A SUSHIL KUMAR PORWAL AND ORS.

v.

VIPIN MANEKLAL AND ORS.

AUGUST 27, 1987

B [RANGANATH MISRA AND MURARI MOHON DUTT, JJ.]

Gold Control Act, 1968—proviso to section 71—interpretation of—Whether it covers primary gold.

One Kesharimal Porwal, who had one of his businesses as gold and silver shop, died on October 7, 1952 leaving behind surviving a widow Ratanbai, a daughter Shantabai and a son Nem Kumar. Kesharimal left a will whereby he bequeathed gold and silver to his grandsons—sons of Shantabai and Nem Kumar—providing that each grandson would receive 500 *tolas* of gold at the time of marriage and the remaining gold would be equally divided among them. The genuineness and validity of the will were not challenged at any stage.

On July 9, 1968, the officers of the Central Excise, Nagpur, searched the residential premises of Nem Kumar and seized 10 slabs and 9 pieces of gold and 230 gold coins having at that time a market value of Rs.7,63,000. The gold seized was primary gold. The offcials of the Central Excise separately recorded the statements of Ratanbai and Nem Kumar. Ratanbai stated that the seized gold was the 'self-earned property' of her late husband, and had been kept in the iron-safe about 8/9 years ago, and that keys of the shelf had all along remained in her possession. Nem Kumar in his statement denied any knowledge of the gold and said that he had come to know of the existence of the gold for the first time during the search. A declaration in respect of the seized gold was filed by Ratanbai with the Central Excise.

The Collector of Central Excise served separate notices on Ratanbai and Nem Kumar, calling upon them to show cause why the seized gold should not be confiscated and a penalty imposed for violation of the provision of paragraph 9(1)(i) of the Gold Control Ordinance, 1968. The notices were replied by both. The Collector came to the finding that Ratanbai had full knowledge of the gold and was in conscious possession of it for at least 8/9 years. As for Nem Kumar, the Collector held that it was difficult to sustain the charge of possession and custody of the gold against him. Accordingly, the Collector, held that only Ratanbai had violated the provision of paragraph 9(1)(i) of the

Gold Control Ordinance, 1968, and directed the confiscation of the gold and imposition of a penalty of Rs.38,000 on Ratanbai under paragraph 75 of the Gold Control Ordinance, 1968, which was replaced by the Gold Control Act, 1968. Nem Kumar was acquitted. A

An appeal preferred by Ratanbai against the order of the Collector was dismissed by the Administrator under the Gold Control Act, Ratanbai then filed an application for revision before the Central Government, challenging the order of the Administrator. The appellant No. 1, Sushil Kumar son of Nem Kumar, who had by then attained majority, also filed a revisional application before the Central Government. Both the revisional applications were dismissed. Thereupon, the appellants Nos. 1 to 5 and Surendra Kumar since deceased, son of Shantabai, filed a writ petition in the High Court. The High Court (Single Judge) quashed the order of confiscation and penalty and directed the return of the gold to the petitioners. B C

The respondents preferred an appeal to the Division Bench of the High Court. The Division Bench did not agree with the interpretation of the learned Single Judge on section 71(1) of the Gold Control Act, including the *proviso* thereto, and set aside the judgment of the Single Judge. Aggrieved by the decision of the High Court, the appellants moved this court for relief by special leave. D

Allowing the appeal, the Court, E

HELD: The ground that weighed with the Central Excise Authorities in confiscating the gold was that the acquisition, possession, custody or control of primary gold in question by Ratanbai became illegal and liable to confiscation, as she had not filed any declaration required under rule 126-I of the Defence of India Rules, 1962, nor had she disposed of the gold by sale or converted the gold into ornaments in contravention of clause (i) of sub-rule (I-B), but had possessed the same in violation of sub-rule (I-A) of Rule 126-H of the Defence of India (Fourth Amendment) Rules, 1966. But, after the amendment of section 71(1) of the Gold Control Act, 1968, by addition of a proviso, the appellants placed reliance upon the *proviso*. It was contended on behalf of the appellants that Ratanbai by her omission to dispose of the gold by sale or to convert the same into ornaments in accordance with the provision of rule 126-H, as amended by the Defence of India (Fourth Amendment) Rules, 1966 rendered the gold liable to confiscation without the knowledge or connivance of the owners of the gold, namely, the grandsons of Kesharimal Porwal, but the same could not be F G H

A confiscated in view of the *proviso* to section 71(1) of the Gold Control Act. The Learned Single Judge of the High Court had upheld the contention and directed the release of the gold in favour of the appellants. [1122F-H; 1123G-H]

