

Shri Mahadeolal Khaitan and anr. Vs. Union of India (Uoi) and ors.

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Court : Kolkata

Decided On : Mar-05-1979

Reported in : 1979CENCUS484D

Judge : Pradyot Kumar Banerjee, J.

Appeal No. : C.R. No. 1440(W) of 1971

Appellant : Shri Mahadeolal Khaitan and anr.

Respondent : Union of India (Uoi) and ors.

Judgement :

ORDER

Pradyot Kumar Banerjee, J.

1. This Rule is directed against an order of confiscation made by the Collector of Central Excise and Customs, West Bengal under Rule 126M of the Defence of India Rules, 1962 (Part XIIA Gold Control). It appears that a show cause notice was issued on 3rd April, 1968 under the Gold Control Rules framed under the Defence of India Rules. There was a search and seizure of the golds and gold ornaments etc. on 13th September, 1966 and 14th September, 1966 from the petitioner admittedly under the Customs Act, 1962. In the meantime, there was ex-parte order extending the time for issuing the show cause notice on 10th March, 1967, 10th May, 1967 and 2nd June, 1967 under the Customs Act, 1962. In pursuance of the show cause notice issued on 3rd April, 1968 under the Defence of India Rules (Gold Control--Part XIIA) the order of confiscation was made on 18th November, 1970. Thereupon the petitioner moved this Court and obtained the present rule without going in appeal to the appellate authority. The show cause notice is annexure 'B' to this petition. The show cause notice was purported to have been given under the provision of Defence of India Rules, 1962 (Gold Control-Part XIIA) for contravention of the said rule and it was stated therein that the petitioner was asked to show cause why penalty should not be imposed on them under Rule 126L(16) of the Defence of India Rules and why the gold and gold ornaments etc. in which offence appears to have been committed should not be confiscated under Rule 126M(1) of the Defence of India Rules, 1962 (Part XIIA). In the statement of allegation it is stated, inter alia that the gold and gold ornaments etc. and other articles were seized by the Customs Officer on the reasonable belief that the provision of the Customs Act, 1962 have been violated in respect of them. On receipt of the report from the seizing officer, the Gold Control aspect of the case was examined and it was reasonably believed that the provisions of Defence of India Rules, 1962 (Part XIIA--Gold Control) have also been violated in respect of the gold and gold ornaments as described in the statement allegations.' The petitioners replied

to the show cause notice and after the hearing the Collector of Customs & Excise, West Bengal, by order dated 18th November, 1970 the following order was passed.

Having regard to the facts and circumstances of the case, I order under Rule 126M(1) of the Defence of India Rules, 1962 (Part XIIA - Gold Control) absolute confiscation of 16 gold guineas, 2 United States Gold coins, 3 Indian gold mohurs, 1 Nepalese gold coin and 26 ancient gold coins weighing in all 351.17 grammes together with one crude bangle weighing 133.47 grammes. I also order confiscation of gold ornaments weighting in all 39.5889 grammes gross and 39.08 grammes net under the aforesaid rule. I however, allow Shri Mahadeolal Khaitan an option to redeem the aforesaid gold ornaments on payment of a fine of Rs. 700/- (Rupees seven hundred only) under Rule 126M(8) ibid with 3 months. I also impose penalty of Rs. 8000/- (Rupees eight thousand only) on Shri Mahadeolal Khaitan and of Rs. 3000/- (Rupees three thousand only) on Shri Narendraput Singh Dugar under Rule 126L (16) of the said rules.

2. Before I deal with the case of the parties, following dates regarding the legislative enactment touching the case are relevant. In 1962, Defence of India Rules were promulgated. On 9th January, 1963 part XIIA was inserted in the Defence of India Rules which contained Rule 126A to Z. In 1965, Gold Control Act was passed but the said Gold Control Act was not brought into force as no notification was made under S. (3) of the said Act. On 29th June, 1968, Gold Control Ordinance, 1968 was promulgated. The said Ordinance repealed part XIIA of the Defence of India Rules, 1962 but there was a saving clause in the said ordinance by which part XIIA of the Defence of India Rules was sought to be kept alive. On 24th August, 1968, Gold Control Act, 1968 was passed which was brought into force on 1st September, 1968 by notification of the Union of India under Section 1(3) of the Act. The said Gold Control Act provided some saving clauses in Section 116(2) of the Gold Control Act. The said Section 116(2) is in the following terms:

116(2). Notwithstanding such repeal, anything done or any action taken, including any notification order or appointment made, direction given, notice licence or certificate issued, permission, authorisation or exemption granted, confiscation adjudged, penalty or fine imposed, or forfeiture ordered, whether under the Gold (Control) Ordinance, 1968, or part XIIA of the Defence of India Rules 1952, shall in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done, taken, made, given, as the case may be, under the corresponding provision of this Act, as if this Act had commenced on the 29th day of June, 1968.

