

Sushil Kumar and Others Vs. Collector of Central Excise and Others

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Court : Delhi

Decided On : Nov-03-1981

Reported in : 1983(12)ELT687(Del)

Judge : T.P.S. Chawla, J.

Acts : [Central Excise Tariff Act, 1985](#)

Appeal No. : Civil Writ Petition No. 1014 of 1973

Appellant : Sushil Kumar and Others

Respondent : Collector of Central Excise and Others

Judgement :

ORDER

1. On 9th July, 1968, the officers of Central Excise, Nagpur, seized a large quantity of gold from a house in Kamptee. The gold has been ordered to be confiscated under the Gold (Control) Ordinance 1968. The confiscation quashed and the gold delivered to them.

2. The law relating to the control of gold is of recent origin. It was first introduced in this country in 1963. Over the next decade it was frequently amended and thereby underwent many changes. For purposes of this case it is necessary to trace the changes in the law as regards ownership and possession of primary gold, so as to see what legal result the facts produced from time to time. But before I do that, the

facts themselves need some considerable exposition.

3. Some thirty years ago there lived a gentleman by the name of Keshrimal Porwal at Kamptee. He had two flourishing businesses : a bidi factory at Kamptee, and a gold and silver shop in Mandsaur. He had residences at both those places. On 7th October, 1952, he died of tuberculosis at the age of 65. He left behind a widow named Ratanbai, a daughter named Shantabai, and a son named Nemkumar. Both the daughter and son were married, and each had a son whilst Keshrimal was alive. The son of Shantabai seems to have suffered from some congenital abnormality and was almost an invalid from birth. It is said that he is also insane. Shantabai had no more children. However, Nemkumar had four more sons after Keshrimal died, making five in all.

4. After Keshrimal's death, his son Nemkumar carried on the bidi factory at Kamptee, but wound up the gold and silver business at Mandsaur. In consequence, the permanent abode of the family was at Kamptee, though the house at Mandsaur was retained.

5. Nearly sixteen years after the death of Keshrimal, the family house at Kamptee was searched on 9th July, 1968 by the officer of the Central Excise, Nagpur. Inside a Godrej cupboard they found a big Godrej iron safe, in the bottom drawer of which were lying 10 slabs and 9 pieces of gold and 230 gold coins. These were seized and are the subject matter of the present petition. At that time the gold seized was valued at Rs. 7,63,200.00. I was told it should be worth almost half a crore of rupees now.

6. On the next day, 10th July 1968, the statements of Ratanbai and Nemkumar were recorded. Ratanbai's statement was extremely brief, rather less than half a page. She said the gold which had been found was the selfearned property of her late husband. She said : 'I do not know how many slabs of gold were there, because a sufficiently long time has elapsed'. The gold, she explained, has been kept by her in the safe 'about 8 or 9 years ago', and the keys of the safe had all along remained in her possession. She added : I have not so far decided as to whom I shall give this gold, whether to my son or to my daughter.'

7. 'Nemkumar's statement was much longer. The sum and substance was that he knew nothing about the gold and came to know of its existence for the first time when it was found during the search. The keys of the safe had always remained with his mother, and he had never asked her what she kept inside it. He said that he had bought the safe 'almost 8 or 9 years back' from the agents of Godrej & Co. in Nagpur.

8. On 29th July 1968, Ratanbai filed a declaration with the Gold Controller, Nagpur, in respect of seized gold. She referred to it as 'gold earned by my husband and meant for grandsons'. After giving particulars of the gold, she ended by saying that although there was 'no necessity of making any declaration, still, as a precautionary measure. I declare the gold left by my husband for my grandsons, about which no one had any knowledge heretofore'. The declaration contained no elucidation of these mysterious and intriguing statements.

9. The Collector of Central Excise, Nagpur, then served separate notices dated 21st August, 1968 on Ratanbai and Nemkumar. They were asked to show cause, within ten days of the receipt of the notice, why the gold should not be confiscated and a penalty imposed. It is worth noticing that whereas it was alleged against both that they had been 'in possession, custody or control of primary gold' in contravention of the Gold (Control) Ordinance 1968, the allegation of having 'owned' it in violation of the Ordinance was made only against Ratanbai. This indicates that the Collector was treating Ratanbai as the owner of the gold, presumably because of the statement she had made on 10th July 1968.

10. On 3rd September 1968, both Ratanbai and Nemkumar wrote to the Collector praying that time for answering the notice be extended by a fortnight. Ratanbai said he was bedridden due to a 'severe attack of high blood pressure, diabetes and heart trouble; and had been advised to take complete rest. Nemkumar said he was unwell and felt giddy, and was having a 'nervous break-down'. On 19th September 1968, further requestes were made to extend time by another fortnight. Ratanbai said she was still 'not quite well'. Nemkumar said he had not been able to prepare his reply due to 'some urgent work connected with income tax'.

11. But, in the meanwhile, on 16th September 1968, Ratanbai addressed a letter to the Superintendent, Central Excise, Nagpur. She said that in her statement recorded on 10th July 1968 a mistake had crept in, probably due to the fact that she and the Excise Officers did not speak the same language. She asserted that what she actually said was that she had kept the gold in the safe 'about 8 or 9 days ago' and not '8 or 9 years ago', and asked for the word 'days' to be substituted for 'years'.

12. Ultimately, Ratanbai sent her reply to the notice 28th September, 1968. It contained a most remarkable story. Nemkumar also sent his reply corroborating what his mother had said. He disclaimed any interest in the gold. Briefly, their tale was as follows.

