

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75629 of 2022

(Arising out of Order-in-Original No.PR.COMMR/BBSR/GOLD CONTROL/01/2020 dated 31.12.2020 passed by Principal Commissioner, CGST & Central Excise, Bhubaneswar.)

Shri Sailendra Narayan Panda

(Vill. Amjore, P.O.Bandigaon, P.S. Jaipatna, Dist. Kalahandi, Odisha-766018.)

...Appellant

VERSUS

Pr. Commissioner of CGST & CX, Bhubaneswar

.....Respondent

(C.R. Building, Rajaswa Vihar, Bhubaneswar-751007.)

APPEARANCE

Shri J.N.Panda, Advocate for the Appellant (s)

Shri J.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75002/2023

DATE OF HEARING : 9 September 2022

DATE OF DECISION : 06 January 2023

P.K.CHOUDHARY :

This is second round of litigation before the Tribunal. The present Appeal has been filed by the Appellant assailing the order of the Principal Commissioner, GST & Central Excise, Bhubaneswar dated 31.12.2020 as under:-

"4.1 I hold that the seized 1315.788 grams gold items including Gold Balas are Primary Gold as defined under Section 2(r) of the Gold Control Act, 1968, as amended.

4.2 I order for confiscation of the above 1315.788 grams Primary Gold including gold Balas under Section 71(1) of the Gold Control Act, 1968, as amended.

4.3 I impose a penalty of rs.50,000/- (Rupees Fifty Thousand) only, on Late Binod Bihari Panda under Section 74 of the Gold Control Act, 1968, as amended."

2. Briefly stated the facts of the case are as under:-

A proceeding was initiated on 14.07.1976 for seizure of gold ornaments pledged with the Appellant's family and gold ornaments of the family itself pursuant to the raid conducted by the Central Excise Staff on 02.04.1976 in the Appellant's residential premises.

The Appellant in the reply dated 31.03.1977 in response to the Show Cause Notice stated that 11 gold balas, the subject matter of this Appeal, are gold ornaments belonging to the members of the family.

The Adjudicating authority held the eleven gold balas as primary gold and passed order of confiscation under Section 73 of Gold Control Act and also levied fine of Rs.2,50,000/- under Section 74 of the Act.

The order of the Adjudicating authority was challenged in Appeal. In Appeal the Appellate authority vide order dated 30.01.1980 was pleased to affirm the conclusion with regard to the gold balas and further be pleased to reduce the penalty.

The said order of the Appellate authority was challenged before the Revisional Court and the Revisional court, by virtue of order dated 24.06.1981 was pleased to pass order for fresh adjudication by the Adjudicating authority in case of certain mortgaged item and upheld the confiscation of the item belonging to the Appellant's family and reducing the penalty amount to Rs.70,000/-.

A Writ Petition in OJC No.1891 of 1981 was filed before the Hon'ble High Court of Orissa challenging the orders passed by the authorities under the Gold Control Act, 1968 directing confiscation

of the gold recovered from the petitioner's premises and imposition of penalty.

The Writ Petition was allowed setting aside the order of confiscation and penalty and in respect of 11 balas, the proceeding was remitted back to the Collector, Adjudicating authority, for reconsideration.

The Adjudicating authority after remittance by the Hon'ble High Court of Orissa sat over the matter for a period of 27 years and did not pass any order and in the meantime 3 generations of the Appellant's family are gone.

Thereafter, the petitioner filed representation before the Chief Commissioner, CGST to release the seized gold ornaments in favor of the petitioner. When the said representation was not disposed of, the petitioner approached the Hon'ble High Court of Orissa in Writ Petition No.28136 of 2019 to direct the Chief Commissioner, CGST, Central Excise & Customs to dispose of the representation of the petitioner.

The Hon'ble High Court of Orissa by virtue of order dated 18.02.2020 was pleased to dispose of the Writ Application directing the Chief Commissioner, CGST, Central Excise & Customs to dispose of the representation of the Petitioner by passing a reasoned order.