B The principal question that fell for the consideration of this Court was whether the *proviso* to section 71(1) also related to primary gold. [1124D]

Power of confiscation of gold including primary gold is conferred by sub-section (1) of section 71. The expression "any gold" refers to all kinds of gold, including primary gold. In view of section 8(1) of the C Gold Control Act, no person can acquire or retain possession, custody or control of primary gold. Under clause (i) of sub-rule (I-B) of rule 126-H of the Defence of India (Fourth Amendment) Rules, 1966, the owner in possession, custody or control of primary gold is bound to either sell such primary gold to a licensed refiner or dealer or deliver the same to a licensed or certified dealer or goldsmith for conversion D thereof into ornaments within a period of six months from September 1, 1967, the date of the Commencement of the said Rules, Sub-rule (1-A) of Rule 126-H prohibits the possession, custody or control of any primary gold after the expiry of the said period of six months. [1124D-E; 1125B-C]

In this case, it was Ratanbai who had failed to either sell or E convert the primary gold within the grace period of six months without the knowledge and connivance of the owners thereof, that is, the grandsons of Kesharimal Porwal. If the contention of the respondents was accepted, it would mean that the owner of the primary gold had to lose the same on account of default committed by somebody who was not the owner. It was also difficult to accept the contention that while the F substantive provision of sub-section (1) of section 71 related to all kinds of gold, including primary gold, the *proviso*, a part of the substantive provision, would not include primary gold within its scope and ambit. The *proviso* lays down the circumstances under which any gold which is liable to confiscation will not be confiscated. Where primary gold is not to be confiscated in view of the *proviso* to section 71(1), the owner thereof G gets it back, but it does not mean that he will be entitled to retain possession of such primary gold which is forbidden by section 8(1) of the Gold Control Act. Thus there would be no difficulty in not confiscating the primary gold under the *proviso*, for after such release the owner of the primary gold will have to dispose it of or convert the same into ornaments. The Court did not agree with the view expressed by the H Division Bench of the High Court that the *proviso* to section 71(1) of the

Gold Control Act did not relate to primary Gold. The interpretation put on section 71(1) by the Court would not run counter to the provision of section 8(1) as the primary gold, not confiscated, would not be allowed to be possessed by the owner but had to be disposed of by him or converted into ornaments in the manner mentioned above or as directed by order date 30.7.76 of the Administrator under the Gold Control Act. [1125D-G; 1127A-B]

The Court set aside the order of the Division Bench and modified the order of the Single Judge of the High Court, directing that the seized primary gold should be released in favour of the appellants and the appellants would either sell the same to a licensed dealer or deliver possession thereof to a licensed dealer or a certified goldsmith, as might be specified by the Administrator, immediately on the release of such primary gold. [1127C]

Badri Prasad **v.** *Collector of Central Excise,* **[1971] Supp. S.C.R. 254, referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5807 of 1983.

From the Judgment and Order dated 10.12.1982 of the Delhi High Court in L.P.A. No. 28 of 1982.

Soli J. Sorabjee, Harish N. Salve, P.H. Parekh and Dr. D.Y. Chandrachud for the Appellants.

Govind Das, Girish Chandra and C.V. Subba Rao for the Respondents.

The Judgment of the Court was delivered by

DUTT, J. This appeal by special leave involves an interpretation of the proviso to section 71 of the Gold Control Act. 1968.

One Kesharimal Porwal, who had two flourishing businesses—a bidi factory at Kamptee and a gold and silver shop at Mandsaur—died on October 7, 1952 leaving behind him surviving a widow Ratanbai, a daughter Shantabai and a son Nem Kumar. Both Shantabai and Nem Kumar had each a son at the time of death of Kesharimal. After the death of Kesharimal, Nem Kumar had four more sons.

A The said Kesharimal also left a will dated February 10, 1952 whereby he bequeathed certain gold and silver to his grandsons. It was provided in the will that each grandson would receive 500 tolas of gold at the time of marriage and the remaining gold would be equally divided among them. It may be stated here that at no stage the genuineness and validity of the will was questioned, nor have they B been challenged before us.

On July, 9, 1968 the officers of the Central Excise, Nagpur, searched the residential premises of Nem Kumar and seized 10 slabs and 9 pieces of gold and 230 gold coins, weighing about 42,404 grams having at that time a market value of Rs.7,63,000, which were kept in a C cupboard inside a big Godrej iron-safe. It is not disputed that the seized gold was primary gold.