The businesses started by Keshrimal prospered so well that he rapidly became very rich. As was the wont of the Marwari community, to which he belonged, he accumulated large quantities of gold and silver by purchase from time to time. Yet, he was an unhappy man. In 1950, his daughter, Shantabai, had given birth to a son who was an invalid and of unsound mind. This had caused the relations between her and her husband to become strained. Nemkumar was proving to be a wrothless son. He was neither interested in learning the father's businesses, nor in educating himself. He left school without passing the 9th class examination, and was whiling away his time in eating, drinking and being merry. The relations between Nemkumar and his mother Ratanbai were also strained. On top of all this, Keshrimal contracted tuberculosis towards the end of his life. He could not be cured despite all treatment, and eventually the disease killed him.

13. In his last years, Keshrimal was extremely worried about the future of his family after his death. He was anxious to make provision for his grandsons, both living and unborn. So, on 18th February 1952, when he happened to be in Mandsaur, he secretly made a will. It was written by his munim Motilal, in whom he reposed the utmost confidence. One of the attesting witnesses was his close friend, Seth Kajodimal of Udaipur. The other was Mr. A. A. Patil, the then Collector of Mandsaur. He exhorted them all to keep the will a secret. He did not speak about the will to any member of his family not even to his wife. About eight months

afterwards, on 7th October 1952, he died.

14. After Keshrimal's death, Nemkumar took charge of the businesses. He closed the gold and silver shop in Mandsaur, and dismissed the munim Motilal. Thereafter, the family rarely visited Mandsaur though the family house remained on the ensuing years, Ratanbai spent the money Keshrimal had left with her, and it was soon finished. Nemkumar would give her no substantial sum, and hence she was unable to make gifts to charities or to her daughter and her daughter's son as she desired. In consequence, the relations between Nemkumar and Ratanbai deteriorated further.

15. Sometime in June 1968, the family decided to go on pilgrimage to Keshariyaji. Enroute, they stopped at Mandsaur. There, a quarrel occurred between Ratanbai and Nemkumar, and she decided to stay back in Mandsaur whilst Nemkumar and his family proceeded to the place of pilgrimage. Ratanbai stayed in Mandsaur for the next five or six days.

16. Learning that Ratanbai was in Mandsaur, the dismissed munim, Motilal, came to meet her. In the course of conversation she narrated her woes, and told him how miserably her son Nemkumar was treating her. At one point she expressed her grave anxiety about future provision for her daughter's invalid son. It was then that Motilal inquired what had become of the gold and silver which Keshrimal had left for his invalid grandson in his will. Ratanbai said she knew nothing about any will. Motilal then told her about it, and said Keshrimal had kept it in the safe in the house. The safe, embedded in the ground, was then carefully searched and the will was discovered. It mentioned that the gold and silver bequeathed were buried in the cellar. So, with the assistance of the driver, Madanlal Parikh, a servant, Babulal, and the munim, the cellar was dug up and the gold and silver were recovered. This was on 30th June, 1968.

17. Ratanbai then brought the gold and silver in a steel box to Kamptee, and placed the same in the safe of which she had the keys. She was still debating whether to distribute the gold in accordance with her husband's will or keep it with herself and utilise it as she wished, when the excise officers came and seized it on 9th July, 1968. It was in these circumstances that she had not filed a declaration

during the 8 or 9 days that she had been in possession of the gold. However, she did afterwards make a declaration within 30 days from the date of acquisition, as allowed by the law. The question of filing a declaration before 30th June, 1968, did not arise because she was not aware of the existence of the gold.

18. Along with her reply, Ratanbai enclosed affidavits of some of the witnesses, a letter from Mr. A. A. Patil who had been Collector of Mandsaur, and a photocopy of Keshrimal's alleged will. The original will was handed over to the income tax authorities before whom proceedings were taking place simultaneously.

19. In the will, the testator recites that he has been suffering from tuberculosis and does not know how long he will survive. He describes his family and mentions that his wife and son are not on good terms. After expressing a doubt whether his son will be able to manage his businesses, he continues :

'Under these circumstances, my son will be the owner of my business, but in order to provide some guarantee for future of my son's sons and daughter's son, who is crippled and minor, I have buried 10 slabs of gold weighing about 2,500 tolas, 9 pieces of gold weighing about 1,000 tolas, 201 gold coins and 6 silver ingots, which was purchased piecemeal by me from my earnings, in the cellar of my house at Mandsaur.'

He directs that each of his grandsons, living or born in future, should be given 500 tolas of gold at the time of his marriage, and any excess remaining should be equally divided between them. He specifically states : 'My son has no right over this gold'. The silver pieces are bequeathed to the 'newly born' grandsons. But except for this gold and silver, he says, 'my son will be the owner of all the movable and immovable properties'. He adds : 'I have already made provisions for my wife by giving her money.' These are the salient features of the will.

The order of the Collector

20. Evidence was recorded in the proceedings before the Collector. Ratanbai and Nemkumar produced a number of witnesses including Motilal, Seth Kajodimal and Mr. A. A. Patil. Some of the officers of the department who had participated in the

seizure of the gold were allowed to be cross-examined. The Collector made his order on 15th May 1970. He ordered the gold to be confiscated and imposed a penalty of Rs. 38,000.00 on Ratanbai.

21. The findings of the Collector are important. He held that the will was proved to be genuine. This is what he said :

'The condition of the will, the statements of independent and respectable witnesses like Shri Patil and Shri Kajodimal and also that of dismissed Motilal cannot be disbelieved. It has been corroborated by the report of the Superintendent (Legal) that Shri Patil was the Collector, Mandsaur at the relevant period. Shri Patil had admitted the signatures on the will in his deposition on 28.11.68 before the Superintendent, Central Excise (Legal). Shri Patil by a letter dated 17.8.68 addressed to Nemkumar testified this fact. A copy of his letter was filed by the defense and is on record. In these circumstances, the execution of the will cannot be lightly brushed aside. But in view of the facts on record, the will is hardly relevant on the point of time, as the gold was recovered from the residential premises of Shri Nemkumar on 9.7.68.'

