
(1979) 03 CAL CK 0022
In the Calcutta High Court
Case No : C.R. No. 12976 (W) of 1975

A. Tosh and Sons (P.) Ltd.	Vs	APPELLANT
Asst. Collector of Customs and Others		RESPONDENT

Date of Decision : 08-03-1979

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Exchange Regulation Act, 1973 — Section 12(1), 18, 18(1)

Citation : AIR 1979 Cal 386

Hon'ble Judges : B.C. Basak, J

Bench : Single Bench

Advocate : B.C. Dutta, B.B. Ghose and S. Bhattacharjee, for the Appellant; S.N. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Basak, J.—In this application under Article 226 of the Constitution of India the petitioner is praying for a Writ in the nature of mandamus directing the respondents to allow shipment of teas as per the shipping bill serial No. 2723 dated 11th April, 1975 and the connected invoice by the steamer which will be ready on 16th June 1975 at the Calcutta Port and/or by such other steamer that may be available for shipping teas to the said Port and also for a Writ in the nature of certiorari for quashing the order dated 5th June 1975 passed by the respondent No. 1 and also the show-cause notice issued on 30th April 1975.

2. The case of the petitioner as made out in the petition is as follows:-- The petitioner is a limited company registered in Calcutta carrying on business in teas in India and abroad. The petitioner also acts as commission agents of foreign principals and is also an exporter of teas. The teas grown in various parts of West Bengal and Assam are sold in auctions in Calcutta by the Tea Auctioners like J. Thomas & Co. Private Ltd. and Caritt Moran & Co. Private Ltd. conducted under the auspices of the Calcutta Tea Traders Association. A show-cause notice was issued, which is Annexure J to the petition. The show-cause notice states as

follows:--

"No. S5-(Gr. IV-10/75E

Dated 30-4-75

From: Asstt Collector of Customs, for Export Custom House, Calcutta.

To: M/s. A. Tosh & Sons Pvt. Ltd. P-32 & 33 Indian Exchange Place, Calcutta.

Sub: Misdeclaration of value contravention of the provisions of Customs Act, 62 & FERA, 1973 -- Notice to Show Cause.

M/s. A. Tosh & Sons submitted a shipping bill which serially numbered 2723 on 11-4-75 for shipment of 20 chests containing 876.6 Kg. of tea to M/s. Paul Schrader & Co., West Germany under a telegram dated 4-4-75 in lieu of contract. The telegram shows the contract prices quoted by the foreign buyer for sample Nos. 26 and 42 @ Rs. 50 per kg. and for sample No. 45 @ Rs. 60 per kg. But the exporter confirmed the price at a much lower rate. (Rs. 44.00 per kg. for goods represented by sample Nos. 26 and 42 and Rs. 44.50 for goods represented by sample No. 45 as shown in the copy of the telegram). And at the same time exporter invoiced the consignment at a different price which was lower than the quotation price of the foreign buyer.

Thus in view of the aforesaid facts it appears prima facie that the exporter M/s. A. Tosh & Sons Pvt. Ltd. have under invoiced the tea consignment. The amount of the under-valuation noticed in the consignment appears as follows:--

Sample No. Chest (K.g.) Price offered by the foreign buyer. Price confirmed by the exporter. Price invoice by the exporter. Extent of under-valuation.

26 -- 8 (331.8 Kg.) Rs. 50/- Rs. 44.00 Rs. 46.27 Rs. 1237.61

42 -- 6 (266.4 Kg.) Rs. 50/- Rs. 44.00 Rs. 46.27 Rs. 993.67

45 -- 6 (277.8 Kg.)

Rs. 50/- Rs. 44.50 Rs. 46.83 Rs. 3658.63

20 Chests (876 Kg.)

Rs. 5889.91

The export of any goods by misdeclaration of value in the prescribed G.R.L. is prohibited u/s 11 of the Customs Act read with the Section 18(1)(a) of the FERA of 1973 and Govt. of India's notification No. 12(17)-F1/47 of 4-8-4T. Therefore M/s. A. Tosh & Sons Pvt's attempt at export of the goods under-invoicing their value to the extent as mentioned above constitutes an offence punishable u/s 113(d) and (j) of Customs Act "62. They also appear to be person concerned for penal action u/s 114 of Customs Act "62 read with Section 67 of FERA "73.

