mind to a

particular subject or, a determination to act in a particular manner". In other words, it is a state of mind. It is still a thought in the mind; whereas attempt has been defined as "an intentional act which a person does towards the commission of an offence but which fails in its object through circumstances independent of the volition of that person". (Ref. T.P. Mukherjee's Law Lexicon).

Section 27 read with Section 71 of the Gold Control Act does not constitute "intention to sell" as an offence. Section 27(1) states that "no person shall commence or carry on business as a dealer unless he holds a valid licence...". As rightly relied upon by the learned advocate for the respondent the real incidence of business is the selling of gold and the selling would obviously mean actual selling so far as this Section is concerned. It is only by Section 71 of the Gold Control Act that even an 'attempt' at contravention of any provisions of the Act, or any Rule or order made thereunder in respect of any gold makes such a gold liable to confiscation but as held by the learned lower appellate authority and to which, I agree that the act of 'attempt' on the part of the appellant (respondent ?) cannot be said to have been made in the instant case because he was found passively sitting in the shop when was detected by the Gold Control Officers.

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