Supreme Court of India
Tribhuvandas Bhimji Zaveri And ... vs Collector Of Central Excise on 4 February, 1997
Equivalent citations: 1997 (92) ELT 467 SC, (1997) 11 SCC 276
Bench: A Ahmadi, F Uddin
ORDER

1. This appeal by the assessee is directed against the order of the Customs Excise and Gold (Control) Appellate Tribunal (CEGAT for short) rendered in Appeal No. G/90/85-NRB, dated 30th July, 1986. Briefly stated the facts giving rise to this appeal are as under :

2. On 21-9-1982, officers of the Income Tax Department raided the business premises of the appellant around 9.30 a.m. and prepared an inventory of gold and gold ornaments found in the premises. After the weighment of the gold and gold ornaments was completed, a copy thereof was delivered to the appellant which showed that 62190.830 gms. of gold ornaments were found in actual stock, whereas the aggregate balance of gold ornaments in their books of account maintained under the Gold (Control) Act, 1968 (hereinafter called The Act) was 67537.100 gms. on that date. The officers of the Central Excise Collectorate, Delhi were called at about 1.00 p.m. and were associated with the exercise undertaken by the Income Tax Authorities. N.K. Zaveri, partner of the appellant firm who was present at the relevant point of time informed the authorities that the transactions reflected under Voucher No. 7489 to 7496 and 7507 to 7511 as well as Receipt (Purchase) Vouchers 1439, 1922 and 1923 had not been entered in the GS-11 and GS-12 accounts. The authorities took this fact into consideration and thereafter reduced the shortage which would have worked out to 5446.217 gms. to 5014.170 gms. The appellant contends that its partner had raised a protest during the search and had followed it up by a letter dated 6-11-1982. In the letter of protest, it was mentioned that the officers had taken down the weights on the tags to the ornaments without correlating them to entries in the books and the weights were recorded without a meticulous co relation with the relevant entries. It is not necessary to indicate in detail the nature of the protest. But suffice it to say that the weight, as mentioned, was not accurate. On 21-1-1983., the Assistant Collector of Customs and Gold, Central Excise Collectorate, New Delhi served the appellant with show cause notice. After indicating the aforesaid facts in paragraphs 1 to 3 of the show cause notice, the appellant was informed that Prima facie : (i) there had been a contravention of Section 55 of the Act read with Rule 13 of the Gold Control (forms, fees and miscellaneous matters) Rules, 1968 (hereinafter called the Rules) in relation to the gold ornaments weighing 5014.170 gms. valued at Rs. 8,02,267/- found short in the stock of the said dealer and (ii) the appellants have, by their acts of omission and commission rendered themselves liable to penal action under the Act.

3. The appellants were, therefore, asked to show cause why penal action should not be taken against them. To the show cause notice was appended a list of gold items found during the search. 29 items were shown in that list with quantity and weight, in some cases, gross weight and in some cases, net weight. A reply to this show cause notice was sent by the appellants on 21-2-1985. In between the reply and the show cause notice, it appears that this Court ruled in Manik Chand Paul and Ors. etc. v. Union of India and Ors. that the GS-11 and GS-12 forms required to be maintained under Section 55 of the Act read with Rule 11 of the Rules brought into force with effect from 31-10-1975, were defective and did not disclose the true and complete account of the gold in the possession and