3. Ld.Advocate for the Appellant submitted as under:-

- The Principal Commissioner without releasing the gold ornaments in favor of the petitioner, adjudicated the matter afresh having not vested with such power, though the power vested in Collector, Central Excise as per the direction of the Hon'ble High Court in OJC No.1891 of 1981. Subsequently, direction was to the Chief Commissioner to consider the representation for releasing the gold ornaments as per the direction of the Hon'ble High Court in W.P. (c) No.28136 of 2019.

- Further the Principal Commissioner passed order for confiscation of the gold Ballas in question and further imposed penalty of Rs.50,000/- (Rupees Fifty Thousand Only) on a deceased person. It is a settled principle of law that any order passed against the deceased person is a nullity.
- It is submitted that 11 gold balas of the Appellant are lying with the Department since 02.04.1976. This Tribunal by virtue of order dated 16.07.1992 was pleased to set aside the order of confiscation and imposition of fine. The Tribunal was further pleased to remit back the matter to the Adjudicating authority for reconsidering the question as to whether those gold balas are primary gold, as contended by the Department or are ornaments as contended by the Appellants.
- When the Adjudicating authority held the so-called Balas as primary gold, the order of the Adjudicating authority was challenged in Appeal. The Appellate authority partly allowed the appeal. Thereafter, the order of the Appellate authority was challenged before the Revisional authority. The Revisional authority also partly allowed the revision application. Against the order passed by the Revisional authority, the Appellant approached the Tribunal. The Tribunal vide order dated 16.07.1992 was pleased to remit back the matter to the Collector, Central Excise for reconsideration after setting aside the order of confiscation and penalty.
- When the matter was not adjudicated by Adjudicating authority as per direction of the Hon'ble High Court for a period of 27 years, the Appellant filed a representation before the Chief Commissioner, CGST, Central Excise & Customs, the highest authority of the Department for release of the gold ornaments. The Chief Commissioner, CGST, Central Excise & Customs also did not consider the representation. Therefore, the Appellant approached the Hon'ble High Court of Orissa. The Hon'ble High

Court directed the Chief Commissioner, CGST & Central Excise & Customs to consider the representation of the Appellant.

- It is further submitted that the Gold Control Act, 1968 has already been repealed since 1990. This Tribunal also was pleased to hold that under the new fiscal policy, possession of gold is not an offence. That is why probably the Gold Control Act, 1968 has been repealed. Since the matter has not been adjudicated by the Adjudicating authority, anyway as per direction of the Hon'ble High Court for a long period of 27 years and in the meantime the Act itself has also been repealed since 30 years, it is not just and proper on the part of the Respondent to adjudicate under the Act which has already been repealed since long and possession of gold is no more an offence now and as such the order passed by the Respondent is whimsical and the order passed by him based on completely non-application of his judicial mind.

- It would appear from the impugned order that there are pictures of gold seized. If those pictures are perused, a correct conclusion can be drawn that these are in the form of ornaments and the same is worn by the people of western Odisha.

- The Respondent has given a finding that the seized gold is pure gold basing of his own surmises such as the task of a jeweler not possible to make ornaments of such pure gold and it is not also practicable to use such gold as ornaments to wear. In view of this the Respondent has also gone against the findings given by the Hon'ble High Court. In any view of the matter the order passed by the Respondent is not sustainable in law.

- For that it would be evident from the photographs of the item seized under the impugned order dated 31.12.2020, that a definite shape has been given to the gold ballas in question and had it been primary gold, it would have been simple gold rod or plate or pieces, and it should not have been bent and also given a certain shape which is evident from the picture. Therefore, there

is no room for doubt that these gold ballas are gold ornaments having a definite shape to be worn by the local people.

In any view of the matter the seized gold balas are ornaments and may be released to the petitioner.

4. On the other hand, the Ld.Authorized Representative for the Respondent Department submitted as under:-

4.1 The following defects are noticed in the instant Appeal:-

(a) The Appeal Paper book does not contain the copy of the Show Cause Notice, copy of the Order-in-Original dated 13.05.1978, copy of the Order of the Appellate authority dated 31.01.1980.

(b) This Appeal was filed by Shri Sailendra Narayan Panda, s/o Late Dilip Kumar Panda claimed to be the legal heir of Late Binod Bihari Panda. However, no succession certificate was submitted against the said claim. It is also unknown whether Shri Sailendra Narayan panda is the only successor-in-interest of Late Binod Bihari Panda or any other successor-in-interest of Late Binod Bihari Panda are there or not and if any should be the co-applicant of this Appeal petition. Thus, successor-in-interest of Late Binod Bihari Panda (the noticee to impugned Show Cause Notice) has to be determined first before proceeding further.