The meaning of this last sentence is not clear. I have not been able to understand what the Collector meant when he said 'the will is hardly relevant on the point of time.....'. Nor has counsel for the Union been able to explain it. As will appear later, the will is the most critical factor in the case,

22. With regard to the alleged discovery of the will and the gold at Mandsaur on 30th June, 1968, the Collector said : 'This entire story appears unnatural and made up and is incredible'. He held that the facts and the evidence led to an 'irresistible conclusion that Smt. Ratanbai had full knowledge of the gold and was in conscious possession of it for at least 8-9 years.

So far as Nemkumar was concerned the Collector held :

'Whereas, therefore, there is strong doubt about the conduct of Nemkumar Porwal in the present case, it is difficult to sustain the charge of possession, custody and control of the gold, against him in view of the vagueness of the

evidence and lacuna in investigation. According to the accepted principles, therefore, a benefit of doubt will have to be given to Shri Nemkumar.'

Accordingly, it was only Ratanbai who was found to have violated the law, and that is why the penalty was imposed only on her.

23. At one place in his order the Collector says, 'From the evidence on record the gold has been owned by Smt. Ratanbai Porwal, mother of Nemkumar Porwal'. In the last paragraph he says she has admitted the recovery of gold and also its ownership. These statements are not accurate, because as the Collector himself mentions earlier, it was argued before him 'that ownership of gold was of the minor sons of Nemkumar and the lunatic son of Smt. Shantabai' and, therefore, 'there was no question of any confiscation as they were not party to the proceedings'. Probably, what the Collector meant was that Ratanbai had admitted that she had been in 'possession' of the gold as opposed to Nemkumar.

The Order of the Administrator

24. Against the order of the Collector, Ratanbai appealed to the Administrator. Whilst the appeal was pending, she was asked by the letter dated 30th July, 1971

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'.....whether you intend to apply to the adjudicating authority in accordance with section 4 of the Gold (Control) Amendment Act, 1971 for reopening of your case for fresh adjudication according to the amended provisions of Sections 71 and 73 of the Gold (Control) Act, 1968 or whether you would like your appeal to be disposed of in conformity with the above amended sections.'

25. To this she replied by a letter dated 12th August 1971, that she did not intend to apply to the adjudicating authority for reopening the case for fresh adjudication, and wanted her appeal to be disposed of in conformity with the said amended sections. However, she submitted that in deciding the appeal it should be taken into consideration that the gold did not belong to her but to her grandsons, and it was sought to be confiscated, not for any fault of theirs, but the alleged act or omission of another without their knowledge or connivance. Therefore, she

contended, that under the newly added proviso to section 71 the gold could not be confiscated. The meaning and purpose of all this will become clear later.

26. The Administrator dismissed the appeal on 23rd February, 1971, except that he released one gold coin because it was 'classifiable as a coin' and hence, not 'primary gold'. In all other respects he upheld the findings of the Collector. He rejected the story regarding the discover of the will and the gold in Mandsaur on 30th June, 1968. He described it as an attempt 'to weave round the terms of the will a plausible defense plea'. But throughout the order he casts no doubt on the will though he agrees with the Collector that it was hardly relevant on the point of time.....etc. It is implicit in his order that the will is genuine.

27. Nevertheless, he refused to accept that the grandsons were the owners of the gold, and not Ratanbai. His reasoning on this point is obscure. He seems to have thought that this question was in some way connected with the story about the discovery of the will and the gold in Mandsaur at the end of June 1968, and since that story was rejected this plea had to be rejected also. He does not seem to have realised that if the will was genuine the ownership of the gold had to vest in the grandsons, no matter that the rest of the case was found to be false.

Order of the Central Government

28. Ratanbai then applied to the Central Government on 14th July, 1972 for revision of the order of the Administrator.

29. Simultaneously, Sushil Kumar, the eldest son of Nemkumar, also applied for revision of that order. He was not 20 years old, and had been married on 20th November, 1971. He said that in accordance with the will of his grandfather, the genuineness of which had been accepted by the Collector and the Administrator, he was entitled to at least 500 tolas of the gold which had been seized and so was a person aggrieved. He contended that the alleged act or omission of his grandmother, which had rendered the gold liable to confiscation, was without his knowledge and, connivance and, therefore, the gold could not be confiscated in view of the newly added proviso to section 71(1) of the Gold Control Act, 1968. In any case, he said he and the other grandsons of Keshrimal had not been given an

opportunity to substantiate their claim to the ownership of the gold and thus, the principles of natural justice had been violated. For these reasons he prayed that the order of the Administrator be set aside.

30. By a letter dated 31st July, 1971, the Central Government summarily rejected Sushil Kumar's application. He was told that under section 82(1) of the Gold Control Act, the 'revision application has to be against the order from which no appeal lies', and since he had not 'come up in appeal' he was 'ineligible to take recourse to revision remedy'. The reasoning is incomprehensible. There is no doubt that the order made by the Administrator was not appealable, so the condition in section 82(1) was fulfilled. That Sushil Kumar had not, or would not, file an appeal against the order of the Collector had nothing to do with the point. Although in a subsequent letter Sushil Kumar made manifest this fallacy, the Central Government answered that the decision already conveyed to him was 'final'. So, this present petition under Article 226 of the Constitution has been filed by him along with his four brothers and the son of Shantabai, i.e. all the grandsons of Keshrimal.

