

D.D. Gurunath Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Aug-19-1987

Reported in : (1988)LC244Tri(Chennai)

Appellant : D.D. Gurunath

Respondent : Collector of Central Excise

Judgement :

1. Since the above appeals arise out of a common order of the Collector of Central Excise, Madras dated 9-1-1987, they are taken up together and disposed of by a single order. The Collector of Central Excise, Madras under the impugned order has imposed a penalty of Rs. 6,500/- each respectively under Section 74 of the Gold (Control) Act, 1968 and Section 112 of the Customs Act, 1962 on the appellant Shri Gurunath (in Appeal Nos. G/116/87 and C/215/87). In pursuance of a statutory direction under Section 82 of the Gold (Control) Act, 1968, the Collector of Central Excise, Madras has preferred an appeal (No.190/87) against the impugned order referred to supra seeking enhancement of the quantum of penalty imposed on Gurunath under the provisions of the Gold (Control) Act, 1968 (the Act for short).

2. Appellant Gurunath is the owner of a silver refinery at Madras and on 1-2-1986 the Preventive Officers of Central Excise Hqrs., Madras visited the appellant's silver refinery on prior intelligence and recovered five gold biscuits with foreign markings in a paper packet placed on the platform of the balance in the refinery. The gold biscuits were found to weigh 500.00 gms. and were valued at Rs.

1,08,000/-. Since the gold biscuits were of foreign origin and since the appellant could not account for the licit acquisition and possession of the same, the authorities effected seizure of the same as per law under a mahazar. Appellant Gurnath also gave a statement before the authorities immediately on seizure on 1-2-1986 that the gold biscuits under seizure had been deposited there by a Muslim who used to come to the appellant's silver refinery very often in the past for melting gold. The appellant also admitted the fact of melting gold in the refinery in the past and confessed to possessing contraband gold. It is in these circumstances after further investigation, proceedings were instituted against the appellant Gurnath which eventually resulted in the impugned order now appealed against. As referred to earlier the Department also has come by way of an appeal seeking enhance-merit of the quantum of penalty imposed on the appellant under the provisions of the Gold (Control) Act, 1968.

3. Shri K. Narayanan, the learned advocate for appellant Gurnath submitted that the appellant had nothing to do with the gold biscuits under confiscation and the mere fact that a third party came and deposited contraband gold in the appellant's refinery, just on the eve of the arrival of the authorities, would not be a circumstance on the basis of which the appellant could be held to have had any knowledge about the contra- band nature of the gold, much less privy to any act of contravention under the Customs Act, 1962 or the Gold (Control) Act, 1968. The learned counsel further urged that the evidence on record would indicate that the appellant did not even know the contents of the paper packet till after the authorities opened it up and, therefore, the charge of contravention against the appellant is not borne out by any evidence on record. The learned counsel further contended that the charges under Section 11(1) and 17(1) of the Gold (Control) Act, in any event, have not been made out because admittedly the gold biscuits in question were not melted in the refinery and the process even had not started. In respect of the appeal by the Department seeking enhancement of the quantum of penalty, the learned counsel urged that since two charges are not per se maintainable against the appellant under Gold (Control) Act, 1968, the quantum of penalty itself would warrant further reduction, much less merit any enhancement. The learned counsel finally pleaded that in any event the quantum of penalty would call for further reduction since the appellant has been proceeded against purely on a

suspicious circumstances and more so on the basis that in the past he had melted gold in the refinery. Heard Shri C.V. Krishnan, the learned Departmental Representative.

4. The question that arises for my consideration in the appeals is whether there is evidence on record warranting a conclusion that the appellant Gurunath had in any way acquired possession or was concerned in keeping contraband gold entailing penal consequences in terms of Section 112 of the Customs Act, 1962, and whether there is evidence on record to hold that the appellant has contravened the provisions of the Gold (Control) Act in terms of Section 8(1), 11(1) and 17(1) of the Act. For the purpose of convenience let me dispose of the case arising under the Customs Act, 1962.

