

(1997) 02 MAD CK 0055
In the Madras High Court
Case No : Reference Case No. 5 of 1988

Comex Co.

APPELLANT

Vs

Collector of Customs, Madras-i

RESPONDENT

Date of Decision : 05-02-1997

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 10A, 8
Constitution of India, 1950 — Article 20, 226
Customs Act, 1962 — Section 11, 111, 112, 113, 115
Foreign Exchange Regulation Act, 1973 — Section 54
Income Tax Act, 1961 — Section 139, 23, 271, 276C

Citation : (1997) 96 ELT 526 : (1998) 1 MLJ 581

Hon'ble Judges : S.M. Abdul Wahab, J; Raju, J

Bench : Division Bench

Advocate : Shri Habibullah Badsha, for Mr. D.W. Stewart, for the Appellant; Shri S. Veeraraghavan, Additional Central Govt. Standing Counsel, for the Respondent

Judgement

Raju, J.—The above reference came to be made u/s 130(1) of the Customs Act, 1962 at the instance of the applicant - Company to refer

to following question for our consideration :

Whether the Tribunal was correct in holding that no mens rea was required for levying personal penalty u/s 112(a) of the Customs Act, 1962 ?

2. The relevant facts to be noticed in appreciating the question referred for our consideration are that the applicant imported palmolein by m.v. Tai

Tung which arrived at Madras Port on 6-1-1979 and got them cleared under ""Open General Licence"" (OGL) appearing against Sl. No. 8 of

Appendix 10 of the Import Trade Control Policy for the period April, 1978 to March, 1979. The date of shipment of the consignment was shown

by the importer on the bill of entry as 29-11-1978 as found on the relative bill of lading which bore that date. In the light of the above, declaration

u/s 46(4) of the Customs Act (hereinafter referred to as "the Act") which purported to show that the goods were shipped within the validity period of the O.G.L., the goods were allowed clearance by the proper officer u/s 47 of the Act under the authority of the above said O.G.L. By a Public Notice No. 91, dated 2-12-1978 import of palmolein under the O.G.L. was cancelled and its import was canalised through STC, with effect from 2-12-1978. The respondent on further enquiries found that the vessel which brought the applicant's cargo of palmolein arrived at the loading port of Kelang on 24-12-1978 and worked till 30-12-1978 and therefore, could not have loaded the cargo on 29-11-1978 as shown to have been done on that date in the bill of lading produced at the time of clearance through Customs. The bill of lading though normally accepted as evidence of loading of goods issued by the carrier to the consignor, the respondent's Department felt that the order of release under O.G.L. was passed on a misdeclaration of the date of shipment in the bill of lading by the applicant and after issue of show cause notice, it was held that the bill of lading could not possibly have borne a genuine date prior to 24-12-1978 since the ship which carried the said cargo called at the loading port of Kelang only on 24-12-1978 and concluded that the importer had arranged to have the bill of lading pre-dated and relying upon the said manufactured evidence got the goods cleared through Customs under O.G.L. It was also held that the import in question of the relevant goods under the cover of O.G.L. was incorrect, improper and illegal and that the importer, therefore, was liable to personal penalty u/s 112 of the Act. After noticing the fact that the goods had already been allowed to be cleared for home consumption and were not available for confiscation and hence no order could be made with regard to them, the respondent imposed personal penalty of Rs. 1,50,000/- u/s 112 of the Act.

(Paragraph number as per certified copy.) 2. The applicant thereupon filed a revision u/s 113 of the Act as it stood before amendment on 11-10-1982, to the Government of India, which, thereafter came to be transferred to the Customs, Excise and (Gold) Control Appellate Tribunal, South Regional Bench at Madras, in terms of Section 131B of the Act to be heard as an appeal before it. After hearing the submissions of both sides, the Tribunal concurred with the order of the respondent - Collector of Customs and held that the order of the respondent was justified in law on the

facts and circumstances of the case and dismissed the appeal by the order dated 24-12-1985, whereupon the applicant moved for a reference and

in the light of the various rulings placed before the Tribunal on either side, the Tribunal though fit to refer the question as to the requirement or

otherwise of the element of mens rea for levying personal penalty u/s 112(b) of the Act.

