

(2001) 09 MAD CK 0139

In the Madras High Court

Case No : C.M.A. No. 66 of 1990 and C.M.P. No. 1043 of 1990

Arcot Exports

APPELLANT

Vs

The Director of Enforcement, Enforcement Directorate

RESPONDENT

Date of Decision : 27-09-2001

Acts Referred:

Customs Act, 1962 — Section 112, 125

Evidence Act, 1872 — Section 101, 102, 103, 104

Foreign Exchange Regulation Act, 1973 — Section 18, 18(1), 18(2), 18(3), 23(1)

Foreign Exchange Regulation Rules, 1974 — Rule 8

Citation : (2002) 79 ECC 539 : (2002) 139 ELT 274

Hon'ble Judges : P. Shanmugham, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : M. Vaidyanathan, for the Appellant; K. Kumar, Additional, Central Government Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

P. Shanmugham, J.—1. The appeal preferred by the appellant u/s 52(2) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the Act") before the Chairman, Foreign Exchange Regulation Appellate Board. The Board has dismissed the appeal, against the order of the Additional Director of Enforcement, but modified the penalty imposed and directed the appellant to pay a sum of Rs.35,000 by way of penalty for contravention of section 18(2) read with Section 18(3) of the Act.

2. The brief facts are as follows- The appellant has admittedly exported ready-made garments to M/s.Universal Enterprises Ltd., Male in September to November 1980 representing to the value of Rs.2.63,654,50. Since the said amount in Foreign Exchange has not been repatriated, a show cause notice was issued to the appellant by the Special Director of Enforcement and after considering the reply filed by the appellant dated 6.4.1984 the Additional Director of Enforcement passed an order dated 14.6.1985 imposing the penalty of Rs 50,000 on the firm and additional amount of Rs.15,000 on the Managing

Partner. An appeal was preferred before the Foreign Exchange Regulation Appellate Board. The Appellate Board by the Impugned order modified the penalty and confirmed the contravention, the appeal is against this order.

3. According to the learned counsel for the appellant the Board having found that the appellant had taken all necessary efforts to secure the realisation of the amount in question and bona fides in the matter ought not to have imposed the penalty. However, according to the learned counsel the penalty is excessive and disproportionate to the alleged contravention.

4. Mr.Kumar, learned Additional Central Government Standing Counsel appearing on behalf of the respondent submits that Section 54 of the Act enables the High Court to interfere with the decision of the Appellate Board only on a question of law and note on the findings of the fact. He further submits that Rule 8 of the Foreign Exchange Regulation Rules, 1973 (hereinafter referred to as "the Rule") provides that the amount representing the full export value of the goods exported shall be realised and be paid to the authorised dealer on the due date for payment or within six months from the date of shipment of the goods whichever is earlier. The Rule also provides for an exception by way of an order before the Reserve Bank of India for a sufficient reasonable cause being shown to extend the said period. In, this case the appellant having not realised the amount and admittedly not sought for extension and obtain extension by Reserve Bank of India has committed contravention of Section 18(2) and 18(3) of the Act,

5. According to him, there is no question of bona fides or lack of willfulness in the case of contravention since the contravention is complete on the facts of non-realisation within the time provided or extension of time granted.

6. After hearing the learned counsel on either side, we find from the order of the Appellate Board that while confirming the contravention have observed as follows:-

"Therefore, notwithstanding various other efforts made by the appellant in securing realisation of the export value and their complete bona fides in the matter, the appellant No.1 must be held liable for contravention of Section 18(2) read with 18(3) of the Act and the contravention having been restricted to Rs.1,88,994,50 and the penalty was directed to be reduced proportionately and was fixed at Rs.35,000 for the said contravention."

Therefore, on the admitted facts of non-realisation of the Foreign Exchange though there was a belated attempt on the part of the appellant by filing the suit after the notice issued by the Special Director of Enforcement the contravention is complete by non-securing the Foreign Exchange.

7. Section 18(3) says that where in relation to any goods to which a notification under Clause(a) of Sub-Section (1) applies the prescribed period has expired and payment therefore has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods

or to procure the sale thereof; that such person has not taken all reasonable steps to receive or recover the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of Sub-Section (2). The fact that the appellant had exported the goods some time in September, 1980 and that within six months he had not repatriated the amount towards the value of the goods. There was no extension sought for and obtained by the appellant. Therefore, the payment has not been made there is a legal presumption unless contrary proof that he had not taken reasonable steps to receive or recover the amount and that he has contravened the provisions of section 18(2) of the Act. The step that is said to have been taken by way of filing the suit for recovery of money after the notice issued by the special Director of enforcement will not mitigate the contravention alleged against the appellant.

8. The Supreme Court in Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others, dealing with the Foreign Exchange Regulation Act held that mens rea is not an essential ingredient for holding a delinquent liable to pay penalty u/s 23(1)(a) of the Act. The Supreme Court has also held that the penalty is imposed for breach of civil obligation and not as sentence. In this case the appellant who is obliged to repatriate the Foreign Exchange for the export has breached the civil obligation and the provisions, section 18(2) and 18(3) of the Act nowhere refers to mens rea. In other words once the factum of contravention is found the offence is complete. The said view of the Hon'ble Supreme Court was followed by our High Court in Union of India v. S.K. Senjan Chettiar Sons, ILR (1996) Mad. 1569 dealing with Section 18(2) of the Act that mens rea is not at all required and that if it is proved that any act or omission had taken place, there is violation of the concerned section justifying the penalty. The judgment referred by the counsel for the appellant of the Supreme Court in Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay, dealt with the Import (Control) Order, whereby in terms of the section "wilful omission" was required. They were dealing with Sections 125 and 112 of the Customs Act 1962, which requires establishment of mens rea, such is not the case in relation to sections 18(2) and 18(3) of the Act. Hence the said judgment will not apply to the contravention under the Foreign exchange Regulation Act.

8. The question whether the penalty is excessive or not is not a matter that can be considered by this Court in appeal u/s 54 since no question of law is involved. The quantum of penalty awarded cannot be held to be arbitrary. For all these reasons, no grounds are made out to interfere with the order of the Appellate Board. The appeal is dismissed.