5. The fact that contraband gold biscuits with foreign markings were seized from the appellant's premises does not admit of any controversy and is not even disputed. The only plea urged by the learned counsel in this context is that the appellant did not know the contents of the paper packet from which the contraband gold biscuits were recovered by the authorities. I have gone through carefully the statement recorded from the appellant by the authorities on 1-2-1986, immediately on seizure of the contraband gold. The statement gives graphic details about the appellant's association with an alleged muslim for whom the appellant used to oblige "very often" in the past for melting gold. Melting gold in a silver refinery is per se an offence under the provisions of the Gold (Control) Act. In spite of the fact that the appellant in his statement referred to supra claims to have known the muslim gentleman who deposited the contraband gold, I am at a loss to understand as to why the appellant did not disclose the identity of the muslim to the officers to enable them to pursue their investigation and to find out as to where-from the gold was procured by the muslim and how the gold was deposited in the appellant's premises by the said muslim. To a specific query in this context the learned counsel merely stated that merely because the appellant has been melting gold for the said muslim often, it would not follow that the appellant must be knowing his name or his particulars of whereabouts. This plea of the learned counsel has to be mentioned to be rejected as utterly incredible and unacceptable. On the other hand, I should think that if the appellant were in the habit of melting

gold in his refinery brought by the said muslim, the appellant would presumably be having greater intimacy with him knowing much better about all his whereabouts than otherwise. The plea of the learned counsel that the appellant did not have knowledge about the contents of the paper packet from which the contraband gold biscuits were recovered is also not acceptable as evidenced by the statement of the appellant himself. On going through the statement of the appellant I find the same to be true and voluntary meriting acceptance; admittedly this statement was not retracted or resiled from for an inordinate long time till after the appellant gave a reply to the show cause notice on 4-8-1986. There is no explanation of any kind from the appellant for such belated retraction. I have, therefore, no hesitation to hold that the belated retraction has been resorted to by the appellant in a desperate bid to extricate himself from the clutches of law. As rightly pointed out by the learned D.R. the statement of the appellant clearly indicates that he knew about the contraband gold brought by the muslim. I, therefore, hold that the appellant had acquired possession or was in possession of the contraband gold and has also been proved to have been keeping the same within the meaning of Section 112(b) of the Customs Act, 1962, the Appellant's disclaimer of ownership of the gold notwithstanding. In this view of the matter on consideration of all the relevant materials on record, I am inclined to hold that the charge against the appellant under the Customs Act, 1962 has been clearly brought home and I, therefore, confirm the finding of the adjudicating authority in regard to the same. In my opinion, having regard to the quantity of contraband gold held by the appellant, the quantum of penalty errs very much on the side of leniency. Unfortunately no appeal has been filed by the Department seeking enhancement of the quantum of penalty imposed under the provisions of the Customs Act, 1962. Therefore, I have no other alternative except to confirm the penalty under the impugned order and dismiss the appeal (C/A. No. 215/87).

6. The charges levelled against the appellant under the provisions of the Gold (Control) Act, 1968 are under Sections 8(1), 11(1) and 17(1).

For the reasons indicated above I find that the statement of the appellant is true and voluntary meriting acceptance. Possession of primary gold by Appellant who is admittedly neither a dealer nor a certified goldsmith is per se an offence under