3. Mr. Habibulla Badsha, learned Senior Counsel appearing for the applicant, while reiterating the stand taken before the authorities below,

contended that though confiscation could be ordered irrespective of knowledge or involvement of the person in whose possession the goods are

found, the imposition of personal penalty requires a deliberate action or knowledge or complicity or common act of abatement to the violation in

question and in the absence of any such personal guilty conduct or mens rea, the question of imposing a personal penalty u/s 112(a) of the Act

does not arise and the imposition of such personal penalty even in the absence of the required mens rea would be totally without the authority of

law. The learned Senior Counsel invited our attention to some of the decisions of the Apex Court and other various Courts, to which reference will

be made at the appropriate stage.

4. Per contra, Mr. S. Veeraraghavan, learned Additional Central Government Standing Counsel contended with equal force that the view taken by

the authorities below including the Tribunal was well justified and that in matters of the nature and type of violations complained of and the scope

and object of the provisions under consideration, the element of mens rea cannot be insisted upon as an essential ingredient and a condition

precedent for levying personal penalty u/s 112(a) of the Act.

5. We have carefully considered the submissions of the learned Counsel on either side. The learned Senior Counsel for the applicant placed strong

reliance upon a Division Bench judgment of this Court, to which one of us (Raju, J.) was a party, in Union of India v. Raja Agencies 1993 (42)

ECC 166 wherein the Division Bench had an occasion to deal with the issue while summarily rejecting the appeal filed by the Department against

the common judgment of a learned single Judge dated 23-9-1988 in W.P. Nos. 1767 and 1768 of 1982. The learned single Judge appears to

have held that no acceptable evidence had been produced by the appellants

Department therein from which it can be proved that the bill of lading was ante-dated and that the finding that the bill of lading was ante-dated could not be returned by the Department on mere surmises and conjectures. The Division Bench concurred with such conclusions of the learned single Judge. The Division Bench held that in the absence of any acceptable evidence from which any presumption may be drawn about ante-dating of the bill of lading, applied the presumption, about the factum of receipt and loading of the goods though rebuttable in the absence on record any acceptable evidence to the contra. The Division Bench also observed that the levy of penalty involves proceedings, which are quasi-criminal in nature and it is well settled in law to establish a charge it is not only necessary to prove the existence of mens rea, but also that the allegations must be proved beyond all reasonable doubt and on the basis of the materials on record, in that case, the allegations against the respondents therein could not be said to have been proved, much less beyond any reasonable doubt. It may be noticed even at this stage that the learned single Judge has in his judgment adverted to the decisions in Hindustan Steel Ltd. Vs. State of Orissa, ; Sha Rikhabdas v. Collector of Central Excise AIR 1963 Mad 336 and Charandas Malhotra Vs. Assistant Collector of Customs and Superintendent Preventive Service and Others, , in coming to the conclusion as to the need for finding out mens rea in the violator before visiting him with any personal penalty. In addition to the above decision, the learned Senior Counsel also invited our attention to the decision in 1990 (29) ECC 211 . The CEGAT, Special Bench "D", New Delhi, while adverting to the decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, held that the penalty proceedings are quasi-criminal proceedings and penalty cannot be imposed in the absence of mens rea. In Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay,) the Bench consisting of two of Their Lordships of the Apex Court held that the importer of foreign goods even according to the finding of the Tribunal acted bona fide and therefore heavy fine is not warranted and justified. In coming to such a conclusion, Their Lordships have adverted to the earlier decision of the Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, wherein it was held that the discretion to impose penalty must be exercised judicially and penalty should

ordinarily be imposed, where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious

disregard of its obligation; but not in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a

bona fide belief that the offender is not liable to act in the manner prescribed by the statute. In *J.K. Synthetics Limited and Birla Cement Works*

and another Vs. Commercial Taxes Officer, State of Rajasthan and another, , the Apex Court held that on a conjoint reading of Section 7(1), (2)

and (2A) of the Act and Rule 25 of the Rules relating to Rajasthan Sales Tax Act, 1954, makes it clear that the use of the words "without

reasonable cause" implied that if reasonable cause is shown by the dealer, he cannot be visited with penalty under that provision, and it is

suggestive of the fact that the Legislature desired to be harsh with wilful defaulters or those guilty of wilful omission and not with dealers, who failed

under bona fide belief. It was also observed therein that the penalty provisions in the statute have also to be strictly construed. The decision in the