M/s. A. Tosh & Sons Pvt. Ltd. is therefore, called upon to explain the matter in

writing and also to show cause to the undersigned within seven days hereof why the goods should not be confiscated under Sections 113(d) and 113(i) of Customs Act 1962 and why penal action should not be taken against them under Section" 114 of the Customs Act 1962. Their written explanation should be addressed to the undersigned within the period mentioned above along with the documentary evidence in support of their reply,

Sd/- Asstt. Collector of Customs (Export (I).)"

The petitioner replied to the said show-cause notice. By an order dated 12th May 1975 the Asstt. Collector of Customs Export I allowed the petitioner to export the goods at the price offered by the foreign buyer i.e. the so-called bid price and not the price quoted by them in the shipping bill. They were warned to be careful in future. Being aggrieved by the said order the petitioner preferred an appeal and by the appellate order dated 28th May 1975 the Assistant Collector of Customs set aside the original adjudication order and remanded back the case. Thereafter the matter was heard again and a fresh order of adjudication was passed. After setting out the background of this case the Assistant Collector of Customs for Export I passed the following orders:--

"The adjudication of the case was accordingly reopened de novo. In the de novo proceedings, the exporter's advocate Shri N. C. Sen prayed in his letter dated 28-5-75 for adjudication of the case without issue of a further show cause memo. Since I also found that the show cause Memo No. S5(Gr. IV)-10/75E dated 30-4-75 issued by previous Asstt. Collector of Customs for Export-I in this case the framing of charges, was correctly done, I agreed to the submission made in the advocate's prayer for not issuing a show cause memo again. However, a personal hearing was granted to the Advocate Shri N, C. Sen and Shri N.R. Ghosh the Export Manager of M/s. A. Tosh & Sons Ltd, in this connection on 29-6-75.

During personal hearing, the Advocate argued before me that the prices quoted by M/s. Paul Schrader & Co. Bremen in their telegram dated 4-4-75 for teas represented by samples Nos. 26, 42 and 45 sent by the exporters, were the "bid" prices from buyer's side. They further argued that "bid" is a price offered in a competition to secure a contract. Therefore, bidding a price in a competitive market, is an action to get a contract and therefore, the same action cannot be contract itself. According to them when an offer of price is reciprocated by acceptance from selling side then the contract comes into existence and force. They further reiterated that they had received an offer by telegram dated 4-4-75, to buy teas represented by samples Nos. 26 and 42 at a total export price not exceeding Rs. 50.00 per kg. and teas represented by samples Nos. 45, 16 at total export price not exceeding Rs. 60.00 per kg. The exporter could however purchase teas represented by samples Nos. 26 and 42 @ Rs. 41.50 per kg. and teas represented by sample No. 45 @ Rs. 42 in the Calcutta auction but. could not purchase teas represented by sample No. 16 as the lot covered by that sample was sold in auction at Rs. 75.00 per kg. After adding freight and

commission charges @ 11/2 and other handling charge @ 2 pence per kg. foreign buyers were informed by the exporters through cable dated 8-4-75, the export price for lot represented by sample Nos. 26 and 42 @ 44.00 P. C & F per kg. and the same for lot represented by sample No. 45 @ 44.50 P. C. & F. per kg. At this stage, when the foreign buyer's offer was duly reciprocated by quotation of specific sale price, the instant sale contract had become complete and irrevocable.

Telegram dated 4-4-75 produced in the Custom House along with shipping bill in lieu of a contract, for the sale does not indicate that prices quoted in the same are bid prices for each lot of teas mentioned therein. Therefore, the arguments put forward by exporter's Advocate that "bid" price is not contractual price is not relevant in this case.

Contract is a document asked by the Custom House assessing Officers to be produced in connection with scrutiny of an export consignment as an evidence showing buyers' willingness to buy goods at an agreed price. It is examined for satisfaction of the assessing officer for the purpose that price declared in the shipping bill is correct as per buyers' agreement which is deemed to be the maximum bargain price of the goods mentioned therein. Foreign buyers offer price of any goods, if it reasonably covers the domestic value of the goods plus exporter's profit and cost of charges for shipment, and if that price is fairly competitive in relation to offers made for the said goods by other buyers in that buying country or the quoted price is in conformity with the prevailing market condition in the said country such price is considered to be the full export value of the goods as envisaged u/s 18(1)(a) of the FERA 1973, In this context, a Custom House assessing officer is not much meticulously concerned as to whether a contract produced in the Custom House is correct according to the tacit implications of the law of contract or not. He is only to be aware of the buyers' expression of mind regarding his accepted price and other relevant terms which affects customs formalities and rules which a Customs Officer has to administer in the course of his specific duty.