31. The application for revision filed by Ratanbai was dismissed by an order dated 3rd May, 1973 made by Mr. M. R. Yardi, Secretary to the Government of India in the Ministry of Finance (Department of Revenue and Insurance). After recounting the contentions of counsel for Ratanbai, the Secretary purports to identify the issues for determination. He says :

'The main issues are whether the gold under confiscation is the same gold as was mentioned in the will executed on the 18th February, 1952 by the late Shri Keshrimal and whether the gold in question was discovered towards the end of June, 1968 and that prior to that the Applicant had no knowledge of its existence. The Government of India observes that the genuineness of the will is not in question. What has been the question, however, is the identity of gold with the gold mentioned in the will.'

I must say that this was a palpable misrepresentation of the orders of the Collector and the Administrator, if not a positive untruth. Neither of those officers had ever raised any question or doubt about the gold seized being the same as that

mentioned in the will. They had assumed that it was, though they had gone on to hold the will to be 'irrelevant' for reasons good or bad. If they had thought that the gold seized was not that mentioned in the will, that finding would have been enough and there was no need to declare the will 'irrelevant'. In these circumstances to say : 'What has been the question, However, is the identity of the gold with the gold mentioned in the will', is directly contrary to the fact.

32. The Secretary then makes a detailed comparison of the gold seized with that mentioned in the will and reaches the conclusion that it is not the same. However, it is important to observe that he, too concedes, in the passage quoted, that 'the genuineness of the will is not in question'. Or, in other words, he accepts that it is genuine.

33. The story as to the discovery of the will and the gold on 30th June 1968 in Mandsaur is then examined and rejected as being 'difficult to believe'.

34. Of course, the questions of law which would have arisen had it been found that the grandsons of Keshrimal were the owners of the gold seized, did not now arise for consideration because of the finding that the gold seized was not the same as that mentioned in the will. Having regard to what will soon follow, I find it difficult to resist the suspicion that the secretary stirred up the question of the identity of the gold for the first time in revision, and decided it in the way in which he did, because he did not wish to face those questions.

The Facts

35. What then are the facts as found by the gold control authorities

They have all found the will to be genuine. The finding is either express or implied. For my part, I entertained substantial doubts. There was practically no cross-examination of the witnesses produced by Ratanbai and Nemkumar before the Collector. Numerous questions which ought to have been asked were never put to them. To get at the truth, I was minded to call Motilal and Mr. A. A. Patil for cross-examination. But, after making inquiries, counsel for the petitioners informed me that both those gentlemen were now dead. thereforee, there is no option but to

proceed on the footing that the will is genuine.

36. As regards the alleged discovery of the will and the gold in Mandsaur on 30th June, 1968, all the authorities have disbelieved the story. They have held, on the basis of Ratanbai's statement of 10th July, 1968, that she was in possession of the gold for at least 8 or 9 years before it was seized on 9th July, 1968.

37. The remaining question is whether the gold seized is the same as that mentioned in the will. The Secretary acting on behalf of the Central Government, has held that it is not. For reaching that conclusion he relies on two discrepancies. First, that the number of gold coins does not tally : 230 were seized, whereas the will mentions only 201. Second, that the weight of the 9 pieces of gold does not match : those seized weighed 916 tolas; the will says they weight 'about 1000 tolas'.

38. In my opinion, the reasons given by the Secretary pale into insignificance when the matter is viewed as a whole. Admittedly, the 10 slabs of gold tally, both in number and in weight. The number of the pieces of gold also tallies, and the difference is only in the weight. But the will does not purport to give their exact weight, for it uses the word 'about'. The difference between 916 and 1000 tolas is not so large as could not be encompassed by that word. As regards the gold coins, there is certainly a discrepancy of 29. But neither Ratanbai nor Nemkumar nor any of their witnesses were questioned on this point. There may have been many explanations; and obvious one being that the testator added some more coins to the collection after executing the will, and did not remember to correct it. The six silver ingots mentioned in the will were also found in Ratanbai's safe.

39. Looking at the overall position, the most striking feature is that slabs, pieces and coins of gold and ingots of silver are the subject-matter of the will, and what is seized is precisely the same. The numbers and the weights also tally, except in the two small respects noted by the Secretary. It is impossible to believe that this was all a coincidence. Therefore, no reasonable person could have arrived at the conclusion at which the Secretary did. This is borne out by the fact that neither the Collector nor the Administrator considered the point even worthy of notice. And, the point was an obvious one.

40. The Secretary's conclusion is thus 'arbitrary and capricious' and can be interfered with under Article 226 of the Constitution : see *M/s Parry and Co. Ltd. v. P. C. Pal*, Judge of the Second Industrial Tribunal, Calcutta and others, : (1970)IILLJ429SC . No purpose will be served by remanding the case back to the Central Government for a fresh decision because all the available evidence is already on record, and the matter has been under litigation for over a decade. I think the only fair course is to proceed on the basis that the gold seized is the same as that mentioned in the will, as did Collector and the Administrator.

41. So, the facts to which I must now apply the law are : (i) that the will is genuine (ii) that the gold seized is that mentioned in the will and (iii) that Ratanbai had been in possession of the gold at least for 8 or 9 years before it was seized on 9th July, 1968, if not from some earlier point of time. Further, from the fact that the will is genuine, it inevitably follows that Keshrimal's grandsons became the owners of the gold from the moment of his death.

I pass on to the law.

The defense of India (Amendment) Rules, 1963

42. It will be remembered that in 1962 there was an outbreak of hostilities with the Chinese on the North-Eastern border. On 26th October, 1962, the President of India issued a Proclamation declaring that 'a grave emergency exists whereby the security of India is threatened by external aggression'. The defense of India Ordinance 1962 was issued on the same day. It was replaced on 12th December 1962 by the defense of India Act 1962. In exercise of the powers conferred by section 3 of that Act, the defense of India Rules, 1962 were made by the Central Government.