P. Unnikrishnan Vs. Food Inspector, Palghat Municipally, Palghat, Kerala State, under the Prevention of Food Adulteration Act, 1954, arose out

of a criminal proceedings instituted before Criminal Court and can be of no relevance. We may point out at this stage that a series of decisions

already noticed and to be adverted to hereafter will go to show that the Courts had no fixed or readymade standards and norms in dealing with the

violations of different kinds and nature under different provisions of different enactments and the views expressed appear to always vary with the

exigencies of the situation and the extent of violation deterrent to discourage the repetition of such offending acts.

6. In *Vijaya Electricals v. State of Tamil Nadu* (1991) 82 STC 268, a Division Bench of this Court, to which one of us (Raju, J.) was a party,

presided over by Dr. A. S. Anand, the then learned Chief Justice of this Court, which rendered the decision in *Raju Agencies*" case (1993) 42

ECC 166 (supra) had an occasion to consider the question as arising u/s 10A of the Central Sales Tax Act, 1956. That was a case, wherein the

certificate of registration granted to the dealer under the said Act authorised him to purchase machineries and electrical goods, under which the

assessee purchased ball bearings on the basis of "C" Form and the ball bearings were not covered by the registration certificate. Penalty was

imposed by the Authorities u/s 10A of the said Act for the violation of an offence created u/s 10(b) of the said Act. The Division Bench held as

hereunder :

Section 10(b) if the Act postulates that if any registered dealer falsely represents when purchasing any class of goods that such goods are covered

by the certificate of registration, he is liable to be punished to the extent contained in the Section itself. Section 10A of the Act contemplates that if

any person is found guilty of an offence under Clause (b) of Section 10, the competent authority may, after following the procedure prescribed in

the section, in lieu of prosecution, impose upon him by way of penalty a sum not exceeding one and a half times the tax which would have been

levied in respect of the sale to him of the goods, if the sale fell within Section 8(2) of the Act. It is, thus, clear that what is imposed by Section 10A

of the Act is a civil obligation while what is contemplated u/s 10(b) is a ""sentence"". The creation of an offence by a statute proceeds on the

assumption that the society suffers injury by the act of omission of the defaulter and in most cases of criminal liability, the intention of the Legislature

is that the penalty should serve as a deterrent of discourage repetition of an offence. In the case of proceedings u/s 10A of the Act, however, it

seems that the intention of the Legislature is to emphasise the fact of loss of revenue and to provide for remedy for such a loss. This becomes

evident from the terms in which the penalty falls to be measured u/s 10A of the Act itself. Therefore, unless there is something in the language of the

statute indicating the need to also establish the element of mens rea in proceedings u/s 10A of the Act, it would be generally sufficient to prove that

the default in complying with the statute had occurred in the manner envisaged by Section 10(b) of the Act. In our opinion, there is nothing in

Section 10A which requires that mens rea must be proved before penalty can be levied under that provision if on facts, it is found that the assessee

had made a ""false representation"". It is the making of a ""false representation"" which is, indeed the sine qua non for invoking the provisions of

Section 10(b) of the Act. Once a finding is recorded by the competent authority that the assessee has made a false representation, that would

clearly attract the provisions of Section 10(b) of the Act and, in our opinion, no further finding is required that the assessee had also the mens rea.

