

C.A. Pendurkar and Co. Vs. Collector of Customs (Prev.)

C.A. Pendurkar and Co. Vs. Collector of Customs (Prev.)

SooperKanoon Citation : sooperkanoon.com/4199

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-25-1988

Reported in : (1988)(38)ELT689Tri(Mum.)bai

Appellant : C.A. Pendurkar and Co.

Respondent : Collector of Customs (Prev.)

Advocate for Pet/Ap. : Shri. Jain

Judgement :

1. The appeal filed before the Gold Control Administrator against the Order-in-Original bearing No. XVII(GC)8-23/81/2641 dated 26th May, 1982 passed by the Collector of Customs (Prev.), Bombay statutorily stood transferred to the Tribunal.

On 15-5-1981 the officers of Gold Control, Bombay, after verification of the statutory records and the physical stock found 1298 gms. of 22 and 23 carats purity and 145 gms. of 12 14 cts.

purity new gold ornaments in excess. As the partner of the firm Shri Chandrakumar could not satisfactorily explain the excess, both the quantities were seized. On the date of seizure the statement of Chandrakumar who appears to be the person in charge of the management of the firm, admitted the seizure. He, however, stated that since his mother who was the other partner, was suffering from cancer he too was not attend -ing to the business and one servant Kashinat was looking after the business. He further admitted that the servant had not been

giving vouchers while receiving gold ornaments from the customers or while handing over the gold ornaments for manufacture of new ornaments to the goldsmith. He also stated that since the year 1968 no stock-taking has taken place. But on 21-5-1981, he addressed a letter to the Gold Control Officer.

Among other things, he stated that he had a stock of 600 gms. in the repairs/polishing side which were ready to be delivered to the customers after polishing and these were also taken by the officers and the officers told him that the claim should be put forth afterwards. It was further stated by him that certain quantity of gold was received from 3 goldsmiths on 14th evening or and 15th morning which remained unaccounted. It was also contended by him that certain quantity were of lesser purity which will not even come under the definition of gold. The further statement of Shri Jain was that 110 gms. are foreign matters involved in the ornaments. The Department after carrying out the investigation and after completing of investigation issued show cause notices as to why the seized gold should not be confiscated and why penalty should not be imposed.

3. After the receipt of the reply and after affording personal hearing, the Collector of Customs (Preventive), ordered confiscation of the seized quantity but allowed redemption on payment of fine of Rs. 25,000/- and also imposed a penalty of Rs. 5,000/- on the partner Shri Chandrakumar. Hence this appeal.

4. Shri Jain appearing for the appellant submitted that out of a quantity of 1443.000 gms., 585.300 gms. were received for repairs and polishing from the customers and the Collector had accepted this contention of the appellant but then he had ordered confiscation of this quantity solely on the ground that the licensed dealer did not maintain proper account and thereby contravened Section 55 of the Gold (Control) Act. Shri Jain submitted that once the Collector had accepted the contentions that this gold belonged to the customs he cannot order confiscation unless he holds that the customers had knowledge of and had connived in the contraventions of the Gold (Control) Act by the dealer. No such finding was recorded by the Collector. Shri Mondal referred to the order of the Collector and submitted that the Collector found that the appellant had not maintained accounts in respect of this quantity of 585.300 gms. and therefore the Collector was right in

holding that there was contravention of Section 55.

5. There is no controversy between the parties as to the contravention of Section 55 of the Act in so far as it relates to 585.300 gms. The question for consideration is whether the Collector, after accepting the contention of the dealer that this quantity of gold belonged to the Customers could order confiscation Section 71 of the Act provides for confiscation of the gold in respect of which there had been any contravention of the provisions of the Gold (Control) Act. But the proviso to that Section makes it clear that in respect of the gold belonging to others no such confiscation could be ordered unless it is established that the act or omission of the dealer which rendered the gold liable to confiscation was with the knowledge or connivance of the persons to whom the gold belongs. In the whole of his order, the Collector had not recorded a finding that the owners were aware of the non-maintenance of accounts by the dealer. There is also no finding that the owners connived with the dealer. In the said circumstances, Shri Jain's contention that the Collector committed a legal error in ordering confiscation of 585.300 gms. is well founded. I, therefore, unhesitatingly set aside the order of confiscation of 585.300 gms.