Those rules, as originally framed, did not contain any provision respecting control of gold. But, by the defense of India (Amendment) Rules, 1963 a new Part XIIA was inserted. This comprised rules 126A to 126Z and was entitled 'Gold Control', the Amendment came into force on 9th January, 1963.

By the rules in the new Part XIIA, restrictions were placed on the making of ornaments and acquisition and possession of primary gold. To carry out the purposes of this Part, a Gold Board was constituted. The rules classified persons as dealers, refiners and others. Dealers and refiners were required to obtain a license, maintain accounts, file returns and so forth.

I am not concerned with them, because no one in the present case falls within those categories.

43. Rule 126A contained the 'definitions'. It is apparent from clauses (d), (f) and (g) that 'gold' is the generic term, and is defined widely so as to include both an 'ornament' and 'primary gold'. The essential difference between an 'ornament' and 'primary gold' seems to be that whereas the former is any article 'in a finished form' made of or manufactured from gold, the latter means gold in 'any unfinished form'. There is no dispute in the present case that the gold that was seized is 'primary gold' and, therefore, I need not dwell on the definitions any further.

'Restrictions on possession and sale of gold' were imposed by rule 126H. Most of the sub-rules of that rule pertained to dealers and refiners, but sub-rule 2(d) was of general application. It said :

'Save as otherwise provided in this part, -

* * * * * (d) no person other than a dealer licensed under this Part shall buy or otherwise acquire or agree to buy or otherwise acquire gold, not being ornament, except

(i) by succession, intestate or testamentary, or

(ii) in accordance with a permit granted by the Board in this behalf :'

I leave out the proviso, which is not relevant. Thus, as regards persons other than a dealer, there was an almost total ban on the acquisition of gold, other than ornament. That is the ban applied to primary gold. It was subject only to the two exceptions in sub-clauses (i) and (ii).

44. Rule 126I enjoined the making of a 'Declaration as possession of gold other than ornament'. It consisted of eleven unwieldy sub-rules of which the drafting was cumbrous and repetitive, probably because they were done in a hurry. I will summarise their material aspects. But, sub-rule (i) needs to be quoted in full. It said :

'Every person, not being a dealer or refiner required to apply for a license, or licensed under this Part, shall within thirty days from the commencement of this Part make a declaration to the Board in the prescribed form as to the quantity, description and other prescribed particulars of gold (other than ornament) owned by him.'

To remove doubts, sub-rule (2) specified who was to make the declaration in certain case. With respect to minors, clause (a) of this sub-rule said the declaration had to be made by the 'guardian'. But, if the quantity of gold was less than limits specified in relation to various classes of persons by sub-rule 7 no declaration was necessary. This was, so to speak, the free limit.

45. The acquisition of gold, other than ornament, was again prohibited by sub-rule (3), except 'by succession, intestate or testamentary' or 'in accordance with a permit granted by the Board. This sub-rule seems to have overlapped with sub-rule 2(d) of rule 126H, to which I have already adverted. If any gold, other than ornament, was acquired under the two exceptions, a declaration or further declaration was required to be made. A further declaration had also to be made when any such gold, already declared, was 'parted with' : vide sub-rules (4), (5) and (6). And sub-rule (10) laid down that -

'No person other than a dealer and a refiner, 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 there under;..... '

So, the acquisition, possession or control of gold without a declaration was hence forth illegal.

46. Under rule 126L power was given to search any premises and seize any gold in respect of which it was suspected that any provision of this Part has been, or is being, or is about to be contravened'. The gold so seized was liable to confiscation under rule 126M. A penalty could be imposed under rule 126P on the person who had failed or omitted to file any declaration without any reasonable cause.

From these provisions, which I have outlined, it is apparent that if the gold had been seized from Ratanbai when Part XIIA was in force, it would have been liable to confiscation because, admittedly, no declaration had been made in respect thereof. Since, by virtue of the will, the grandsons of Keshrimal were the owners of the gold as from 7th October, 1952, when he died, a declaration ought to have been made by Nemkumar as their guardian; for rule 126I imposed the obligation on the person who 'owned' the gold. That Ratanbai was in possession would make no difference, just as if it had been lodged in a bank or a safe deposit vault. But, in any case, she did not make a declaration either. So, on any view, the gold could have been confiscated.

The defense of India (Fourth Amendment) Rules, 1966

47. Although a Gold (Control) Act was passed by Parliament in 1965, it was never brought into force. Instead, the defense of India (Fourth Amendment) Rules were notified on 1st November, 1966. Amongst other things, the amendments sought to ban altogether private possession of primary gold, and obtain declaration of holdings of ornaments about specified limits. Rules 5, 9 and 10 of the Fourth Amendment Rules did not come into force immediately. By rule 1(2), it was left to the Central Government to appoint a date for their enforcement. They were brought into force on 1st March, 1967 by a notification issued on 25th February, 1967.

Rule 9 amended rule 126H. It inserted sub-rules (1A) to (1G) after sub-rule (1) of that rule. The ban on the possession of primary gold was stated in sub-rule (1A) as follows. -

'No person (other than a dealer or refiner licensed under this Part) shall, after the expiry of a period of six months from the commencement of the defense of India

(Fourth Amendment) Rules 1966, either own or have in his possession, custody or control any primary gold.'

During the grace period of six months allowed by this sub-rule, all primary gold was required to be disposed of by sale to a refiner or a dealer or by conversion into ornaments. Details of the procedure to be followed for this purpose were set out in sub-rule (1b). The other newly added sub-rules ensured that the primary gold was either converted into ornaments or standard gold bars. The period of six months, reckoned from 1st March 1967, expired on 1st September 1967. Consequently, after that date no one, other than a dealer or refiner, could be in lawful possession of primary gold. Not even if he had made a declaration under rule 126I.