The statute does not contemplate that, Even otherwise, mens rea is a state of mind. Under the criminal law, mens rea is considered as the "guilty intention", but when it is relatable to tax delinquency, which is a civil obligation, it implies a "blameworthy conduct". Therefore, unlike in criminal cases, where it is essential for the prosecution to establish that the accused had a guilty intention or, in other words, the requisite mens rea before recording conviction, the obligation on the part of the Revenue, in cases of tax delinquency, would be discharged were it can be shown that the blameworthy conduct of the assessee was established, like by recording a finding that the assessee had made a "false representations" and the like. The recording of such of a finding by itself shows the establishment of the blameworthy conduct, which would be the establishment of mens rea to the limited extent applicable to civil obligations. Mens rea can be established either by direct evidence or by drawing inferences from the established facts and circumstances of a given case. To the extent that mens rea is the blameworthy conduct, it goes without saying that the making of a "false representation", which has been made an offence u/s 10(b) of the Act, would bring the case of the defaulting party within the ambit of that section. The application of the doctrine of mens rea in cases of tax delinquency has been nicely summed up in "Corpus Juris Secundum", Volume 85, at page 580 in paragraph 1023, where it is stated thus :

"A penalty imposed for a tax delinquency is a civil obligation remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

We are in agreement with the above statement. Therefore, we hold, to the limited extent that mens rea has application in tax default cases, it would stand established, if the conduct to the assessee is found to be blameworthy, within the meaning of the particular provision of the given tax statute.

Where a finding is recorded on facts about the existence of the blameworthy conduct, which the Legislature has treated as an offence or a default on the part of the assessee, like the making of a "false representation", it would attract the provisions of Section 10(b) of the Act and no further finding would be required to be recorded about the existence of mens rea on the part of the assessee, as it would be inherently included in the

earlier finding. We, therefore, cannot accept the proposition that even if a finding has been recorded on facts by the competent authorities that an

assessee has made a "false representation", as contemplated by Section 10(b) of the Act, in the absence of an additional finding that the assessee

also had the requisite mens rea, he cannot be penalised u/s 10(b) of the Act. The argument has no basis and is absolutely far-fetched.

7. In *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others*, a constitution Bench of the Apex

Court had an occasion to deal with the question of levying penalty u/s 167(12A) and Section 183 of the Sea Customs Act, 1978, corresponding

to Sections 115(1)(a) and 125(1) of the Customs Act, 1962 respectively. While dealing with the scope and purpose of Section 52A of the Sea

Customs Act, 1878 which directly prohibited the entry of vessels that have been so constructed, altered, adjusted, adopted or fitted as to conceal

goods the elements of mens rea or knowledge of its owner or master in that regard cannot be read into the provisions particularly in the absence of

the words like "knowingly or wilfully or intentionally". In *Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala*,

Ernakulam, the Apex Court was concerned with the construction to be placed on Section 271(1)(a) of the Income Tax Act, 1961, which

provided that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the

return of total income and Section 276C which provided that if a person wilfully fails to furnish in due time the return of income required u/s

139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. Their Lordships of the Supreme

Court while noticing the dichotomy in the language and the situation dealt with under the different provisions, held as follows :

Learned counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed u/s 271(1)(a) of the

Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and

the High Courts in order to demonstrate that the proceedings by way of penalty u/s 271(1)(a) of the Act are quasi-criminal in nature and that

therefore the element of mens rea is a mandatory requirement before a penalty can be imposed u/s 271(1)(a). We are relieved of the necessity of

referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is

sufficient for us to refer to Section 271(1)(a) which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person

has without reasonable cause failed to furnish the return of total income, and to Section 276C which provides that if a person wilfully fails to furnish

in due time the return of income required u/s 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or

with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can

be no dispute that having regard to the provisions of Section 276C which speaks of wilful failure on the part of the defaulter and taking into

consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is

established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an

offence by statute proceeds on the assumption that society suffers injury by the actor or omission of the defaulter and that a deterrent must be

imposed to discourage the repetition of the offence. In the case of a proceeding u/s 271(1)(a), however, it seems that the intention of the legislature

is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the

penalty. In this connection, the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute

indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In

our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision.

We are supported by the statement in Corpus Juris Secundum, Volume 85, page 580, paragraph 1023 :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or

a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income Tax Officer u/s 271(1)

(a) of the Income Tax Act against the assessee for the assessment years 1965-66 and 1966-67.