Section 8(1) of the Act. In the present case the possession of primary gold of 5 pieces has been clearly established not only by the recovery of the same as evidenced by the mahazar but also by the statement of appellant Gurunath himself referred to supra, therefore, the charge under Section 8(1) of the Act has been clearly brought home. So far as the charges under Section 11(1) and 17(1) are concerned, they could be considered together. Section 11(1) of the Act reads as under - (b) make, manufacture, prepare, repair, polish or process any ornaments, or (c) make, manufacture, prepare, repair, polish or process any article, or (d) make, manufacture or prepare anything containing gold of any purity, whether such purity exceeds nine carats or not, or (e) melt, assay, refine, alloy or extract gold of any purity, whether such purity exceeds nine carats or not, or subject such gold to any other process, Section 17(1) provides that no person shall establish a refinery or carry on business as a refiner save as otherwise provided in that Act unless he holds a valid licence issued in that behalf by the Administrator. In the present case the appellant was having a silver refinery duly licensed. It is not the case of the Department nor the case of the appellant that he was having a gold refinery or a licence for one such thing. Section 11(1) extracted above, would clearly indicate that only if a person is found to have made, manufactured, prepared or processed any primary gold, he would be guilty of contravention of that Section. In the present case even the case of the Department is that on the basis of intelligence when they visited appellant's refinery they found the appellant in possession of five pieces of primary gold with foreign markings. It is not the case of the Department even in the show cause notice that the five pieces of primary gold recovered from the possession of the appellant's refinery were the result of melting of any gold by the appellant in the refinery in terms of Section 11 of the Act. The possession simpliciter of primary gold would not ipso facto lead to the conclusion that the appellant should have melted any gold in the refinery. Presumably, the authorities have found the appellant guilty of the charges under Section 11 and 17 on the ground that the contraband gold biscuits were kept by the appellant only for the purpose of eventual melting, possibly with a view to obliterate the foreign markings. Since admittedly no melting had taken place and no process towards melting had also taken place, in my opinion, the charges under Section 11 and Section 17 have not been brought home against the

appellant by the evidence on record. The learned D.R. at this stage pleaded that the previous conduct of the appellant in regularly melting and refining gold would be a pointer to the conclusion that the gold pieces were also kept for similar purposes.

I, therefore, exonerate the appellant of the charges under Section 11 and 17 of the Act for the reasons stated above. Shri Narayanan, the learned counsel at this stage pleaded that in view of the fact that the two charges have been found by the Tribunal to have not been brought home against the appellant, the quantum of penalty should suffer a pro- portionate reduction, since the adjudicating authority has imposed the penalty only on the ground that the appellant was guilty of the charges of contravention under three Sections. I am afraid even though at the first blush this argument would seem attractive, yet I find it difficult to accede to the plea of the learned counsel because imposition of penalty in exercise of a quasi-judicial power, is only discretionary and taking into consideration the facts and circumstances of the case, the role played by the appellant who has a silver refinery and having regard to the past conduct of the appellant, I do not think that the quantum of penalty calls for any reduction. I, therefore, confirm the same.

7. Let me now deal with the appeal by the Department viz. G/Appeal No.190/87, seeking enhancement of the penalty imposed on Gurunath, the respondent herein, under the provisions of the Gold (Control) Act, 1968. For the reasons set out above, I have already exonerated him of the charges under Sections 11 and 17 of the Act. The only charge of contravention that remains against him (Gurunath) is under Section 8(1) of the Article. It is not the case of the respondent Gurunath that he is the owner of the gold in question. The Department also has proceeded to act on the inculpatory statement of the respondent in bringing home the charge against him under the Act. The person who actually deposited the gold biscuits has not been traced during investigation and the learned D.R. is also not able to enlighten as to the nature of the investigation conducted in this regard. If, as I have observed earlier, the Department had chosen to file an appeal seeking enhancement of the quantum of penalty in respect of the contravention under the provisions of the Customs Act, 1962, that would have been more appropriate in the facts and circumstances of the case and so far as the provisions of the Gold

(Control) Act are concerned, the contravention is only in relation to a person being found in possession of primary gold in contravention of Section 8(1) of the Act. The question that the primary gold was of foreign origin is not of any relevance so far as the charge under Section 8(1) of the Gold (Control) Act, 1968 is concerned. In this view of the matter, I do not find any justification for enhancement of the quantum of penalty imposed on respondent (Gurunath) under the provisions of the Gold (Control) Act, 1968. In the result the appeal of the Department (G/A. No. 190/87) is dismissed.

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