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Rajmal Vs. Superintendent, Central Excise and anr.

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Court : Madhya Pradesh

Decided On : Feb-08-1963

Reported in : AIR1967MP20; 1967CriLJ76

Judge : T.P. Naik and ;K.L. Pandey, JJ.

Acts : Defence of India Rules, 1962 - Rule 126D, 126F and 126I

Appeal No. : Misc. Petn. No. 26 of 1963

Appellant : Rajmal

Respondent : Superintendent, Central Excise and anr.

Advocate for Def. : H.L. Khaskalam, Govt. Adv.

Advocate for Pet/Ap. : Y.S. Dharmadhikari, Adv.

Disposition : Petition dismissed

Judgement :

Naik, J.

1. This petition under Article 226 of the Constitution is laid mainly against the directions implied in a memorandum, dated 22nd January 1963, issued by the Deputy Superintendent, Central Excise, Jabalpur (respondent 2), to the effect that dealers have to furnish a list of ornaments of gold pledged with them and that,

after 8th February 1963, they can neither return such ornaments to the owners nor accept such ornaments as security for loans.

2. The facts giving rise to this petition may be stated in a few words. After the commencement of the Defence of India (Amendment) Rules, 1963, introducing Part XII-A relating to control of gold, issued under Section 3 of the Defence of India Act, 1962 (51 of 1962) dealers of Sarafa Bazar, Jabalpur, were uncertain whether that Part affected the business of advancing loans on the security of gold ornaments irrespective of their purity and, in particular, whether such ornaments, of which they were in possession as security for loans which they had already advanced could be retained by them till their loans were repaid and they were redeemed by their owners. The uncertainty arose because of the directions implied in the aforesaid memorandum which was issued by the Deputy Superintendent, Central Excise, in reply to an enquiry by the Secretary of the Sarafa Bazar Committee, Jabalpur, made on 22-1-1963 from the respondent 2 as to the true legal position of the three points indicated by him in the opening paragraph of his enquiry (Annexure A).

3. The petitioner, who is the President of the Sarafa Bazar Committee and who is also a dealer within the meaning of Part XII-A, contests the position indicated in the impugned memorandum and claims that he is not obliged to include the gold ornaments pledged with him in his return under Rule 126 F nor is he, either before or after 8th February 1963, inhibited by any provision in the aforesaid Part XII-A from returning such ornaments to the owners or from accepting other ornaments as security for loans.

4. The respondents have controverted the position taken up by the petitioner and also urged that, in the circumstances of the case. the petition does not lie and is, therefore, liable to be dismissed.

5. On the main points of contest, we are of opinion that the respondents have misconceived the true legal position.

6. Before examining the respective contentions of the parties, we shall briefly examine the salient features of the Rules so far as they are relevant for our

present purpose. In Chapter I of the Rules. ' dealer ', ' gold ' and 'ornament' have been defined in Clauses (c), (d) and (f) of Rule 126-A as follows:

' (c) ' dealer ' means any person who carries on, directly or otherwise, the business of

(i) making, manufacturing, buying, selling, supplying, distributing, melting, processing or converting ornaments,

(ii) buying, selling, supplying, distributing, melting, processing or converting gold for the purpose of making or manufacturing ornaments,

whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes :--

(i) an undivided Hindu family which carries on such business; and

(ii) a local authority, company, society registered under the Societies Registration Act, 1860 (21 of 1860), co-operative society incorporated under any law with respect to co-operative societies, club, firm or other association which carries on such business, or

(a) buys ornaments, or gold for the purpose of making ornaments, from or

(b) makes or manufactures ornaments tor,

(c) processes, melts or converts ornaments, or gold for the purpose of making ornaments, for.