custody of the licence dealers. It went on to illustrate how the said forms were defective after the omission of form GS-10 since it also did not take care of the loss of weight (Ghat) which would necessarily fall on re-making, melting, refining and polishing of new ornaments from old ornaments etc. Suffice it to say that this Court felt that after the omission of GS-10, the obligation on the dealer to maintain the accounts in forms GS-11 and GS-12 was an onerous one in that they do not provide adequate and proper columns which would reflect a true and complete account of gold owned or possessed or held or controlled by the dealer. This Court, therefore, directed the administrator to look into these grievances and remedy the same by taking appropriate action and expressed the hope that in the meanwhile, no action, penal or otherwise, would be taken against the licenced dealers for failure to maintain accounts in the amended forms GS-11 and GS-12. An attempt was made by the learned Additional Solicitor General to contend that if the account was not maintained at all in GS-11 and GS-12 forms, the dealer could be excused but not in cases where the account is maintained in those two forms and is found to be reflecting shortage of gold . We find it difficult to accept this contention for the simple reason that if the two forms do not reflect the true and correct account of the gold owned or possessed or held or controlled by the dealer, the mere fact that the dealer in obedience to law maintains the accounts in those forms, can not put him in a disadvantageous position when compared to a situation where he totally omits to maintain the accounts in those two forms. It may also be mentioned that the appellants, in reply to the show cause notice, challenged the correctness of the shortfall worked out from the entries in GS-11 and GS-12 in the show cause notice and contended that the account in Annexure B to the show cause notice did not represent proper weighment at all and that it would be a travesty to rely on such a document. Proceeding further, referring to the search list prepared, it was stated that it was impossible for anyone to be assured that there was no error in working out the true quantity of gold as lying in the stock of the dealer at the relevant date. It would, thus, be seen that the appellants challenged the correctness of the very basis on which the shortage was worked out in the show cause notice. Thereafter, without prejudice to the said contention, the appellants proceeded to state that the comparison between the stocks in GS-12 and in the inventory ought to have been on the basis of net weight whereas some of the items reflected the gross net weight only without deducting the weight of lac, beads, threads, enamel, stones etc. and if these deductions were made, the shortage would further shrink to 1400 gms. only. On this premise, the appellants questioned the action proposed to be taken under the show cause notice. The Collector of Customs and Central Excise, on adjudication of the show cause notice, found the petitioner guilty of violation of Section 55 of the Act read with the relevant rules and imposed a penalty of Rupees Five lakhs. The appellant, thereupon, preferred a writ petition CWP No. 12408/85 questioning the correctness of the shortfall worked out on entries in GS-11 and GS-12 and the penalty imposed on the basis thereof. This Court granted an interim stay against the recovery of the penalty amount. However, on 6-12-1985, the authority suspended the appellant's licence to deal in gold which compelled the appellant to move a CMP No. 48672/85 in the pending writ petition and this Court granted an interim stay against the suspension of the license also. Thereafter, by an order dated 15-1-1986, this Court ordered as under :

Heard counsel on both sides. In all the facts and circumstances of the case we are of the view that the question of suspension and or cancellation of the petitioners' licence should await the result of the appeal that has been preferred by the petitioners to the Tribunal against the order of the Collector dated August 1, 1985. The question whether there was shortage and consequently a

contravention of Sections 36 and 55 of the Gold Control Act, 1968 read with the relevant Rules and whether such contravention arises without any reference to the defective Forms GS-11 and GS-12 will have to be considered by the Tribunal in the appeal and the Tribunal will decide the latter question for coming to a conclusion that there has or has not been any contravention.

4. After the matter went back to the Tribunal, the Tribunal by the impugned judgment concluded as under :

(i) That according to their own admission, certain vouchers were not entered in the appellant's account and the transactions covered by these purchase and Receipt vouchers were not entered in the accounts maintained under Section 55 of the Gold (Control) Act, 1968 and, therefore, the appellant clearly committed breach of Section 55 of the Act. This breach arises without reference to the defective Form GS-11 and GS-12.

(ii) That there was a shortage and consequently a contravention of Section 36 and 55 of the Gold (Control) Act.

5. Dealing with the question regarding the contravention of Sections 36 and 55 of the Act, the Tribunal come to the conclusion that even without reference to the defective forms GS-11 and GS-12, there was sufficient independent material to hold that there was a shortage and consequently contravention of Sections 36 and 55 of the Act. The Tribunal, however, reduced the penalty from Rupees Five Lakhs to Rupees Two Lakhs.

6. After the aforesaid impugned order was passed, the appellant preferred the present appeal by filing a special leave petition. On 21-10-1986, this Court granted special leave and ordered that pending the same, no steps for suspension or cancellation of the licence be taken by the concerned authorities and also granted an ex parte stay against the recovery of the penalty. The stay in regard to the recovery of the penalty was, however, vacated on 29-1-1990 and we are informed that the penalty amount of Rupees Two Lakhs has since been paid.

7. Mr. Diwan, the learned senior counsel for the appellants contended that the Tribunal had committed an error in appreciating the order passed by this Court on 15-1-1986 as it had, in fact, placed reliance on the defective forms GS-11 and GS-12 in working out the shortfall even though it mentions that the shortfall arises independently of those forms. It was further contended that the Tribunal was wrong in thinking that the appellants had not denied the factum of the shortfall in their reply to the show cause notice which was an error on the face of the record and that itself vitiates the order of the Tribunal. It was further stated that the principles of natural justice were violated because the authorities expressed their inability to provide the appellants with the information sought in regard to certain documents and papers by their reply dated 25-1-1985 which reads as follows :

As regards request for furnishing the certified copy of the working of the individual items of the inventory showing their gross and net weight and other particulars which have been summarised in Annexure-E, the relevant papers are not readily available with me and, therefore, I am not in a

position to furnish the copies at this stage.