6. In respect of 644.200 gms. which were ordered to be confiscated, Shri Jain did not address any argument.

7. As regards the remaining 254.950 gms., Shri Jain submitted that as early as 21-5-1981 the appellant had informed the Department that 145 gms. out of 254.950 gms. should be outside the purview of the Gold (Control) Act inasmuch as those ornaments are less than 9 ct. in purity. As regards remaining 110 gms. Shri Jain contended that they form foreign matters which are involved in the ornaments. According to Shri Jain, at the time of seizure, no inventory of the ornaments or description of each of the ornament had been made. Shri Jain submitted that according to the Department all the ornaments were new ornaments.

As per G.S. 12 Register the dealer is not required to include the weight of thread, lack and copper covered by gold sheet while entering gross weight of the ornaments. Shri Jain submitted that since this contention had been taken up even before the issue of show cause notice and the gold was in the custody of the

Department there was an obligation on the part of the Department to verify the correctness of this contention but then no such verification had been made and in the said circumstances, the Collector was unjustified in ordering confiscation of this 254.950 gms. Shri Jain submitted what remained was only a technical breach of not accounting and non-issue of vouches in respect of 602.750 gms. and for that technical breach the Collector was not justified in imposing a fine of Rs. 25,000/- and a penalty of Rs. 5,000/-.

8. Shri Mondal appearing for the Collector, however, submitted that the appellant was present at the time of panchnama. His statement was also recorded on the very day. The purity mentioned in the panchnama could have been given by the appellant himself. Therefore, the subsequent contention is an afterthought; the same has been rightly rejected by the Collector. As regards 602.750 gms., Shri Mondal drew my attention to the statement of the appellant recorded on 15.1.1981 wherein he had admitted about non-issue of vouchers and receipt by the servant who was authorised to carry out the dealings. Shri Mondal contended that in respect of 602.750 gms. it was not a technical breach, there was contravention of Sections 31, 36 and 55. He, therefore, justified not only the order of confiscation but also imposition of fine and penalty.

9. It is difficult to accept Shri Jain's contention that there was only a technical breach in respect of 602.750 gms. Admittedly, no vouchers were issued for receipt of this gold. No entry had been made in the statutory register. No account was maintained when this quantity was stated to have been issued to the goldsmith. Therefore the Collector was justified in holding that there was contravention of Section 36 read with Rule 13(1) of the Rules.

10. There is, however, considerable force in the contention of Shri Jain that there was an obligation on the part of the Department to examine the contention as to whether any quantity of gold seized was less than 9 Ct. which could have been made by even touch stone method.

Even this elementary thing had not been carried out. It is however difficult to accept Shri Jain's contention that 110 gms. form part of foreign matter. The appellant apparently taking advantage of the seizing officers not making inventory

or not giving description of each item seized. The Collector while passing orders has observed : "However, in this 245.900 gms. major portions of 12 to 14 carat purity will be taken into consideration while fixing the quantum of fine and penalty." The Collector, however, was not correct in holding that there was contravention of Section 31 in respect of the entire quantity of 245.900 gms. The party had taken a contention that certain quantity of gold seized are less than 9 carat. The Department ought to have tested the gold for its purity. This had not been done without carrying out the test and without ascertaining the purity the contention of the dealer cannot be brushed aside.

11. In the result, this appeal is allowed in part. The confiscation of 585.300 gms. of gold ornaments belonging to the customers is set aside.

The confiscation of 145 gms. out of 254.950 gms. is also set aside. The confiscation of the remaining quantity is however confirmed.

12. Since I had set aside the confiscation of gold amounting to 730.300 there should be proportionate reduction in the quantum of fine and penalty. The fine is reduced from Rs. 25,000/- to Rs. 12,500/- (Rupees Twelve thousand five hundred only) and the penalty is reduced from Rs. 5,000/- to Rs. 2,500/- (Rupees Two thousand five hundred only). The appellant be granted consequential relief.

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