8. In *State of Tamil Nadu v. Lakshmi & Co.* 87 STC 345, the same Division Bench, which decided the decision in *Vijaya Electricals*" case

(supra), had once again dealt with a similar case of misuse of "C" Form obtained under the Central Sales Tax Act, 1956 by the registered dealer

therein. It was once again held, while following the earlier decision in *Vijaya Electricals*" case (supra), that it cannot be accepted as a proposition

that even if a finding has been recorded on facts by the competent authorities that an assessee has made a "false representation" as contemplated

by Section 10(b) of the Act, in the absence of an additional finding that the assessee also had the requisite mens rea, he cannot be penalised u/s

10(b) of the Act. As a matter of fact, such claim has been repelled as having no basis and as a far-fetched one.

9. In *Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others*, ,

(i) the Supreme Court had an occasion to directly consider the issue in the context of a case arising under Foreign Exchange Regulation Act, 1947.

That was a case, wherein a Private Limited Company and its Directors were proceeded against departmentally for having contravened the

provisions of Section 10(1)(a) of the said Act, the gravamen of the charge of the Department being that the offending Company failed to repatriate

the Foreign Exchange lying in Malaysia, which they had a right to receive in India and thereby failed to take or refrained from taking, which had the

effect of not securing the receipt of the Foreign Exchange in this Country. They had no special or general permission from the Reserve Bank of

India authorising them to hold the aforesaid foreign exchange lying with their Branch at Kuala Lumpur in Malaysia without repatriating the same to

India. In the Departmental proceedings, taken for such violation by an order dated 19-9-1977, it was held that the Company and its Directors

were guilty of committing the two contraventions alleged against them mentioned in the Article of charges and so far as the first count of charge, a

penalty of Rs. 40,000/- was imposed on the Company and Rs. 4,000/- each on its Directors. Likewise, in respect of the second count of charge,

a penalty of Rs. 2 lakhs was imposed on the Company and Rs. 20,000/- upon each of the Directors u/s 23(1)(a) of the said Act. In the appeals

filed before the Board, though the Board took the view that since it was not a case where foreign exchange had been surreptitiously held abroad

with any male fide motive, though it was so retained deliberately and intentionally, the contraventions were of technical nature and on that view,

reduced the penalty to Rs. 2,000/- on each of the Directors and Rs. 20,000/- on the Company in respect of the first count of charge and Rs.

5,000/- on each of the Directors confirming of the same while retaining the penalty on the Company in respect of the second count of charge. The

matter was pursued before the High Court, Madras, u/s 54 of the Foreign Exchange Regulation Act, 1973 and the Division Bench of this Court

allowed the appeals and set aside the penalty imposed and modified the order of the Central Board. This Court appears to have taken the view

that Section 10(1) of the FERA, 1947 Act is not an independent provision and unless some directions given u/s 10(2) by the Reserve Bank of

India, were contravened, no penalty could be imposed for breach of Section 10(1) (a) u/s 23(1)(a) of FERA, 1947 and held further that a finding

regarding the existence of "mens rea or criminal intent" for failure to repatriate foreign exchange was necessary before the Company or its

Directors could be penalised and in the teeth of the very finding of the Board, the award of penalty was not justified. As against this, the

Department went on appeal to the Apex Court and it is the said appeal that came to be dealt with and disposed of by reversing the judgment of

this Court on the terms of the directions contained in para 19 of the reported judgment.

(ii) His Lordship Dr. A. S. Anand, J., speaking for the Bench in a masterly analysis of the principles on the topic and expression characteristic of

His Lordship's own and in an inimitable style, has held as follows :

6. The High Court while dealing with the first question opined that Section 23 is a "penal provision" and, the proceedings u/s 23(1)(a) are "quasi"

"criminal" in nature and therefore, unless "criminality" is established the penalty provided u/s 23(1)(a) of the Act cannot be imposed on any person.

The High Court thus held the existence of "mens rea" as a necessary ingredient for the commission of an "offence" u/s 10 of the Act and in the

absence of a finding about the presence of "mens rea" on the part of the offenders, no punishment u/s 23(1)(a) of FERA, 1947 could be imposed.