(d) sells, supplies or distributes ornaments, or gold for the purpose of making ornaments, to, its members,

(iii) a commission agent, broker, del (SIC) agent, auctioner or other mercantile agent, by

whatever name called, who carries on such business on behalf of any principal; Explanation.--For the purpose of this Part-

(a) every person who acts as an agent of a dealer residing outside India and carries on the business of such dealer in India or acts on behalf of such dealer as

(i) a mercantile agent as defined in the Indian Sale of Goods Act, 1930 (3 of 1930); or

(ii) an agent for handling gold or documents of title relating to gold; or

(iii) an agent for the collection or payment of sale price of gold or as a guarantor for such collection or payment; and

(b) every branch in India of a firm or company having its registered office outside India, shall be deemed to be a dealer;

(d) ' gold ' means gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought. in any shape or form, of a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold;

(e) . . . .

(f) 'ornaments' means any article in a finished form, meant for personal adornment or for the adornment of any idol, deity or any other object of religious worship, made of, or manufactured from, gold, whether or not set with stones or gems, real or artificial, or with pearls, real, cultured or imitation or with all or any of them and includes parts, pendants or broken pieces of ornaments;'

7. Chapter 11 then deals with the control of business in gold. Under Sub-rule (a) of Rule 126-B, on and from 9th January 1963, a dealer is prohibited from making or manufacturing any article of gold other than ornament, while under Sub-rule (c) any other person is prohibited from making or manufacturing any article of gold, unless such dealer or other person is authorised by the Board by general or special order to make or manufacture such article. Rule 126-C, then says that from the aforesaid dale no dealer, whether licensed or not shall make, manufacture or prepare, or sell or otherwise transfer, agree to sell or otherwise transfer, or expose or offer for sale or transfer any ornament having gold of a purity exceeding

fourteen carats; and no person shall place any order with any dealer, whether licensed or not for the making, manufacture or preparation of any such ornament. An exception is, however, provided by stating that any dealer having in his possession or custody any ornaments having gold of a purity exceeding fourteen carats on the aforesaid date (i.e., 9-1-1963) may sell or otherwise transfer such ornaments within a period of thirty days from that date or within such further period as the Board may. by general or special order, grant. Rule 126-D prohibits loans on 'hypothecation of any gold other than ornaments unless such gold has been included in a declaration or a further declaration made under Rule 126-1.

8. Chapter III deals with the licensing of dealers and refiners Sub-rule (1) of Rule 126-E provides that no dealer who is registered under any law with respect to sales-tax shalla carry on business as such dealer unless he holds a valid licence issued in this behalf by the Board. Sub-rules (2), (3), (4), (5), (6), (7), (8) and (9) provide for ancillary matters, such as the issue of such licences and the conditions and restrictions which they could contain as also for their cancellation. Sub-rule (10) (a) then provides that if a dealer who, being required by this rule to make an application for a licence, has failed to do so, or whose application for the issue of a licence has been rejected or whose licence has been cancelled. shall not, after the expiry of thirty days or after such rejection or cancellation carry on his business & shall within thirty days from the date of such expiry, rejection or cancellation deposit with the Board the entire quantity of gold in his possession on the date of such expiry, rejection or cancellation. Sub-rule (10) (b) permits the Central Government to purchase such gold at a price fixed by it under it.

9. We then come to Chapter IV which deals with the returns to be made by the dealers as also the accounts to be kept by them in respect of their gold transactions. Rule 126-F provides that every dealer required to apply for a licence, or licensed under the Rules, shall make a return to the Board as to the quantity, description and other prescribed particulars of gold in his possession or under his control in accordance with the provisions containd in Sub-rules (1) (a) to (d), (2) and (3) Rule 126-G provides for the keeping of accounts in a particular form prescribed under the Rules of the gold bought or sold or otherwise received or disposed of by the dealer at each transaction; while Rule 126-H prescribes

restrictions on possession and sale of gold by, inter alia, providing that (i) a dealer shall not possess any gold not included in his returns, (ii) he shall neither purchase nor sell gold other than ornaments except from or to a licensed dealer but may purchase gold from a non-dealer provided the gold so purchased is included in that person's declaration under Rule 126-1. (iii) he may accept ornaments from any person for repairing them, for polishing them or for making new ornaments out of them, and (iv) gold not required to, be declared may be sold or otherwise transferred by any person under and in accordance with a permit granted by the Board.