On July 10, 1968, the officials of the Central Excise separately recorded the statements of Ratanbai and Nem Kumar. It was stated by Ratanbai that the seized gold was the 'self-earned property' of her late D husband, and that the same had been kept in the iron-safe about 8/9 years ago. She admitted that the keys of the shelf had all along remained in her possession. Nem Kumar in his statement denied any knowledge about the gold. He said that he had come to know of the existence of the gold for the first time when it was found out during the search. A declaration in respect of seized gold was filed by Ratanbai to E the Central Excise, Nagpur, on July 29, 1968.

The Collector of Central Excise, Nagpur, served two separate notices on Ratanbai and Nem Kumar calling upon them to show cause why the seized gold should not be confiscated and a penalty imposed for the violation of the provision of paragraph 9(1)(i) of the Gold F Control Ordinance, 1968. Both Ratanbai and Nem Kumar showed cause against the proposed confiscation and penalty.

The Collector came to the findings that Ratanbai had full knowledge of the gold and was in conscious possession of it for at least 8 9 years. So far as Nem Kumar was concerned, the Collector held that G it was difficult to sustain the charge of possession, custody and control of the gold against him in view of the vagueness of the evidence and lacunae in investigation. Accordingly, by his order dated May 15, 1970, the Collector came to the conclusion that it was only Ratanbai who had violated the provision of paragraph 9(1)(i) of the Gold Control Ordinance, 1968 and directed confiscation of the gold and imposi- H tion of penalty of Rs.38,000 on Ratanbai under paragraph 75 of the

Gold Control Ordinance, 1968. Nem Kumar was acquitted of the charges levelled against him. The Ordinance was replaced by the Gold Control Act, 1968. A

Being aggrieved by the said order of the Collector, Ratanbai preferred an appeal against the same to the Administrator under the Gold Control Act, 1968. The Administrator, however, dismissed the appeal by his order dated February 23, 1972. B

Ratanbai filed an application for revision before the Central Government challenging the propriety of the order of the Administrator. The appellant No. 1 Sushil Kumar, son of Nem Kumar, who had by now attained majority, also filed a revisional application before the Central Government. Both the revisional applications were dismissed by the Central Government. C

Thereafter, the appellants Nos. 1 to 5 and Surendra Kumar, since deceased, son of Shantabai, filed a writ petition in the Delhi High Court. The learned Single Judge of the Delhi High Court, on an interpretation of section 71(1) of the Gold Control Act including the proviso thereto, took the view that the seized gold could not be ordered to be confiscated and no penalty could be imposed on Ratanbai. In that view of the matter, the learned Judge quashed the order of confiscation and penalty and directed the return of gold to the petitioners. D E

The respondents could not accept the decision of the learned Judge and, accordingly, preferred an appeal to the Division Bench of the High Court. The Division Bench did not agree with the interpretation of the learned Judge on section 71(1) of the Gold Control Act including the proviso thereto. We shall have occasion to refer to the interpretation put forward on section 71(1) by the Division Bench of the High Court and it is sufficient to state here that the Division Bench set aside the judgment of the learned Single Judge and allowed the appeal of the respondents. Hence this appeal by special leave by the sons of Nem Kumar, Shantabai and Nem Kumar himself. F G

Under rule 126-I of the Defence of India Rules 1962, every person other than a dealer was required to make a declaration as to the quantity, description and other prescribed particulars of gold (other than ornaments) owned by him within thirty days from January 9, 1963, the date on which the Defence of India (Amendment) Rules, 1963 came into force. Rule 126-H was amended by the Defence of H

India (Fourth Amendment) Rules, 1966. Sub-rules (1-A) to (I-G) were added to rule 126-H. Sub-rule (1-A) provided as follows:

> "(1-A)—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 Defence of India (Fourth Amendment) Rules, 1966, either own or have in his possession, custody or control any primary gold."

Clause (i) of sub-rule (1-B), which is also important for our purpose, reads as follows:-

> "(1-B)—Every person who owns or has in his possession, custody or control at the commencement of the Defence of India (Fourth Amendment) Rules, 1966, any primary gold which has been included in a declaration or further declaration made under rule 126-I (as in force immediately before the commencement of the said Rules) or in respect of which no such declaration is required to be made under that rule, shall dispose of such primary gold in the following manner, namely:
>
> (i) If he, being the owner, is in possession, custody or control thereof at such commencement, he shall, within a period of six months from such commencement, either sell such primary gold to a refiner or dealer licensed under this Part or deliver the same to a dealer or goldsmith licensed or certified, as the case may be, under this Part for conversion thereof into ornaments;"