These defects are to be removed.

4.2 From the copy of the Order-in-Original dated 31.12.2020 it appears that this Appeal relates to the Gold (Control) Act, 1968 which was repealed by Gold (Control) Repeal Act, 1990 and the dispute is whether the seized gold was primary gold within the meaning of Section 2® of the Gold (Control) Act, 1968.

4.2.1 The Appellant, only on the basis of a certificate and an affidavit issued by the local representative holding public office claimed that the said seized gold does not fall within the ambit under the definition of primarily gold as given under Section 2® or the Gold (Control) Act, 1968.

4.2.2 The certificate and affidavit issued by the local representative holding public office are general in nature and not specific to the seized items.

The said certificate stated that, *"This is to certify that the rustic people of the villages in our district Kalahandi generally use gold or silver plain balas as per their financial conditions. The balas are generally in pure form in round shape. The male persons use the same in their wrist or forearm. In bigger shape the females use on their neck which is called 'Khogla'."*

The affidavit state that, *"that the rustic people of Kalahandi commonly used ornaments in the shape of gold or silver 'balas' as per their financial capacity. The balas are generally in pure plain and in round shape which are used by them in their wrist. They generally prefer this form because by this way they can keep the purity of gold intact which when required can be converted into cash at any time."*

Both the certificate and the affidavit stated that balas are used by the local people as per their financial condition and balas used by the rustic people are generally pure. The word 'balas' mentioned in the said certificate and the affidavit was for general bala not the particular goods under seizure. The word "generally pure" is a vague term as it does not specify the purity of the gold the local people used. However, the test report given by the Government Mint Kolkata that the purity of the gold of the said seized gold in the form of rod/strips ranges from 950.7 to 981.6.

3.2.3 No further evidence was produced by the noticee to the Show Cause Notice other than a certificate and affidavit issued by the local representative holding public office.

5. Heard both sides and perused the appeal records.

6. The Appellant Shri Sailendra Narayan Panda has filed some documents which would go to show that he is the legal heir of Late Binod Bihari Panda.

7. Further, in the order impugned before me Shri Sailendra Narayan Panda has been considered as the legal heir of Late Binod Bihari Panda. I find that the Hon'ble High Court of Orissa, the Chief Commissioner and the Principal Commissioner have already considered Shri Sailendra Narayan Panda, the Appellant before me as legal heir of Late Binod Bihari Panda. Now the question of legal heir being raised by the Authorized Representative for the Department in the course of hearing does not have any legs to stand at this juncture. This is totally uncalled for and the Authorized Representative before raising such legal issues should have properly gone through the records of the case and once Shri Sailendra Narayan Panda has been considered as the legal heir he has no authority to question and raise doubts on such consideration.

8. The 11 gold Balas of the Appellant are lying with the Department since 02.04.1976. The Hon'ble High Court by virtue of order dated 16.07.1992 was pleased to set aside the confiscation order passed by the Adjudicating authority holding that the said 11 gold Balas are primary gold and the Hon'ble High Court was further pleased to remit back the matter to pass an order to the effect that whether the said 11 gold Balas are primary gold or the ornaments, based on the evidences available on record. The Hon'ble High Court in the said judgement was pleased to give a finding that no definite tests have been prescribed under law to come to a conclusion as to whether a gold is primary gold within the meaning of Section 2(r) of Gold Control Act, 1968 and further pleased to hold that it depends on the proof and in assessing the evidence led, the opinion of the expert and also the opinion of the common man of the society in the area is a vital consideration.

9. In support of the stand of the Appellant, with regard to 11 gold Balas to be ornaments, the evidence is available on record such as statement of important personality of the area and affidavits filed by

the then Deputy Minister of Orissa Cabinet and the then Member of Orissa Legislative Assembly from Koksara Constituency in the district of Kalahandi. The finding of the Adjudicating authority, holding it primary gold is based on mere surmises. The Adjudicating authority failed to appreciate the evidence adduced by the claimant of the gold Balas that it is usual and common that the said gold Balas are used by the people of that locality as ornaments in their neck and also wrist.