3. Mr. Dipankar Ghosh on behalf of the petitioner challenges the show cause notice and the order of confiscation on four grounds. Firstly it is argued by Mr. Ghosh that the seizure of gold being under the Customs Act, the said seized gold etc. cannot be confiscated under Rule 126M as there being no seizure under the Rule 126L of the Defence of India Rules. Secondly it is contended that the formation of opinion under Rule 126L(b) of the Defence of India Rules not being in the mind of the seizing officer at the time of seizure, there was no seizure in the eye of law under the Gold Control Rule and as such there cannot be any order or confiscation under Rule 126M of the Defence of India Rules. It is argued by Mr. Ghosh that the notice under the Gold Control Rules as hereinbefore stated does not survive as it is inconsistent with Section 79 of the Gold Control Act, 1968 and therefore not saved by Section 116(2) of the said Act. Even assuming that the order of confiscation is saved under Section 71 of Gold Control Act, but the said section was struck down by the Supreme Court in the case reported in : AIR1971SC1170 (Badri Prasad v. Collector, Central Excise). Mr.

Ghosh lastly argued that Rules 126L and 126M of the Defence of India Rules Part XIA ate ultra vires the Constitution of India partly on reasoning given in the Supreme Court judgment in the case reported in : AIR1971SC1170 while it struck down Section 71 of the Gold Control Act.

4. Mr. R.N. Das appearing for the respondent however contended that the seizing officer has power to seize under different Acts and in the affidavit-in-opposition it has been stated that the Customs authorities have also power to make a seizure under the Gold Control Rules. Mr. Das further contended that the show cause notice was issued on 3rd April, 1968 before the Gold Control Ordinance came into force and therefore Section 79 cannot come into picture at all. It is argued that as the gold was already in possession of the customs authorities who are also gold control authorities, it is not necessary to have a further seizure under the Gold Control Rules. It is further argued that as the order impugned was made during the proclamation of the Emergency under Articles 358 and 359 of the Constitution of India, the order cannot be challenged after the lifting of the emergency. It is argued that though the order was passed in 1970, the proceeding was started by the show cause notice dated 3rd April, 1968 and therefore the action taken and liability incurred continues after the expiration of the rules.

5. Admittedly the gold etc. was not seized under Rule 126L of the Defence of India Rules. The case reported in : AIR1970Guj108 Jayantilal v. Union of India on which both the parties relied in my opinion, supports Mr. Ghosh's case. In paragraph 5 of the said judgment, the Hon'ble Chief Justice of Gujarat High Court held as follows:

5. RE GROUND (A)--This ground is based on the premises that unless gold is validly seized under Rule 126-L it cannot be confiscated under Rule 126-M. It is, therefore, necessary to determine what on a true construction of Rule 126-M, is the condition for confiscation under that Rule. Is it necessary that gold must be validly seized under Rule 126-L before it can be confiscated under Rule 126-M '? Rule 126M says that any gold seized under Rule 126-L shall be liable to confiscation. It is not any gold which is declared to be liable to confiscation. It is only gold seized under Rule 126-L which is subjected to the liability to confiscation. Seizure of gold must, therefore, clearly precede its confiscation, having regard to the clear and explicit language of the rule. Mr. Khambhatta on behalf of the respondents could not resist the conclusion that unless gold is seized it cannot be confiscated but his argument was that though seizure may be a necessary condition of liability to confiscation, it was not necessary that the seizure must be a valid seizure under Rule 126-L. What is required to satisfy the condition of that rule is, he argued, the physical act of seizure and whether it is done in accordance with Rule 126-L or otherwise is entirely immaterial for that relates only to the mechanics of seizure. He contended that it was therefore entirely irrelevant to consider whether or not the undeclared gold was validity seized under Rule 126-L. This contention is, in our opinion, not well founded for it ignores the key words 'any gold seized under Rule 126-L'. Rule 126-M does not say 'any gold seized shall be liable to confiscation but it says 'gold seized under Rule 126-L' shall be liable to confiscation and effect must be given to the words 'seized under Rule 126-L'. The seizure contemplated by Rule 126-M is a seizure under Rule 126-L and, therefore, it must be in accordance with Rule 126-L. Moreover, the suggested construction would make a mockery of the safeguard provided by Rule 126-L in regard to search and seizure of gold.

6. Mr. Das however contended that this judgment was on the basis that Mr. R.M.

Shelat who made the seizure was not authorised to do so under Gold Control Rules at all. The Gujarat High Court also held in paragraph 5 as hereinbefore stated repelling the argument made by the Government Advocate Mr. Khambhatta that unless a seizure is made under Rule 126-L of the Defence of India Rules, no confiscation under Rule 126-M can be made. I am, therefore, of the opinion that unless the seizure is made under Rule 126-L, the confiscation order under Rule 126-M could not have been made. Mr. R.N. Das contended that this judgment was appealed against by the Government to the Supreme Court and the said judgment is reported in the case reported in AIR 1971 SC 1113 (Jayantilal v. Union of India). It does not appear to me that the question which has been raised in this case was mooted before the Supreme Court. The said case only decided, according to me, that any action taken under Rule 126-M can be agitated as it is protected. If there is inconsistency with Gold Control Act, in so far as the inconsistency is concerned, the Gold Control Rule cannot continue. It is further not necessary for me to go into the question but prima facie it appears to me that the proceeding under rule 126-M is inconsistent with S.79 of the Gold Control Act. Section 79 of the Gold Control Act is as follows-

79 Giving of an opportunity to the owner of gold etc.-- 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 reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and 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. Explanation- 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.

