
(1986) 07 KL CK 0030
In the High Court Of Kerala
Case No : M.F.A. No. 27 of 1981

Ajantha Cashew Company

APPELLANT

Vs

Assistant Director of Enforcement

RESPONDENT

Date of Decision : 10-07-1986

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 12(2)

Citation : AIR 1987 Ker 34 : (1989) 66 CompCas 673 : (1986) 9 ECC 352 : (1987) 32 ELT 377 : (1987) 1 ILR (Ker) 205

Hon'ble Judges : V. Sivaraman Nair, J;K. John Mathew, J

Bench : Division Bench

Advocate : M.N. Sukumaran Nayar and N.A. Muraleedharan, for the Appellant; Central Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Sivaraman Nair, J.—The appellant is an exporter of cashewnuts. It had entered into a contract with a foreign buyer, M/s. Zaloom Brothers Inc., New York, through its agents, M/s. Abel Reggio Company Inc., New York, for sale of 1500 cartons of cashewnuts during July, August and September, 1971. The price stipulated was 70 cents per pound.

2. It appears that there were certain over-drawings by the appellant from its agent and certain adjustments were made on account of the alleged default in shipping the stipulated quantity of cashewnuts, during August, 1971. The statement of accounts submitted by its agents are alleged to have been forwarded to the Reserve Bank of India by the appellant along with its covering letters. One such statement indicated that an amount of U.S. \$ 750 was appropriated from the overdrawn balance due to the appellant on various shipments of cashewnuts consignments. A further amount of US \$ 203.94 was shown as having appropriated by the agent as overdrawing made by the appellant but really due to the agent.

3. Proceedings were initiated by the Assistant Director of Enforcement under the Foreign Exchange Regulation Act, stating that the appellant contravened Section 5(1) read with Section 12(2) of the Foreign Exchange Regulation Act, 1947, in that an amount of US \$ 953.94 from out of the value of the goods exported by the appellant were not repatriated into India within the period prescribed. After calling for the explanation of the appellant, the Assistant Director passed an order dated 7-12-1977 requiring the appellant to pay an amount of Rs. 1000/- each for contravention of Section 5(1)(a) and Section 12(2) of the Foreign Exchange Regulation Act, 1947.

4. The appellant filed a statutory appeal before the Foreign Exchange Regulation Appellate Board, after remitting the amount of fine on the two counts. The two main contentions urged by the appellant in its appeal before the Appellate Board were: (1) that the adjustment of amounts over-drawn by the appellant did not require specific sanction of the Reserve Bank of India, and (2) that the amount was adjusted by the agent as it was found on accounting that there was over-drawal to the extent of US \$ 203.94 by the appellant, which should not have been repatriated in terms of the agency contract with M/s. Abel Reggio Company Inc., New York. It was, therefore, stated that no offence was committed contravening Section 5(1)(a) of the Foreign Exchange Regulation Act. As far as the allegation of contravention of Section 12(2) of the Act was concerned, it was submitted that the statement of accounts emanating from the foreign agent relating to all sale-transactions were duly forwarded to the Reserve Bank of India, soon after the receipt of such statements, and therefore, no offence was involved in the adjustments effected by the foreign agent. The appellant also took up the position that an offence of contravention of Section 12(2) of the Act can take place only in respect of consignment sales and not completed sales. Reference was made to a decision of a Full Bench of the Calcutta High Court reported in *The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others*, in this regard. A contrary view taken by a decision of a Division Bench of the Madras High Court and reported in *R. Venkata Subbu and Others Vs. The Director of Enforcement and Another*, was said to have become invalid in view of the later Full Bench decision of the Calcutta High Court.

5, The Appellate Board accepted the contentions of the appellant as far as the alleged contravention of Section 5(1)(a) of the Foreign Exchange Regulation Act, 1947 was concerned. It, however, expressed its inability to accept the case of the appellant in respect of contravention of Section 12(2) of the Act, either on merits or because of the Calcutta precedent. The Appellate Board felt that it was bound by the decision of the Madras High Court and could not be persuaded to accept the Calcutta decision in preference to the Madras decision. On admitted facts, it was found that an amount of US \$ 750 was not repatriated out of the value of the goods which were exported. It was, therefore, found that the offence of contravention of Section 12(2) of the Act was fully proved. The Appellate Board, however, took other attendant circumstances into consideration like forwarding of the statement of accounts to the Reserve Bank of India and the circumstances

which led to the non-repatriation of the entire sale proceeds into India, therefore, reduced the penalty to Rs. 500/-.

6. This Second Appeal is filed by the appellant alleging that the Appellate Board went wrong in affirming the findings against it u/s 12(2) of the Foreign Exchange Regulation Act. Counsel submitted that the view expressed by the Full Bench of the Calcutta High Court in the later decision ought to have been preferred by the Appellate Board instead of feeling bound by the incorrect earlier decision of a lesser Bench of the Madras High Court.