10. The Order dated 16.07.1992, passed by the Hon'ble High Court, in OJC No.1891 of 1981 has reached its finality, since it has not been challenged in any higher forum and in the meantime, more than 28 years have already passed. Besides, the Adjudicating authority has taken enough time to decide basing on the evidences available on record to come to a conclusion that the said 11 gold Balas are primary gold or gold ornaments, during 28 years of long period. Since the Hon'ble High Court was pleased to set aside the order passed by the Adjudicating authority holding the said 11 gold Balas as primary gold, and in the meantime 28 years have passed and the Adjudicating authority has not considered afresh as per the Hon'ble High Court's direction, it is well established that, the Adjudicating authority has nothing to do or re-adjudicate after his confiscation order was set aside by the Hon'ble High Court and accepted and no further order was required to be passed. In any view of the matter, it is clear that the Adjudicating authority is of the opinion that 11 gold Balas are ornaments. Had it been otherwise, he would have re-adjudicated the matter afresh in view of the Hon'ble High Court's direction.

11. Further the Principal Commissioner passed order for confiscation of the gold Balas in question and further imposed penalty of Rs.50,000/- (Rupees Fifty Thousand only) on a dead person. It is settled principle of law that any order passed against a dead person is a nullity.

12. It is submitted that 11 gold Balas of the Appellant are lying with the Department since 02.04.1976. The Hon'ble High Court by virtue of

order dated 16.07.1992 passed in OJC No.1891 of 1981 was pleased to set aside confiscation order passed by the Adjudicating authority holding the said 11 gold Balas as primary gold and also levying fine in respect of the gold Balas. The Hon'ble High Court was further pleased to remit back the matter to the Adjudicating authority for reconsidering the question as to whether those gold Balas are primary gold, as contended by the Department, or are ornaments as contended by the Appellant.

13. When the Adjudicating authority was pleased to hold the so-called Balas as primary gold, the order of the Adjudicating authority was challenged in Appeal. The Appellate authority partly allowed the Appeal. Thereafter, the order of the Appellate authority was challenged before the Revisional authority. The Revisional authority also partly allowed the Revision. Against the order passed by Revisional authority, the Appellant approached the Hon'ble High Court. The Hon'ble High Court by virtue of order dated 16.07.1992, was pleased to remit back the matter to the Collector, Central Excise for reconsideration after setting aside the order of confiscation and also order for levying penalty.

14. When the matter was not adjudicated by the Adjudicating authority as per direction of the Hon'ble High Court for a period of 27 years, the Appellant filed a representation before the Chief Commissioner, CGST, Central Excise & Customs, the highest authority of the Department for release of the gold ornaments. The Chief Commissioner, CGST, Central Excise & Customs also did not consider the representation. Therefore, the Appellant approached the Hon'ble High Court of Orissa. The Hon'ble High Court directed the Chief Commissioner, CGST, Central Excise & Customs to consider the representation of the Appellant.

15. That the Gold Control Act, 1968 has already been repealed since 1990. The Hon'ble High Court was also pleased to hold that under the new fiscal policy, possession of gold is not an offence. Since the matter has not been adjudicated by the Adjudicating authority in any way as

per direction of the Hon'ble High Court for a long 27 years and in the meantime the Act itself has also been repealed since 30 years.

16. It would appear from the impugned order that there are pictures of gold seized. If those pictures are perused, a correct conclusion can be drawn that these are in the form of ornaments and the same is worn by the people of western Odisha. It is evident from the photographs of the item seized under the impugned order dated 31.12.2020, it is quite clear that a definite shape has been given to the gold Balas in question and had it been a primary gold, it would have been simple gold rod or plate or pieces, and it should not have been bent and also given a certain shape which is evident from the picture. Therefore, there is no room for doubt that these gold Balas are gold ornaments having a definite shape to be worn by the local people.

In any view of the matter the seized gold Balas are ornaments and may be released to the Appellant. In view of the above discussions, the impugned order is set aside and the Appeal filed by the Appellant is allowed with consequential relief, as per law.

(Order pronounced in the open court on 06 January 2023.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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