10. Chapter V then provides for declaration of gold by persons other than dealers, Sub-rule (1) of Rule 126-I says that every person, not being a dealer required to apply for a licence, or licensed under the Rules, shall within thirty days of 9th January 1963 make a declaration to the Board in the prescribed form as to the quantity, description and olher prescribed particulars of gold (other than ornament) owned by him Sub-rule (2) then specifies persons who are to make declaration in cases of minors, lunatics, idol. Court of Wards, etc. Sub-rule (3) says that no person shall acquire any gold other than ornament except by succession intestate or testamentary, or in accordance with a permit granted by the Board in this behalf. Sub-rule (4) provides that if such person does acquire any gold by succession, intestate or testamentary, or in accordance with a permit granted by the Board, or parts with any gold in his possession, not being ornament, he shall, as often as he acquires or parts with any quantity of gold, make, within thirty days of such acquisition or parting with, a further declaration to the Board in the prescribed form.

Under Sub-rule (6) if a person, who does act own any gold, not being ornament, at any time within thirty days from 9th January 1963, acquires by succession, intestate or testamentary, or in accordance with a permit granted by the Board, any quantity of gold, not being ornament, he shall make a similar declaration. Sub-rule (6) provides that the declaration aforesaid has to be made as many times as acquisition or parting with it is effected. Sub-rule (7) provides for the exemption limit for not making the aforesaid declaration in respect of gold other than ornament. Sub-rules (8) and (9) provide for the safe custody of the de-elarations

so made and how they are to he made. Sub-rule (10) then says that no person, other than a dealer, licensed under this Part, shall acquire or have in his possession or under his control any quantity of gold required to be declared under this rule, unless such gold has been included in a declaration or further declaration made thereunder. Sub-rule (11) generally deals with the burden of proof by stating that any person in possession or control of any gold, not being ornament, shall be presumed, until the contrary is proved, to be the owner thereof.

11. It would thus be seen that broadly speaking the Rules deal with three classes of articles, e.g., (a) gold ornaments of fourteen carats purity or under, (b) gold ornaments of purity over fourteen carats which were in existence on 9th January 1963, and (c) non-ornament gold. So far as the first category is concerned all persons, whether dealers or non-dealers, are free to make them or get them made. They are also free to sell or purchase them without any restriction whatsoever. They are also therefore, free to pledge them as security for loans. As regards the second category, the gold ornaments which were in existence on 9th January 1963 may be sold by the dealers upto 8th February 1963. Thereafter, they can only be sold by them after converting them into ornaments of fourteen carats purity or less. Their sale by private owners other than licensed dealers, is, however, not prohibited. Thev are free to sell or purchase them so long as they keep their identity intact. They cannot, however, re-make or re-manufacture them, though they may gel them repaired or polished. Their pledge as a security for a loan is also not prohibited. On and after 9th January 1963, the making or manufacture of gold ornaments of a purity above fourteen carats is absolutely prohibited as also the ordering of making or manufacturing of such ornaments.

As regards the third category e.g., non-ornament gold, its sale or purchase except under a licence is prohibited, tts possession above the exemption limit has to be declared in the prescribed form, it cannot be converted into ornaments of a purity above fourteen carats, it cannot be converted into non-ornament articles unless authorised by the Board and it can only be acquired by inheritance or can be sold to a licensed dealer, but all such acquisitions or partings have to be declared in the prescribed form. Its hypothecation is also prohibited unless it has been included in a declaration or further declaration which a non-dealer is required to make in

respect of his gold other than ornaments under Rule 126-I.

12. We shall now consider the three questions raised in this petition on which the parties are at issue.

13. The first question that arises for consideration is whether the dealers are required to furnish a list of gold ornaments pledged with them, and if so, by what date.