For what follows, we cannot agree.

7. "Mens rea" is a state of mind. Under the criminal law, mens rea is considered as the "guilty intention" and unless it is found that the "accused"

had the guilty intention to commit the "crime", he cannot be held "guilty" of committing the "crime". An "offence" under Criminal Procedure Code

and the General Clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force". The proceedings

u/s 23(1)(a), FERA, 1947 are "adjudicatory" in nature and character and are not "criminal proceedings". The Officers of the Enforcement

Directorate and other administrative authorities are expressly empowered by the Act to "adjudicate" only. Indeed, they, have to act "judicially" and

follow the rules of natural justice to the extent applicable, but, they are not "Judges" of the "Criminal Courts" trying an "accused" for commission of

an offence, as understood in the general context. They perform quasi-judicial functions and do not act as "Courts" but only as "administrators" and

"adjudicators". In the proceedings before them, they do not try "an accused" for commission of "any crime" (not merely an offence), but determine

the liability of the contravenor for the breach of his "obligations" imposed under the Act. They imposed "penalty" for the breach of the "civil

obligations" laid down under the Act and not impose any "sentence" for the commission of an offence. The expression "penalty" is a word of wide

significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensator in

character is also termed as a "penalty". When penalty is imposed by an adjudicating officer, it is done so in "adjudicatory proceedings" and not by

way of fine as a result of "prosecution" of an "accused" for commission of an "offence" in a Criminal Court. Therefore, merely because penalty

clause exists in Section 23(1)(a), the nature of the proceedings under that Section is not changed from "adjudicatory" to "criminal" prosecution. An

order made by an adjudicating authority under the Act is not that of conviction, but of determination of the breach of the civil obligation by the

offender.

8. It is true the breach of a "civil obligation" which attracts "penalty" u/s 23(1) (a), FERA, 1947 and a finding that the delinquent has contravened

the provisions of Section 10, FERA, 1947 would immediately attract the levy of

"penalty" u/s 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the "accused" had the necessary "guilty intention" or in other words, the requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA would be discharged, where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his "blameworthy" conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947, without any further proof of the existence of "mens rea".

Even after an adjudication by the authorities and levy of penalty u/s 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence, the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts "prosecution" u/s 23F and on conviction by the "Court" for the said offence imprisonment may follow.

9. In *Maqbool Hussain Vs. The State of Bombay*, a Constitution Bench of this Court while considering the nature of proceedings under the Sea Customs Act and FERA, 1947 dealt with the principle and scope underlying Article 20(2) of the Constitution. In that case, gold was found in possession of the appellant therein when he landed at the Santa Cruz Airport. The appellant was detained and searched by the Customs Authorities and gold was seized from the possession. Proceedings u/s 167(8) of the Act were taken by the Customs Authorities and after recording evidence, an order was passed confiscating gold and giving an option to the owner to pay fine in lieu of such confiscation u/s 188, Sea Customs Act. Since nobody came forward to redeem the gold, a complaint was filed in the Court of the Presidency Magistrate, Bombay against the appellant charging him with having committed an offence u/s 8, FERA, 1947. The appellant thereupon filed a petition in the High Court of Bombay under Article 226 of the Constitution seeking quashing of the complaint