8. It may be mentioned that Annexure-E was an annexure to the show cause notice and it is with reference to the said document that certain particulars were demanded by the appellants. Lastly, Mr. Diwan submitted that the penalty under Section 74 of the Act was envisaged only if there was surplus gold liable for confiscation under the Act and not otherwise.

9. From the above, it becomes clear that after the decision of this Court in Manik Chand's case (supra), it was evident that by the deletion of GS-10, GS-11 and GS-12 were found to be incomplete and, therefore, defective by this Court and this Court went to the length of saying that no action based on the accounts in the said two forms should be initiated for levy of penalty and the authority should consider removing the defects at an early date. To put it tersely, GS-11, and GS-12 were found to be forms containing accounts which did not properly reflect the gold in possession or control of the dealer at the material date. If, therefore, the decision is based on the entries in the said two forms, it could well be argued that penalty levied on the basis of defective forms cannot be sustained as the shortage reflected in the accounts therein would not correctly reflect the actual shortage. The Tribunal concluded that according to the admission of the appellants, certain vouchers were not entered in the accounts and the transactions covered by these purchase and receipt vouchers were not entered in the accounts which would go to show that there was a clear breach of Section 55 of the Act. The Tribunal then proceeds to add that this breach arises without reference to the defective forms GS-11 and GS-12. The Tribunal has clearly fallen into an error. The show cause notice itself shows that the authorities, when informed by N.K. Zaveri that GS-11 and Gs-12 were not complete in that entries from certain vouchers had not been made therein, allowed the appellants to reflect the un-entered vouchers and the shortage was worked out on that basis. The show cause notice merely stated that there was a contravention of Section 55 of the Act and Rule 13 of the Rules in relation to gold ornaments weighing about 5014.170 gms. in the accounts with the dealer at the relevant date. There was no charge that by failing to enter the particulars of the vouchers in GS-11 and GS-12, the appellants had violated Section 55 of the Act. This goes to show that the conclusion reached by the Tribunal is not consistent with the charge in the show cause notice. Secondly, the Tribunal holds that there was a shortage and consequently a contravention of Sections 36 and 55 of the Act. Here again, it must be noticed that the shortfall has been worked out in the show cause notice based on the account in GS-11 and GS-12 and this is clear from the Annexures appended to the show cause notice. The figures 62190.830 gms. and 67537.100 gms. are clearly taken from GS-11 and GS-12 and, therefore, it is not correct to say that the shortfall had been worked out independently of the entries in these two forms. It will further be seen that in the reply to the show cause notice, the appellants had clearly questioned the correctness of the shortfall worked out from these two forms and by way of an alternative they had contended that if the weight of other material such as lac, beads, enamel, stones etc. was deducted, the shortfall would come to 1400 gms. only. This, however, does not mean that the appellant admitted the fact that there was infact a shortfall of gold for which they could be penalised. All that they stated was that even if the authorities go by GS-11 and GS-12, if the aforesaid deductions are made, the shortfall would shrink to 1400 gms. Therefore, to take the alternative statement as an admission on the part of the appellant, was not correct. We are, therefore, of the opinion that the Tribunal, even though it states that it does not base its decision on the accounts in GS-11 and GS-12, has , in fact, relied on those accounts which, as held by this Court do not properly

reflect the correct state of affairs as far as the shortfall is concerned.

10. The appellants, by their letter dated 9-1-1985, had requested the authorities to furnish the certified copy of the check list prepared at the time of the raid with a view to enabling them to check and verify the particulars. In reply thereto, the Income Tax Officer expressed his inability to provide the required documents. We have extracted the passage from his reply in the earlier part of this judgment. This, contends the learned Counsel for the appellants, severely prejudiced the appellants' right to offer a proper explanation and to that extent the principle of natural justice stood violated. We fail to appreciate why the authorities could not furnish the required information to the appellants. To say that the documents are not readily available with the officer, is no ground to deny vital information to a person who is to be visited with a penalty under the Act. We are of the view that the failure to supply this important piece of information to the appellants has prejudiced the appellants and to that extant, we agree with Mr. Diwan that the principle of natural justice would stand violated.

11. We think it is sufficient to rest the judgment on these two grounds. The result is that this appeal must be allowed. The impugned order is set aside and the penalty paid shall be refunded. There will, however, be no order as to costs.

Writ Petition (C) No. 1420 of 1986

12. Counsel states that the petition has become infructuous in view of the decision in Manik Chand's case. The petition shall stand so disposed of with no order as to costs.