Telegram contract dated 4-4-75 produced in this connection showed prices quoted by foreign buyer for different grades of tea that they wanted to buy. This telegram contract does not show that prices quoted in the same is bid price. Since the telegram contract prices covered well the tea cost price plus exporter's margin of profit and other charges and since the said prices can be considered to be the worth prices for export of the particular teas to the buying country that price should be considered to be the full export value of the goods. Because no buyer can afford to offer a price for any goods, purchasing at which he has to sustain a loss in domestic or otherwise sale. Therefore, the prices shown in the foreign buyer's telegram dated 4-4-75 even if those are correspondingly higher in comparison with domestic sale value in Calcutta auction, permitting quite high profit for exporters, there is no reason to think that such buyer's quoted price in the telegram is not best bargain price which the particular teas worthed in that

overseas country. I, therefore, consider that any attempt to export any goods to an overseas country at a price lower than the price that the particular goods worthed in that foreign country, is a case of attempt at under-invoicing and a definite contravention of the provision of Section 18(1)(a) of the FERA, 1973. By virtue of provision of Sec. 67 FERA, 1973 the prohibition imposed u/s 18(1)(a) of the FERA, 1973 shall be deemed to have been imposed u/s 11 of the Customs Act 1962. I hold that the exporters M/s. A. Tosh & Sons Pvt. Ltd. have contravened the provision of Section 11 of Customs Act 1962 read with Section 18(1)(a) and Section 57 of the FERA, 1973 by attempting to export the teas in the subject consignment by declaring their export value lower than the full export value on the GRI and as such teas are liable to confiscation u/s 113(d) and (i) of the Customs Act 1962. I further hold that the exporters are also liable to penal action u/s 114 ibid.

ORDER

However, having regard to the circumstances of the case and the fact that they are a firm of considerable reputation and there is no antecedent of their commission of under-invoicing in the past, I take a lenient view in this case.

I order that the teas in the subject consignment, be allowed shipment at prices offered by foreign buyer in their telegram dated 4-4-75 received in Calcutta on 5-4-75 and not at the prices declared in the invoice and the S/Bill. The exporters, M/s. A. Tosh & Sons Pvt. Ltd. are cautioned to be careful in future.

Sd/- Asstt. Collector of Customs for Export (I)

Copy forwarded to M/s. A. Tosh & Sons Pvt. Ltd. for information. Sd/- Assistant Collector of Customs for Export (I)."

3. Being aggrieved by the said order this application under Article 226 has been made. Upon such application being made on the 12th June 1975 this rule nisi was issued. Mr. B. C. Dutt, learned Advocate for the petitioner has made the following submissions. He has submitted firstly that the Assistant Collector of Customs has come to an erroneous conclusion. There has been no undervaluing in the present case. The bid rate could not be treated as contract rate and that the telegram merely specified the bid rate. That was not the contract made between the parties. Accordingly the bid rate could not be treated as export value within the meaning of the Act. In this connection he has reiterated the facts and contentions made on behalf of his client in the petition and also before the adjudicating officer. The second submission of Mr. Dutt is that assuming that there is any wrong or mistake in particulars given in the declaration regarding the export value, Section 18 of the Foreign Exchange Regulation Act 1973 (hereinafter referred to as FERA 1973) is not attracted. He has submitted that misdeclaration and/or wrong declaration if any does not amount to "no declaration". In this connection he has relied on a decision of the Supreme Court in the case of Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, and the two other cases which followed the same

being Becker Gray and Co. (1930) Ltd. and Others Vs. Union of India (UOI) and Another, and Jute Investment Co. Ltd. v. S.K. Srivastava reported in (1973) 77 CWN 501, Mr. Dutta has submitted that the law which was laid down by the Supreme Court and which has been followed subsequently is still good law. He has submitted that even if there has been amendment to the old Act or a replacement of the old Act by a new Act, the position still remains the same and the said decision will still be applicable in respect of all cases u/s 18 of the FERA 1973. Mr. Dutt has further submitted that in any event having acted bona fide in this matter it cannot be said that there has been any violation of the provisions of the said Act.

4. Before I deal with the contentions of Mr. Dutt, I set out hereunder the relevant provisions of the relevant Acts at different times. Originally Section 12(1) of the Foreign Exchange Regulation Act 1947 provided as follows:--

"Section 12 (1). The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be paid in the prescribed manner."

5. The decision of the Supreme Court in Union of India v. Shreeram Durga Prasad Pvt. Ltd. (supra) was u/s 12 (1) of the 1947 Act before its amendment. After such decision an Ordinance was promulgated whereby Section 12 of the 1948 Act was substituted by introduction of the following provisions. This was later replaced by an amending Act.