14. The petitioner contends that on a true construction of the Rules he cannot be required to do so, while the respondents contend that he is required to do so.

15. The respondents rely on the provisions of Rule 126-F for their view, while the petitioner urges that, that rule has no application to his case. Tt is contended by the learned counsel for the petitioner that a dealer has several capacities. He may be manufacturing and selling gold ornaments as a dealer. He may be accepting gold ornaments as security for loans advanced by him as a money-lender. Also, as an individual, he may be in possession of personal ornaments of gold. He may even be in possession of gold in one or more of the various capacities enumerated in Rule 126-I (2). What he is, by Rule 126-F, requir ed to do is to give a return of gold, including gold ornaments, which he holds in his capacity as a dealer. This implies that he would continue to be in possession of gold ornaments which he holds in his other capacities with out the obligation to include them in his returns.

16. In our opinion, the contention is well founded. Under Rule 126-F every dealer required to apply for a licence, or licensed, under this Part, shall make a return to the Board as to the quantity, description and oilier prescribed particulars of gold in his possession or under his control, in accordance with the provisions detailed in this Rule. The Rule thus enjoins on a dealer required to apply for a licence, or licensed, under this Part, to make a return prescribed by the Rule. The provisions of Rule 126-E then show that every dealer, who was doing the business of a dealer before 9th January 1963, and was registered under any law with respect to sales-tax, is required to be compulsorily licensed provided he intends to carry on the business of such a dealer in future, in which case he must hold a valid licence issued in this behalf by the Board for which he must apply as soon as possible

after 9th January, 1963 and, in any case, before thirty days therefrom; Consequently, a dealer, who was doing the business of a dealer before 9th January 1963 and was registered as such under the Sales Tax Act, is not a 'dealer required to apply for a licence' within the meaning of Rule 126-F (1), unless he evinces his intention to carry on the business of a dealer in future.

Thus, Rule 126-F has no application to non-dealers, nor to a person in his capacities other than a dealer, nor to a dealer who does not intend to carry on the business of a dealer in future and has expressed his unequivocal intention in this regard on or before 9th January 1963. Its application is limited to dealers who intend to carry on the business of a dealer in future on and after 9th January 1963, i.e., those who are making up their mind whether to carry on the business of a dealer in future, those who have applied for a licence and their applications are pending, and those who have been granted licences. But, even as regard such persons, what the Rule requires is that they shall declare their stock-in-trade qua dealers, with which capacity alone of the dealer the Rule deals The suggestion that under Rule 126-F a dealer required to apply for a licence, or licensed, under this part, must declare all gold under his possession and control under whatever capacity it is held does not commend itself to us for three weighty reasons to which we do not find any adequate answer.

The first is that, there is no indication in the Rules that, such dealers, simply because they happen to be dealers who intend to carry on the business of a dealer in future, have been placed in any special disadvantageous position in respect of their possession of gold as individual private householders or as managers of deities or guardians of minors, etc. There is no adequate reason to discriminate against them in their capacity as private individuals, and consequently a construction, which avoids this anomaly, ought ordinarily to be preferred unless the law in clear terms had provided otherwise. The second reason is that the Rule concerns itself with the capacity of a person as a dealer and not with his other capacities, and consequently all gold in his possession and control qua dealer alone is meant to be returned in their declarations under the Rule. The third, which we consider is of somewhat greater importance is that under Rule 126-E (10), certain disabilities have been prescribed against a dealer, who, being required to

make an application for a licence fails to do so within the prescribed period, or whose application for a licence has been rejected, or whose licence has been cancelled, in that he has to cease his business and deposit with the Board ' the entire quantity of gold in his possession on the date of such expiry, rejection or cancellation, which the Central Government is empowered to purchase at the rate of Rs. 53.58 n.p. per 10 grams.