by contending that his prosecution in the Court of the Chief Presidency Magistrate was in violation of his fundamental right guaranteed under Article 20(2) of the Constitution. It was the case of the appellant before the High Court that since the complaint before the Chief Presidency Magistrate also proceeded on the footing that the appellant had committed an offence insofar as he brought gold into India without any permit from the Reserve Bank of India on which allegations alone the gold stood already confiscated by the authorities under the Sea Customs Act during the confiscation proceedings, he was being punished twice for the same offence which was not permissible in law in view of Article 20(2) of the Constitution. The High Court was of the opinion that the appellant could claim protection of Article 20(2) only if he was the owner of gold which had been confiscated. The Chief Presidency Magistrate was, therefore, directed to first determine that question of fact. After recording some evidence, the Chief Presidency Magistrate returned a finding that the appellant was the owner of gold. The High Court, however, reversed the finding and sent the case back to the Trial Court for its trial in accordance with law after refusing the benefit to the appellant of the protection under Article 20(2) of the Constitution. By special leave, the appellant filed an appeal in this Court. It was in this background that the Constitution Bench proceeded to determine whether the appellant could be said to have been prosecuted when proceedings for confiscation were taken by the Sea Customs Authorities for if it was found that the appellant had been prosecuted when proceedings were taken by the Sea Customs Authorities to confiscated gold, there was no scope left for the arguments that he had not been punished by the confiscation of gold and the option given to him to pay fine in lieu of such confiscation. The Court examined in detail the ambit, scope and applicability of the principle of "double jeopardy" in the light of the fundamental right guaranteed under Article 20(2) of the Constitution. The Court opined (para 12 of AIR) :-

"It is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a Court of law or a Tribunal required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a Tribunal which

entertains a departmental or an administrative enquiry even though set up by a statute, but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein :

"convicted", "commission of the act charged as an offence", "be subjected to a penalty", "commission of the offence", "prosecuted and punished",

"accused of any offence", would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law

or a judicial Tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of

law or a judicial Tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

10. The Court then laid down various tests for determining when a Tribunal can be considered to be a judicial Tribunal and after referring to a

catena of authorities, relevant provisions of the Sea Customs Act, 1878 and the nature of the adjudicatory proceedings as contained in that Act,

opined that an adjudicatory authority functioning under the Act was merely an administrative machinery of the purpose of adjudging confiscation,

determination of duty or the increased rate of duty and for imposition of penalty of prescribed under the Act and not a judicial Tribunal. The Court

opined *Maqbool Hussain Vs. The State of Bombay*, :

"We are of the opinion that the Sea Customs Authorities are not a judicial Tribunal and the adjudging of confiscation, increased rate of duty or

penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose

of supporting a plea of double jeopardy.

It therefore follows that when the Customs Authorities confiscated the gold in question neither the proceedings taken before the Sea Customs

Authorities constituted a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a Court or judicial

tribunal on the appellant. The appellant could not be said by reason of these proceedings before the Sea Customs Authorities to have been

"prosecuted and punished" for the same offence with which he was charged before the Chief Presidency Magistrate, Bombay in the complaint

which was filed against him u/s 23, Foreign Exchange Regulation Act."

11. The Constitution Bench then laid down that though the administrative

authorities functioning under the Sea Customs Act had the jurisdiction to confiscate gold, illegally brought into the country, and levy penalty on the defaulter, none the less the authorities were not trying a criminal case, but deciding only the effect of a breach of the obligations by the defaulters under the Act. On a parity of reasoning, what holds true for the adjudicatory machinery under the Sea Customs Act holds equally true for the administrative or adjudicatory machinery, designed to adjudge the breach of a civil statutory obligation and provide penalty for the said breach, under the FERA, 1947, whether the breach was occasioned by any guilty intention or not is irrelevant.

12. In "Corpus Juris Secundum" Volume 85, at page 580, paragraph 1023, it is stated thus :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal laws."

13. We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" equally holds goods for the "blameworthy"

conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that means *rea* (as is understood in criminal law is not an essential

ingredient for holding a delinquent liable to pay penalty u/s 23(1) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947

and that penalty is attracted u/s 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established. The

High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence",

overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a Civil

obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed u/s 23(1)(a) of the Act irrespective

of the fact whether he committed the breach with or without any guilty intention. Our answer to the first question formulated by us above is,

therefore, in the negative.