12 (1). The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereinafter in this section referred to as export) of all goods or of any goods specified in the notification from India directly or indirectly to any place so specified unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed or so specified and true in all material particulars which, among others, shall include the amount representing--

(i) the full export value of the goods or

(ii) if the full export value of the goods is not ascertainable at the time of export the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the course of international trade, and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been, or will within the prescribed period be, paid in the prescribed manner."

6. In the year 1973 the new Act viz., FERA 1973 came into force and Section

18(1) of the said Act provides as follows:--

"18. Payment for exported goods --(1) (a) The Central Government may, by notification in the Official Gazette prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of all goods or of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed or so specified and true in all material particulars which among others shall include the amount representing--

(i) the full export value of the goods; or

(ii) if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the overseas market, and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been or will within the prescribed period be, paid in the prescribed manner.

(b) if the Central Government is of opinion that it is necessary or expedient in the public interest so to do, it may by notification in the Official Gazette, specify any goods, from among those goods to which a notification under Clause (a) applies, and direct that in respect of the goods so specified, where an exporter makes a declaration under Sub-clause (ii) of Clause (a) of the value which he, having regard to the prevailing market conditions expects to receive on the sale of such goods in the overseas market, he shall not, except with the permission of the Reserve Bank on an application made to the Reserve Bank by the exporter in this behalf, authorise or permit or allow or in any manner be a party to, the sale of such goods for a value less than that declared:

Provided that no permission shall be refused by the Reserve Bank under this clause unless the exporter has been given a reasonable opportunity for making a representation in the matter:

Provided further that where the exporter makes an application to the Reserve Bank for permission under this clause and the Reserve Bank does not, within a period of twenty days from the date of receipt of the application, communicate to the exporter that permission applied for has been refused, it shall be presumed that the Reserve Bank has granted such permission.

Explanation-- In computing the period of twenty days for the purposes of the second proviso, the period, if any, taken by the Reserve Bank for giving an opportunity to the exporter for making a representation under the first proviso shall be excluded."

7. I shall take up the first contention of Mr. Dutt first. The whole question is what is the export value of the goods. In order to ascertain the export value of the goods the adjudicating officer has relied on various facts. He has relied on the

rate specified in the telegram. He has not accepted the same to be the bid price. For the reasons given therein the price quoted by the telegram has been considered by him to be the full export value of the goods. Mr. Dutt has contended that the said decision is erroneous in the facts of this case. He has submitted that the petitioner acted as an agent of the foreign buyers and the bid price was only the ceiling price at which the petitioner was authorised to purchase the goods in question for the purpose of the export. He has submitted that there are various documents which have been annexed to the petition to show that the price quoted in the telegram could not be taken as the contract price.

8. In my opinion it is not open to this Court in its writ jurisdiction to grant relief to the petitioner on the basis of such contention of Mr. Dutt. This Court in its Writ Jurisdiction is not sitting in appeal over any decision of any authority. This Court can interfere with the decision of a subordinate authority only when this authority is acting without jurisdiction or in violation of the; principle of natural justice or where there is an error of law apparent on the face of the impugned order which would include a case where there is no material before the authority or where the order is perverse. In this particular case error if any is not an error of law but an error of fact. The question involved was not certainly not a pure question of law. At the most it is a mixed question of fact and law. In any event there cannot be any question of any error apparent on the face of the record. Certain materials were produced by the petitioner before the authority concerned. What was to be ascertained was what was the export value. In this connection various materials have been relied upon by the petitioner. On the basis of these materials the adjudicating officer has come to a certain conclusion. This conclusion may be erroneous but there is no question of this being perverse or without any material. At the most error if any is an error of fact and not of law apparent. Certainly there is no error of law apparent This Court in its Writ Jurisdiction is not sitting in appeal over the order passed by the Assistant Collector of Customs, This Court will not interfere with any such order merely on the ground that if this Court was sitting in appeal over such order, it would have come to some other conclusion. Appraisement of evidence is not permissible in a Writ Jurisdiction. In that view of the same I reject this contention of Mr. Dutt.