Now, if all dealers were required to make returns of all gold in their possession in all their various capacities, and if the intention was that on their ceasing to be dealers, either because they did not intend to carry on the business of a dealer and therefore, did not apply for a licence or because their applications for licence were not granted or because their licences were cancelled, all their gold was to be compulsorily acquired by the Central Government at the rate fixed, a very onerous liability was being thrust on persons who were doing the business of a dealer as defined in the Rules. There is no indication in the Rules that the dealer was being singled out for this discriminatory treatment, nor is there reason to believe that the scheme of the Rules is that he was to be so very disadvantageously treated than others. For a result so far reaching we would require a positive rule and not allow It to be spelled out by implication by ah unwarranted straining of the language of the Rules.

We are, therefore, of opinion that Rule 126-F is concerned with the capacity of a person qua a dealer alone, and consequently the return that he is required to furnish is of his stock-in-trade qua a dealer only and not of the gold possessed by him in his various other capacities, if any. On this reasoning, the pledged ornaments of which he is in possession as a pledgee or a money-lender have not to be declared because he is not in possession or control of them as a dealer as defined in the Rules.

17. On the other two points, we are of opinion that, dealers are not prevented by any provision contained in Part XII A from returning gold ornaments pledged with them to the owners or from accepting in future such ornaments as security for loans. The only provision prohibiting loans on hypothecation is the one contained in Rule 126-I). which reads :

' As from the commencement of this part, no person shall make, advance, or grant any loan to any other person on the hypothecation, pledge, mortgage or charge of any gold other than ornament unless such gold has been included in a declaration or a further declaration made under Rule 126-I.'

The prohibition contained in this Rule is confined to non-ornament gold, which has not been included in a declaration or a further declaration under Rule 126-I. and it expressly excludes from ils operation gold ornaments. The learned counsel for the respondents made the point that the word ' person ' in the expression 'no person' occurring in the Rule does not include dealers and also endeavoured to show that there are other provisions impliedly prohibiting transactions by dealers involving pledges of gold ornaments. We do not agree. We are unable to find any provision, apart from Rule 126-D, nor was the learned counsel for the respondents able to point oul to us any, which expressly or impliedly prohibited the dealers from doing the business of money-lending by advancing loans on the hypothecation of gold; and if the prohibition contained in Rule 126-D was held to be not applicable to them, they would be free of even such restrictions as the Rule imposed, for, if we were to accept the interpretation urged by the learned counsel for the respondents, the position would be that dealers would be free to enter into transactions involving pledges of gold other than gold ornaments, provided that they had included all such gold in their returns and accounts as envisaged by Rules 126-F and 126-G.

On the other hand, if the word ' person ', was held to include a dealer, by implication he would be absolutely prohibited from pledging his non-ornament gold as there is an absolute prohibition in regard to it, and the only exception in respect of gold declared under Rule 126-I was not applicable to their cases qua dealers. We are, therefore, of opinion that the word ' person ' in Rule 126-D includes a dealer as envisaged in the Rules.

18. It may here be mentioned that it is implicit in the view we are taking thai if dealers are in possession of any gold other than ornament in their other capacities wherein it is required to be declared under Rule 126-I, they have to do so.

19. The question then is whether the memorandum dated 22-1-1968 could be quashed and whether the respondents could be restrained from interfering with the business of the petitioner as a pledgee of gold ornaments. Here, the respondents are right in contending that the memorandum only contained the opinion of the writer of that memorandum against whom certiorari did not lie. Similarly, there is no threatened act against the petitioner, which could be restrained by a writ, order or direction prohibiting the respondents from interfering with the business of the petitioner relating to pledge of ornaments.

20. It is true that an opinion wrongly held by a person in authority may often times constitute a real threat to even law-abiding citizens in the discharge of their legitimate functions; but we hope and trust that what ever erroneous impressions the respondent authorities may have carried so far would have been cleared by our aforesaid discussion, and that their erroneous impressions as to the state of the law under the Rules would no more be a threat to the lawful activities of the petitioner and others in respect of their business as pledgees of gold ornaments.

21. The petition is dismissed. There shall be no order as to costs The amount ofsecurity deposited by the petitioner shall be refunded to him.

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