The ground that weighed with the Central Excise Authorities in confiscating the gold was that the acquisition, possession, custody or control of primary gold in question by Ratanbai became illegal and contraband and liable to confiscation, as she did not file any declaration required under rule 126-I of the Defence of India Rules, 1962 within thirty days from January 9, 1963 nor did she dispose of the gold by sale nor convert the same into ornaments in contravention of clause (i) of sub-rule (1-B), but possessed the same in violation of sub-rule (1-A) of rule 126-H of the Defence of India (Fourth Amendment) Rules, 1966. But , after the amendment of section 71(1) of the Gold Control Act, 1968 by the addition of a proviso, the appellants have placed reliance upon the proviso.

Initially section 71(1) was as follows:- A

> "71(1)—Any gold in respect of which any provision of this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, shall be liable to confiscation." B

This Court in *Badri Prasad* v. *Collector of Central Excise*, [1971] Supp. SCR 254 held that section 71 placed an unreasonable restriction on the right of a person to acquire, hold and dispose of gold articles or gold ornaments. In that view of the matter, this Court struck down section 71 as unconstitutional. Thereafter, by Gold (Control) Amendment Act, 1971, a new section 71(1) was enacted with retrospective effect from 1-9-1968. Sub-section (1) of section 71, with which we are concerned, is as follows:- C

> "Sec. 71(1)—Any gold in respect of which any provision of this Act or any rule or order made thereunder 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: D
>
> 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 authorized by this Act, may be taken against the person who has, by such act or omission, rendered it liable to confiscation." E F

It is contended on behalf of the appellants that Ratanbai by her omission to dispose of the gold by sale or to convert the same into ornaments in accordance with the provision of rule 126-H, as amended by the Defence of India (Fourth Amendment) Rules, 1966, rendered G the gold liable to confiscation without the knowledge or connivance of the owners thereof, namely, the grandsons of Kesharimal Porwal, the same cannot be confiscated in view of the proviso to section 71(1) of the Gold Control Act. The learned Single Judge of the High Court upheld the contention and directed the release of the gold in favour of the appellants. H

A On the other hand, the Division Bench of the High Court took a contrary view. According to the learned Judges of the Division Bench, the proviso will apply only to such gold the possession of which can be retained. As the gold in question was not converted or sold within the grace period of six months from March 1, 1967, such gold became contraband and the possession thereof by Ratanbai was illegal. B Moreover, under section 8(1) of the Gold Control Act, 1968, no person can own, acquire or possess primary gold. In the view of the Division Bench, confiscation of primary gold is mandatory under section 8(1) of the Gold Control Act and earlier under the Defence of India Rules. According to the Division Bench, the proviso cannot be so construed as to permit primary gold to be retained by prohibiting an C order of confiscation from being passed. The Division Bench held that possession of primary gold could never be legalised.

The principal question that falls for our consideration is whether the proviso to section 71(1) also relates to primary gold. It is not disputed that the power of confiscation of gold including primary gold D is conferred by sub-section (1) of section 71. The expression "any gold" refers to all kinds of gold including primary gold. Indeed, section 2(j) defines "gold" as meaning gold, including its alloy (whether virgin, melted or re-melted, wrought or unwrought) in any shape or form, of a purity of not less than nine carats and includes primary gold, article and ornament.

E

We may now consider the contention made on behalf of the respondents that the proviso does not relate to primary gold. The reason for this contention is that as, in view of section 8(1) of the Gold Control Act, nobody can retain possession of primary gold, the proviso cannot relate to primary gold, for, if the conditions mentioned in F the proviso are fulfilled, the gold shall not be ordered to be confiscated. In other words, the gold would be allowed to be retained by the owner thereof. It is submitted that such interpretation would render section 8(1) nugatory. Section 8(1) is in the following terms:-

> "Sec. 8(1). Save as otherwise provided in this Act, no G 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 H

(iii) buy, accept or otherwise receive or agree to buy, accept or otherwise receive, A

any primary gold."

There can be no doubt that in view of section 8(1), no person can own, acquire or retain possession, custody or control or primary gold. B It has already been noticed that under clause (i) of sub-rule (1-B) of rule 126-H of the Defence of India (Fourth Amendment) Rules, 1966, it was enjoined that the owner in possession, custody or control of primary gold was bound to either sell such primary gold to a licensed refiner or dealer or deliver the same to a licensed or certified dealer or goldsmith for conversion thereof into ornaments within a period of six months from September 1, 1967, the date of commencement of the C said Rules. Sub-rule (1-A) of rule 126-H prohibits possession, custody or control of any primary gold after the expiry of the said period of six months.