9. The next question is whether there has been a violation of Section 18(1) of FERA 1973. I have already quoted the relevant section in this connection. The Supreme Court's decisions are based on the original Section 12 (1) under the old Act which is quoted above. The Supreme Court came to its conclusion on the basis of such section as it then stood. It was pointed out in the majority of the decisions of the Supreme Court that there was no such violation. The Supreme Court pointed out that the only question that arose for decision in those appeals was whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of the proceedings, the respondents can be held to have contravened Section 12 (1) as it then stood. The Supreme Court pointed out that admittedly the stipulated declarations in the prescribed

forms have been furnished. The evidence specified has also been given. Therefore prima facie there was no contravention of Section 12 (1). It was pointed out that what was said against the respondents was that the invoice price mentioned by them in the declarations did not represent the full export value; hence the declarations given by them are invalid declaration which means that the concerned goods were exported without furnishing the declaration required by Section 12 (1). The Supreme Court held that it was not possible to accept this argument. It was held that the declarations given do satisfy the requirements of Section 12 (1) though they do not correctly furnish all the informations asked for in the form. Such declarations cannot be considered as non est. Accordingly it was held that there was no contravention of Section 12 (1). In this context it was stated as follows:--

"If we are to hold that every declaration which does not state accurately the full export value of the goods exported is a contravention of the restrictions imposed by Section 12 (1) then all exports on consignment basis must be held to contravene the restrictions imposed by Section 12 (1). Admittedly Section 12 (1) governs every type of export. Again it is hard to believe that the legislature intended that any minor mistake in giving the full export value should be penalised in the manner provided in Section 23A. The wording of Section 12 (1) does not support such a conclusion. Such a conclusion does not accord with the purpose of Section 12 (1).

10. This decision was followed by the subsequent decision of the Supreme Court viz., in Becker Gray & Co. (supra). In view of this decision an amendment was introduced by an ordinance which was later on replaced by the Foreign Exchange Regulation (Amendment) Act 1969 whereby Sub-section (1) of Section 12 of the Foreign Exchange Regulation Act 1947 was substituted in the manner indicated above. The new 1973 Act replaced the old Foreign Exchange Regulation Act and the corresponding law was contained in Section 18(1)(a) which is quoted above. The case before the Division Bench of this Court in the case of Jute Investment Co. was also in respect of a show-cause notice dated 2nd December 1965 i.e. prior to the amendment. The Division Bench following the judgment of the Supreme Court in the case of Shreeram Durga Prasad (supra) made the Rule absolute. The Division Bench referred to the amendment in 1969 and pointed out that before such amendment in 1969 Section 12 (1) did not require that the particulars given in the declaration must be true and correct in all respects and the requirement of the said section therefore will have to be given even if the particulars of declaration were incorrect. In my opinion it cannot be said that the decision of the Supreme Court in Rai Bahadur Sri Ram Durga Prasad's case is still applicable after the amendment or after 1973 Act. As rightly pointed out by the Division Bench of this Court the old Section 12 (1) prior to the amendment did not require that particulars given in the declaration must be true and correct in all respects. After the amendment and particularly after the 1973 Act came into force, under which the present show-cause notice has been issued, once it is held that the particulars given in the declaration are not true or correct in all

respects immediately Section 18 is attracted and there is a violation of the said Act. In the present case the finding of the adjudicating officer is to the effect that there has been under-invoicing. It automatically attracts the provisions of Section 18 because in that event the declaration furnished was not true in all respects and accordingly it must be held that there has been a breach of Section 18 of the Act. I have already held for the reasons given above that the finding of the adjudicating officer to that effect cannot be challenged and accordingly if that is so then there is such a violation of Section 18 in view of the language of the present Act, and I cannot hold that the authority has acted without jurisdiction. In my opinion the Madras decision relied upon by Mr. Dutt does not make any change. The facts are quite different. In the facts of that case the High Court came to the conclusion that from the available materials it cannot be said that the petitioner furnished untrue facts with regard to material particulars in connection with the export in question.

11. I have got only one observation to make in respect of the Madras judgment. Though it was a writ jurisdiction the learned single Judge thought it fit to appraise the evidence and the materials available in order to come to the conclusion as to, whether on the available materials it can be said that the petitioner furnished untrue facts with regard to the material particulars within the meaning of Section 18. As I have already stated, in my opinion, the scope of jurisdiction of a writ Court does not go to the extent of examining materials independently in coming to an independent conclusion on a question of fact.

12. So far as the question of bona fide is concerned, in my opinion that is not material in the present case. If there is an under-invoicing, that is, if the petitioner has not shown the correct export value, then the declaration is not correct and there is a violation of Section 18. Whether they have acted bona fide or not is immaterial. In any event whether the person has acted bona fide or not is not a pure question of law and at this stage this Court cannot hold that the petitioners have acted bona fide.

13. For the aforesaid reasons I dismiss this application and discharge the Rule. There will be no order as to costs. Interim orders if any are vacated.