48. Another part of rule 9 added two provisos after the already existing proviso in clause (d) or sub-rule (2) of rule 126H. The first of the new provisos said :

'Provided further that no person shall, after the expiry of a period of six months from the commencement of the 'defense of India (Fourth Amendment) Rules, 1966, acquire any primary gold by succession, intestate or testamentary'.

Hence, after 1st September, 1967, primary gold could not be acquired even by succession, whether intestate or testamentary.

Rule 12 of the Fourth Amendment Rules substituted a new sub-rule (1) for the existing sub-rule 126I. The new sub-rule required 'every person' to make a declaration only in respect of 'any article or ornament, or both, owned by him'. It did not mention 'gold'. A declaration in respect of primary gold was, therefore, no longer required or contemplated. The reason obviously was that declarations in respect of primary gold, already held, were presumed to have been made under the original sub-rule (1) of rule 126I, and, after that was disposed of by 1st September 1967, primary gold could neither be owned nor possessed by a person other than a dealer or refiner.

What was the impact of the Fourth Amendment Rules on the case in hand Simply, that Ratanbai's possession of the gold became doubly unlawful after 1st

September 1967. First, because no declaration had been made, and, second, because possession of primary gold was banned. So, for both those reasons, it could have been seized under rule 126L and confiscated under rule 126M.

The Gold (Control) Ordinance and the Act of 1968

49. The Gold (Control) Ordinance 1968 was promulgated on 29th June 1968. It repealed Part XIIA of the defense of India Rules 1962. The Ordinance itself was repealed by the Gold (Control) Act, 1968, which came into force on 1st September 1968. The Act also repealed the gold (Control) Act 1965 which still lay dormant on the statute book.

50. Since the gold in the present case was seized on 9th July, 1968, when the Ordinance was in force, but the Act had superseded it when proceedings were afoot, a question may have arisen whether the law applicable was that in the Ordinance or the Act. However, as it happens, the provisions of the Ordinance and the act are verbatim the same (except, that the Act has one section less), so the question loses all importance. For convenience, I will refer to the provisions of the Act, treating it as having come into force on 29th June 1968. It is understood, that where necessary, the equivalent provision of the Ordinance is meant.

The ban with regard to primary gold was embodied in section 8(1). It reads as follows : save as otherwise provided in this Act, no person shall -

- (i) own or have in his possession custody or control, or
- (ii) acquire or agree to acquire the ownership, possession, custody or control of, or
- (iii) buy, accept or otherwise received or agree to buy, accept or otherwise receive, any primary gold.'

Comparing this with sub-rule (1A) of the amended rule 126H of the defense of India Rules, it can be seen that the ban now was less absolute. The opening words : 'Save as otherwise provided in this Act' had no equivalent in the rule. They indicate that the section has exceptions, the rule envisaged none. To expound his argument, counsel for the petitioners identified the various sections in which the

ban is relaxed, but he rested his case only on sections 16(3) and (4). So I will confine myself to them.

The side-note of section 16 reads : 'Declarations as to articles or ornaments'. That is exactly what sub-sections (1) and (2) deal with. They make no reference to 'gold', except in the second proviso to sub-section (1) which says :

'Provided further that nothing in this sub-section shall be construed as enabling any declaration to be made in respect of any gold for which the period prescribed or allowed under the law for the time being in force before the commencement of this Act had expired before such commencement.'

It is plain that the Act does not intend to grant any amnesty for defaults in making declarations under the earlier law.

The sub-section (3) states as follows :

'If any person who did not own, possess, hold or control before the commencement of this Act, any quantity of gold in excess of the quantities specified in sub-section (5), acquires, after such commencement, the ownership (whether by succession, intestate or testamentary, or otherwise), possession, custody or control of any gold and if, as a result of such acquisition, the total quantity of gold owned, possessed, held or controlled by such person exceeds the quantities specified in sub-section (5), such person shall, within thirty days from the date of such acquisition or within such further period as the Administrator, may, on sufficient cause being shown, allow, make a declaration in the prescribed form stating the total quantity, description and other prescribed particulars of -

(a) the gold owned, possessed, held or controlled by him immediately after such acquisition, and

(b) the person from whom the ownership, possession, custody or control of such gold was acquired.'

Here, the word used is 'gold'. The definition in section 2(j) says that it 'includes primary gold, article and ornament'. But the problem is that sub-section (5), which

specifies the free limits, does not mention primary gold but only 'articles' and 'ornaments'. If 'gold' in sub-section (3) intended to cover primary gold, one would expect to find a free limit specified for it in sub-section (5). But, as I have said, that sub-section makes no reference to primary gold at all. This would suggest that 'gold' in sub-section (3) should be given a more limited meaning, and restricted to 'articles' and 'ornaments'. The definitions in section 2 do not apply if 'the context otherwise requires'. The side-note of section 16 also indicates that the section is concerned with only 'articles' and 'ornaments'.

51. However, counsel for the petitioners cited *Ganpatrai Dhanuka v. A. K. Bandopadhyay*, Collector, Customs and Central Excise, Shillong and another, AIR 1973 Gauhati 8, in which it has been held that 'gold' in sub-section (3) includes 'primary gold' because there is no reason why the definition in section 2(j) should not be applied. I am not sure that I agree with that Judgment; nevertheless, in the present case, I will assume that it is right.