In the instant case, it was Ratanbai who had failed to either sell D or convert the primary gold in question within the grace period of six months without the knowledge and connivance of owners thereof, that is, the grandsons of Kesharimal Porwal.

If the contention of the respondents is accepted, it will mean that the owner of primary gold has to lose the same on account of default E committed by somebody who is not the owner. It was perhaps one of the considerations that weighed with this Court in ***Badri Prasad's*** case (supra), namely, that the pawnee who is the owner has to suffer confiscation or to pay a fine in lieu of confiscation not exceeding twice the value as provided in section 73 of the Gold Control Act before the same was amended, not for any fault of his, but for the omission of the F pawn broker to file declarations or monthly statements and this Court struck down the unamended provision of section 71 as unconstitutional. Therefore, in interpreting the provision of section 71(1) including the proviso thereto, we shall have to keep in view the above decision of this Court. It is with a view to removing the unconstitutionality of the unamended provision of section 71 that section 71(1) has been G re-enacted with a proviso added to sub-section (1) of section 71. In that view of the matter, it is difficult to hold that the proviso does not relate to primary gold but to other kinds of gold.

It is also difficult to accept the contention that while the substantive provision of sub-section (1) of section 71 relates to all kinds of gold H

A including primary gold, the proviso which is a part of the substantive provision, will not include within its scope and ambit primary gold. It is true that under section 8(1) of the Gold Control Act, retention of possession of primary gold is prohibited. But because of that, it will not be reasonable and justified to ignore the plain meaning of the proviso and to interpret it in such a manner as to render it inconsistent B with the substantive part of sub-section (1) of section 71.

The proviso lays down the circumstances under which any gold which is liable to confiscation will not be confiscated. Confiscation deprives the owner of his property to his loss and detriment. Where primary gold is not to be confiscated in view of the proviso to section 71(1), the owner thereof gets it back, but it does not mean that he will C be entitled to retain possession of such primary gold which is forbidden by section 8(1) of the Gold Control Act. In such a case, the owner has to sell the primary gold to a licensed refiner or dealer or deliver the same to a dealer or goldsmith, licensed or certified, as the case may be, that is to say, in the same manner and following the same procedure as was laid down in sub-rule (1-B) of rule 126-H of the Defence of India D (Fourth Amendment) Rules, 1966 and, in our opinion, so interpreted there will be no conflict between the proviso to section 71(1) and the provision of section 8(1) of the Gold Control Act. Indeed, the Administrator under the Gold Control Act has issued an order No. 11/76 F. 131/41/75-GC.II dated 30-7-1976 whereby it is directed, *inter alia*, that where gold is seized and confiscated and thereafter released and if E such release relates to primary gold, it is further directed: (a) such primary gold shall be sold to a licensed dealer or got converted into ornaments; (b) the person concerned shall, within one month of taking back into his possession, custody or control of such primary gold, furnish to the concerned Gold Control Officer a certificate from the licensed dealer that such primary gold has been sold to him and where F such primary gold has been converted into ornaments, a certificate from the licensed dealer or the certified goldsmith, as the case may be, that such primary gold has been so converted.

Thus, there will be no difficulty in not confiscating the primary gold under the proviso, for after such release the owner of primary G gold will not be entitled to retain possession of the same, but will have to dispose it of or convert the same into ornaments. We do not, therefore, agree with the view expressed by the Division Bench of the High Court that the proviso to section 71(1) of the Gold Control Act does not relate to primary gold. The Division Bench was greatly influenced by the fact that in view of section 8(1) of the Gold Control Act, the H possession of primary gold cannot be retained by any person. But, as

already discussed above, such an interpretation is not possible to be made of the proviso to section 71(1). The interpretation that we have put on section 71(1) will not run counter to the provision of section 8(1), in view of the fact that although the primary gold is not confiscated, it will not be allowed to be possessed by the owner, but has to be disposed of by him or converted into ornaments in the manner as mentioned above or as directed by the Administrator by his said order dated 30-7-1976.

For the reasons aforesaid, we set aside the order of the Division Bench and modify the order of the learned Single Judge of the High Court directing that the seized primary gold shall be released in favour of the appellants with a further direction that the appellants shall either sell the same to a licensed dealer or deliver possession of the same to a licensed dealer or a certified goldsmith, as may be specified by the Administrator, immediately on the release of such primary gold.

The appeal is allowed, but in view of the peculiar facts and circumstances of the case, there will be no order as to costs.

S.L. Appeal allowed.