7. We do not think that the view expressed by the Madras High Court in the decision reported in *R. Venkata Subbu and Others Vs. The Director of Enforcement and Another*, was incorrect. The facts of that case were that the exporter had over invoiced and the charge of violation of Section 12(2) of the Foreign Exchange Regulation Act, 1947, was based on non-repatriation of the full amount payable by the foreign buyer. The exporters contended that the fact of over invoicing having been found on materials, including their admissions, non-repatriation of the full invoice value could not be sustained. It was also submitted that the terms of Section 12(2) of the Act would apply only to contravention committed in respect of consignment sales and not to completed sales. It was observed by Anantanarayanan, C.J., that -

"Certain inferences, however, would appear to be fairly clear. The words "no person entitled to sell, or procure the sale of the said goods", are clearly descriptive; they refer to the person in the capacity of the seller of the goods, or to a person entitled to procure the sale of the same, after the export of the goods has been made. But this does not necessarily imply, as far as we can gather, that the export must only be to a nominee of the consignor at the other end. On the contrary, any such interpretation would render meaningless the certificate in the G.R.I. Form furnished in these cases, that not only is the invoice value declared as the full export value of the goods, but that it is the same as that contracted with the buyer. Any person in this situation has two legal obligations. He must see that the sale of the goods is not delayed to an unreasonable extent. He must further see that payment for the goods is made in the prescribed manner representing the full amount payable by the foreign buyer in respect of goods, and also that such payment is not unduly delayed."

Natesan, J., agreeing with the Chief Justice, observed :

"I find no difficulty in holding that Section 12(2) applies to cases both of export on sale and export for sale, that is, consignment sale as referred at the Bar, though there was considerable discussion on this. Section 12 must be read in its entirety and Section 12(2) interpreted in the context. The language no doubt is rather unhappy but the legislative intent is clear. The person referred to as the person entitled to sell or procure the sale of in the first part of Section 12(2) is only descriptive and can include a case where the person has actually sold or procured the sale of the goods. In the Indian Sale of Goods Act, the words

"Buyer and Seller" subject to the context, may mean both a person who buys or agrees to buy and a person who sells or agrees to sell as the case may be. In the context of the provisions under consideration, it appears to me that it can, without violence to the language and bearing in mind the scope and object of the Act, include a person who sells or has sold, or a "consignor for sale who offers for sale the goods exported. There is nothing incongruous or incompatible in applying Section 12(3)(a) or (b) to the case of an export on sale, that is to a case where there is a contract of sale with a foreign buyer. Even where there is a firm contract of the sale with a specified buyer, the completion of the sale may be delayed for various reasons and property may not pass immediately on the goods being placed on board the ship. The sub-section, of course, ex-facie applies to the case of consignment for sale, that is, an export by a consignor of goods to a consignee for sale; but it clearly takes in also cases where there are firm contracts of sale."

8. The above decision of the Madras High Court was also considered by the Full Bench of the Calcutta High Court in *The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others*, . We do not find any answer to the view expressed by the Madras High Court, particularly with that of Natesan, J., with reference to the Sale of Goods Act. If the phrase "person entitled to sell or procure the sale of in the first part of Section 12(2) of the Act is descriptive, and the analogy of the definition of "Buyer and Seller" in the Indian Sale of Goods Act is available, the reasoning adopted by the Madras High Court cannot be faulted. Unwavering literality in the matter of interpretation may, perhaps, justify the view adopted by the Calcutta High Court. But, the preamble of the Foreign Exchange Regulation Act, which shall be adopted as the key for understanding its real import, seems to us to justify the Madras view. It has been repeatedly held that in the matter of economic offences, the enactment should be interpreted so as to make it workable and that the rule that a construction in favour of the subject should be accepted does not apply to such laws. We need only refer to the following observation in *Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others*, :

"I have to construe an Act which was enacted in the interest of the national economy. A deliberate large-scale contravention of its provisions would affect the interests of every man, woman and child in the country. Such an Act, I apprehend, should be construed so as to make it workable; it should, however, receive a fair construction, doing no violence to the language employed by the Legislature. It was said that if two constructions are possible the one that is in favour of the subject should be accepted. It is not necessary to pronounce on this proposition for I have come to the conclusion that there is one true construction of Section 12(1). But I should not be taken to be assenting to this proposition in so far as it is applicable to an enactment like the Exchange Act, for no subject has a right to sabotage the national economy".

We are conscious of the fact that we are dealing with a penal provision in the

Foreign Exchange Regulation Act. But, if it sub-serves conservation of foreign exchange resources of the country and results in an effective over-sight of transactions indirectly affecting such foreign exchange, we feel that that interpretation shall commend itself for acceptance by this Court. We are, therefore, of the opinion that we shall prefer the view expressed by the Madras High Court in the matter of interpretation of Section 12(2) of the Foreign Exchange Regulation Act to the view expressed by the Full Bench of the Calcutta High Court.

9. In this view, we do not find it possible to accept the submission of counsel for the appellant that the appeal was wrongly decided by the Appellate Board. We confirm the order of the Foreign Exchange Regulation Appellate Board, which is the subject matter of this appeal.

The appeal, therefore, fails and is hereby dismissed. There will be no order as to costs.