52. The contention of counsel for the petitioner was that since the will and the gold had been discovered in Mandsaur on 30th June 1968, the grandsons of Keshrimal must be deemed to have acquired the ownership of the gold by testamentary succession on that date. Likewise, Ratanbai acquired the actual possession, custody or control of the gold on the same date. thereforee, he said, by filing a declaration with the Gold Controller, Nagpur, on 29th July 1968, i.e., within 30 days, Ratanbai had complied with sub-section (3) and her possession of the gold was lawful.

53. The short answer to that whole argument is that the gold control authorities have not believed the story regarding the discovery of the gold in Mandsaur on 30th June 1968. They have held that Ratanbai had been in possession of the gold for at least 8 or 9 years before it was seized on 9th July 1968. thereforee, sub-section (3) is not available because, as the opening words show, it presupposes that the person 'did not own, possess, hold or control' any gold 'before the commencement of this Act.'

54. I might add that is not without significance that the gold is alleged to have been discovered on 30th June 1968 : that is, one day after the Ordinance came into

force. If it had been 'discovered' a day or two earlier, there would have been no provision under which a declaration could be made. It will be recalled that after the Fourth Amendment Rules a declaration in respect of primary gold was not possible.

55. Sub-section (4) of section 16 is equally inapplicable for the same reason. It merely provides for a further declaration to be made when a person acquires or parts with any gold after the first declaration was made under the Act or an earlier law. It has no application to gold acquired before the Act came into force, and respecting which no declaration had been made.

56. The result is that the declaration filed by Ratanbai on 29th July 1968 was of no effect. Sub-section (11) of section 16 says :

'No person shall own or have in his possession, custody or control any quantity of gold which is required to be included in a declaration unless such hold has been included in a declaration or further declaration, as the case may be :

Provided that nothing in this sub-section shall apply until the expiry of the period within which a person is entitled to make a declaration or further declaration'. Obviously, the sub-section assumes that the declaration is otherwise valid. That not being the case here, the sub-section was violated. So, also, was section 8(1), as primary gold could not be owned or possessed. thereforee, the gold could be confiscated under section 71(1), which said : 'Any gold in respect of which any provision if this Act or any rule or order made there under has been, or is being, or is attempted to be, contravened, shall be liable to confiscation.'

The Amended Section 71

57. If the law had stood there, nothing more could have been said, and this petition would have to be dismissed. But in *Badri Prasad v. Collector of Central Excise, Sarvodayanagar, Kanpur and others* : AIR 1971 SC1170 , the Supreme Court held that section 71 of the Gold (Control) Act 1968 was unconstitutional. To rectify the position, the Gold (Control) Amendment Act 1971 was passed. It substituted a new section 71. The new sub-section (1) is as follows :

'(1) Any gold in respect of which any provision of this Act or any rule or order made there under 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;'

Unlike the other new sub-sections, this sub-section was expressly given retrospective effect. In the words of the Amending Act it 'shall be deemed always to have been substituted'. Consequently, it is necessary to reconsider the case in the light of the new sub-section (1).

58. The critical part is the proviso. Since gold control authorities, and in particular the Collector, held the will to be genuine, it must follow that they were 'satisfied' that the gold belonged to the grandsons of Keshrimal; to wit, the petitioners. The declaration in respect of the gold ought to have been made under rule 126I of the defense of India Rules, 1962 by Nemkumar as their 'guardian'. The omission to do so was by him. It is that which rendered the gold 'liable to confiscation'. Similarly, he should have disposed of the gold before 1st September 1967 either by sale to a refiner or dealer or by conversion into ornaments. Again the default was by him. Since, at all material times, the petitioners were minors, these omissions by Nemkumar were, or must be deemed to be, without their 'knowledge or connivance'. As all the requirements of the proviso are met, the gold could 'not be ordered to be confiscated'. The only course open was to take 'such other action as is authorised by this Act' against Nemkumar. For example, he could be prosecuted under section 86 for failure to make a declaration. Howsoever that may be, confiscation of the gold was, in any event forbidden.

59. It was contended, on behalf of the Union of India, that the petitioners could not now invoke the proviso because they had not chosen to avail of the procedure furnished by the Amending Act of 1971 itself for having the confiscation set aside. This argument has reference to section 4 of that Act. The section is entitled : 'Reopening of past confiscations' and comprises five sub-sections. In brief, it provides that an order of confiscation, made before the Amending Act came into force, 'shall' be set aside if it 'could not have been made' had the Amending Act been then in force; and, thereafter, a fresh adjudication' shall be made in accordance with the amended Act : sub-section (1). The power of setting aside has to be exercised by the competent adjudicating officer in relation to the 'final' order of confiscation 'whether or not' it was made in appeal or revision : sub-section (2). But, the 'aggrieved person' must move 'an application' within 90 days from the commencement of the Act, or such further time, not exceeding 90 days as on showing sufficient cause might be allowed : sub section (3).

60. This section is concerned with the reopening of cases which already stood 'finally' concluded before the Amending Act came into force. Hence the phrase 'past confiscations' is the title. It is not concerned with cases which were still pending, whether at the stage of adjudication or appeal or revision. In those pending cases, the adjudicating officer or the appellate or revisional authority were naturally bound to give effect to the new sub-section (1) of section 71 as it had been made retrospective. There was no need to make any provision for reopening in relation to such cases.

61. Thus, Ratanbai, or the petitioners, did not have to move under section 4 of the amending Act for setting aside the order of confiscation, as Ratanbai's appeal was pending. The letter dated 30th July 1971, written by the Administrator to Ratanbai, asking whether she intended to apply for reopening, was misconceived. Yet, the fact that such a query was made shows that the Administrator understood that the proviso applied. indeed, the alternative he posed to Ratanbai was whether she would like her appeal to be 'disposed of in conformity' with the 'amended sections'. Her reply to this was emphatically in the affirmative. Nevertheless, the Administrator did not give effect to the proviso. Nor did the Secretary, acting on behalf of the Central Government, in revision. Had they done so, they would have

had no option but to set aside the order of confiscation.