In the said section it has also been provided that if a seizure is made, then within 6 months from the date of seizure show cause notice should be issued. In Jayantiil's case it has already been held that if the show cause notice is not issued within 6 months from the date of seizure the petitioner has vested right to get back his seized property. It has been argued at length by Mr. Das and replied to by Mr. Ghosh that whether even after the gold is seized, the proceeding can continue. But the view I take is that it is not necessary for me to consider this question. I am of the opinion that as the seizure is not made under Rule 126-L there cannot be any confiscation under Rule 126-M. Mr. Das relied upon the case reported in AIR 1966 SC 1209 (Durga Prasad v. Supdt. (Preventive) Central Excise, Nagpur) in support of his contention and contended that the seized gold need not be in the possession of the petitioner. About that there cannot be any doubt. If the petitioner's gold is in

somebody's possession and the seizure is made by the authority, Mr. Ghosh's argument would have failed. In AIR 1966 SC 129 (Durga Prasad v. Supdt. (Preventive) Central Excise, Nagpur) there were two seizures, one by the Customs and the other by the Gold Control authority and the proceeding was continued by both the authorities. Therefore the case reported in AIR 1966 SC 1209 does not help Mr. Das. Mr. Ghosh relied upon the case reported in : 1983(13)ELT1365(SC) (Gian Chand V. State of Punjab) which was a case under the Sea Customs Act. In that case the Police was also authorised under Section 180 of the Sea Customs Act to seize. In my opinion Mr. Ghosh rightly contended that unless in the present case the goods have been seized under Rule 126-L of the Defence of India Rules, no confiscation under Rule 126-M can be made.

7. Further it appears that the goods were seized by the Customs authority on 13th September, 1966 and 14th September, 1966 and show cause notice was issued on 3rd April, 1968 and the Gold Control Act came into force on 1st September 1968. If the show cause notice is inconsistent with the Act then that notice does not survive. In the present case I have already said that the show cause notice was issued about 18 months after the seizure under the Customs Act and therefore is patent inconsistent with Section 79 of the Gold Control Act. In support of this argument of Mr. Ghosh, Mr. Das relied upon the case reported in AIR SC 193 Jayantilalv. Union of India. It appears that the notice in the said case was issued within 6 months from the date of seizure. The seizure was made in December, 1964 and the show cause notice was issued within 6 months in June 1965.

8. Mr. Das contended that if there is power in some authorities to seize the goods, the non mention of the said power or wrong mention of the particular section authorising seizure will not invalidate the seizure- There is no doubt about the proposition but it appears from the face of it that in this case at the time of seizure, the Customs officer who seized had no suspicion at all about the gold. It is stated that after the receipt of the report from the seizing officer long after the seizure, the gold control aspect was examined and it was then and then only that the aspect regarding the violation of Defence of India Rules was considered. In my opinion this belief must exist at the time of seizure not subsequent thereto.

9. Mr. Das contended that under the Gold Control Rules there is an alternative remedy by way of appeal which has not been followed by the petitioner and therefore this application should be thrown out. In my opinion, as the Gold Control authority acted without jurisdiction the plea of alternative remedy cannot be a bar. If the authority concerned acted illegally without jurisdiction or in violation of the principle of natural justice, the bar of alternative remedy will not stand in the way in giving relief to the petitioner. In the present case, I am of the opinion, that the confiscation order under Rule 126 M not being preceded by a valid seizure of gold and gold ornaments as under Rule 126-L the authority concerned acted without jurisdiction Mr. Das referred to a Criminal Appeal being No. 58 of 1972 decided on 5.10.78 which had held that the liability and penalty incurred during the operation of Defence of India Act is kept alive by Section 1(3)(a)(b) and (c) of the Defence of India Act, 1962. The view I take, however, it is not necessary for me to refer to the decision at all. It has been held in the case reported in : AIR1961Bom227 M.G.Abroi v. Amichand that the belief of the officer concerned must exist at the time of search and seizure, and subsequent belief is of no consequence, and in my opinion it will not be right to say that even after the seizure is completed under some other Act, the seizing officer can form his opinion on suspicion regarding the gold seized under the Act that the

Defence of India Rules is violated. Unless Rule 126-L of the Defence of India Rules is followed, no order of confiscation under Rule 126-M of the Defence of India Rules can be made.

10. In my opinion, therefore, the order impugned including the show cause notice cannot be sustained and must be quashed which I hereby do.

11. The operation of the order is stayed for eight weeks. But in the meantime, the respondent will not deal with the seized gold etc.

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