Section 79 of the Gold (Control) Act, 1968

62. There is one other reason why the confiscation ought to have been set aside. Section 79 of the Gold (Control) Act, 1968 provides as follows :

'No order of adjudication of confiscation or penalty shall be made unless the owner of the gold, conveyance, or animal or other person concerned is given a notice in writing -

(i) informing him of the grounds on which it is proposed to confiscate such gold, conveyance or animal or to impose a penalty; and

(ii) giving him a reasonable opportunity of making a representation in writing within such a reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein any, if he so desires, of being heard in the matter :

Provided that the notice and the representation referred to in this section may, at the request of the owner or other person concerned, be oral :

Provided further that where no such notice is given within a period of six months from the date of the seizure of the gold, conveyance or animal or such further period as the Collector of Central Excise or of Customs may allow, such gold, conveyance or animal shall be returned after the expiry of that period to the person from whose possession it was seized.

Explanationn. - Where any fresh adjudication is ordered under this Act, the period of six months specified in the second proviso shall be computed from the date on which such order for fresh adjudication is made.'

The owners of the gold, in the present case, were the petitioners. They were never given a notice in writing' or any notice at all, informing them 'of the grounds' on which it was proposed to confiscate the gold. Nor were they given an opportunity of making a representation in writing against the confiscation and of being heard in the matter. According to the second proviso of section 79, where no such notice is

given within a period of six months from the date of seizure of the gold, it 'shall be returned after the expiry of that period to the person from whose possession it was seized'. The period of six months from the date of seizure, 9th July 1968, had expired much before the Collector made his order on 15th May 1970. Hence, on this ground he should have ordered the gold to be returned to Ratanbai, from whose possession it was taken.

63. Although the point is clear enough, there is direct authority in support of what I have just said. In *Ambalal Morarji Soni v. Union of India and others* 0043/1972 : AIR1972 Guj126 , the notice enjoined by section 79 was served two days after the six months had expired. It was held that 'a civil right to get back the seized goods' had become vested in the person concerned and a writ of mandamus was issued. The judgment of the Supreme Court in the *Assistant Collector of Customs and Superintendent, Preventive service Customs, Calcutta and other v. Charan Das Malhotra* : 1973ECR1(SC) , which dealt with almost identical provisions in the Customs Act 1962, was followed. The Supreme Court had affirmed the judgment of the Calcutta High Court in *Charandas Malhotra v. Assistant Collector of Customs and Superintendent Preventive Service and others*, : AIR1968 Cal28 , where the notice issued out of time was quashed, and the seized goods were ordered to be returned.

Conclusion and Relief

64. On the facts found, or deemed to have been found, by the gold control authorities, the gold seized from Ratanbai was liable to confiscation : initially because no declaration was filed, and after 1st September 1967 because it could not be retained in its primary form. But since the will was found to be genuine, and the petitioners were, therefore, the owners, notice ought to have been given to them under section 79. As that was not done, a statutory obligation arose under the second proviso of that section to return the gold to Ratanbai six months after the date of seizure. In any event, after the amending Act of 1971, the order of confiscation ought to have been set aside as it was retrospectively rendered contrary to the law.

65. The technical objection was raised that since the petitioners were not parties to the proceedings before the gold control authorities they could not maintain this petition. I see no substance in that point. It is always open to a person to move this court to quash orders made behind his back which affect his civil rights. Besides, when Sushil Kumar applied to the Central Government for revision of the order made by the Administrator, he was thwarted on the utterly erroneous ground that he had no locus standi. It would be absurd to hold that, in these circumstances, the petitioners, the real owners of the gold even according to the findings of the gold control authorities, were bereft of all remedy.

66. As a final argument, counsel for the Union of India said, that the gold could not be ordered to be returned as possession of primary gold was prohibited by section 8(1) of the Gold (Control) Act 1968. Both the amended section 71 and section 79, as it has stood from the beginning, are a perfect refutation of that argument, Under the former primary gold cannot be confiscated; and under the latter, it has to be returned. An order for return of primary gold was in fact made both in *Ambalal Morarji Soni v. Union of India and others* 0043/1972 : AIR1972 Guj126 , and *Ganpatrai Dhanuka v. A. K. Bandopadhyay, Collector, Customs and central Excise, Shillong and another*, AIR 1973 Gauhati 8.

67. A small dilemma remains. If the matter is viewed under the proviso of the amended sub-section (1) of section 71, the gold ought to be returned to the owners, that is, the petitioners. But if the obligation under the second proviso of section 79 is to be enforced, it has to be returned to Ratanbai. She died on 16th April, 1973. However, the problem is obviated by an application moved, just before the hearing commenced, by Nemkumar and Shantabai, to be imp leaded as co-petitioners in their capacity as the heirs of Ratanbai. The application has been opposed on the ground of delay, but, I think, having regard to the extreme intricacy of the law and the possibility of misunderstanding, that in the interests of justice the application ought to be allowed. Accordingly, Nemkumar and Shantabai will be deemed to have been added as petitioners. I was explicitly told that there is no conflict of interest between them and the original petitioners and order may be made in favor of any or all of them.

68. For these reasons, this petition is allowed. The order by the Collector confiscating the gold seized on 9th July 1968 and levying a penalty on Ratanbai, as well as the orders of the Administrator and the Central Government unholding the same, are quashed. The gold will be returned forthwith to the petitioners, who will nominate one of themselves in writing to take delivery of the same. Having regard to all the circumstances of the case, in particular the difficulty of the questions of law, I make no order as to costs.

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