(iii) The principles laid down, as above, by the Apex Court *ipso facto* applies with all force to the case on hand and we respectfully agree, as we

are enjoined to be bound by the Constitutional mandate too, in interpreting the

type of legislation with which we are concerned and the nature and character of the offending Act and intention and also the manner in which it requires to be dealt with. In our view, in cases of violation of taxation laws, Economic laws and laws relating to Imports or Exports, Customs, Foreign Exchange, Foreign Trade and such other laws, as would affect the economic stability and viability of the Nation and the commissions or omissions constituting violation of the provisions of such laws have the innate nature of seriously affecting and undermining the security of the Society and public interest and jeopardising general welfare - the sanctions imposed have necessarily to be enforced by so imposing penalties on the persons committing the violation as to operate and serve as a deterrent to prevent or discourage recurrence of the violations. In matters relating to the above, the only test should be, whether a violation has been committed, irrespective of the fact that it might have been committed with or without the mens rea, in the literal sense or meaning of the word - bad or guilty mind characteristic of early common law usage, when one breaks the law even with the best of motives, still he commits an offence sufficient in law to render him liable to be dealt with by the Adjudicatory Authorities departmentally, and in such cases, the delinquency of the defaulter itself would establish the blameworthy conduct sufficient in law to impose a penalty to make amends for the violation - by payment of penalty. We are of the view that the final word has been said in the statement of law declared by the Apex Court in Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others, which has invariable application dealing with pari materia provisions or similar and allied Laws.

10. In the light of the above, it becomes necessary to notice the nature of the powers conferred under the Act, which has come to be exercised in dealing with a violation under the Act. The penalty in question came to be imposed in this case by the Collector of Customs as a sequel to the following findings :

"In view of the foregoing, clearance of the goods, viz., 256 drums of RED palmolein valued at Rs. 2,95,402/- under OGL (Sl. No. 8 Appendix

10) ITC Policy April-March 1978-79 on the basis of mis-declaration of the date of shipment by the importers appears erroneous."

"By Clause 3 of Import (Control) Order, 1955 (as amended) and notifications

issued thereunder u/s 3(1) of Imports and Exports (Control) Act, 1947, read with Section 11(2)(v), Customs Act, 1962, import of the above consignment is unauthorised in the absence of valid import licence and the same is accordingly liable to confiscation u/s 111(d) of Customs Act, 1962, read with Section 3(2) of Imports and Exports (Control) Act, 1947".

"By the aforesaid acts, the importers M/s. Comexco, Bombay have also rendered themselves liable for penal action u/s 112 of Customs Act, 1962."

Section 112(a) of the Act, under which the penalty by order dated 28-4-1980 came to be imposed, reads as follows :-

"Penalty for improper importation of goods, etc. : Any person

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation u/s 111, or abets the doing or omission of such an act, or....."

It can be seen from the above, that any person who, in relation to any goods does or omits to do any act, which would render such goods liable to confiscation u/s 111 or abets the doing or omission of such an act, shall be liable to one or the other of the penalties listed under clauses (i) to (v).

Section 111, which provides for dealing with improperly imported goods, etc. if such goods have been brought from a place outside India, in all or

anyone of the manner envisaged in clauses (a) to (p) renders them liable to confiscation for one or other contraventions noticed therein. The

applicant in this case before us has been accused of having violated the various provisions referred to supra from the findings recorded by the

Collector of Customs and adverted to in the earlier part of the order rendering him liable for having violated in addition to other laws, Section

111(a) of the Act, read with Section 3(2) of the Imports and Exports (Control) Order, 1947.

11. On a careful reading of the provisions contained in Section 111 or 112(a), we are unable to come to the conclusion that there was hardly any

scope or need to import into adjudicatory proceedings for breach of civil obligations, the principle of mens rea in the conventional sense of

common law usage, as having been inbuilt as an ingredient to be established as a condition precedent before indicating any violator under any of

those provisions with personal penalty. The establishment of blameworthy conduct, which stands proved from the very proof of contravention of

the civil obligation, would in our view, suffice to justify the imposition of personal penalty in adjudicatory proceedings before the statutory

departmental Authorities. The need for insisting upon further proof of the mental attitude of the violator concerned, may assume some significance

in any prosecution initiated before the Criminal Court for the very contravention or violation concerned. But, in our view, as held by the Apex

Court in Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others, ; Gujarat Travancore Agency, Cochin Vs. Commissioner of

Income Tax, Kerala, Ernakulam, and the two Division Bench judgments of this Court in Vijaya Electricals Vs. State of Tamil Nadu, and Lakshmi

& Co.'s case 87 STC 345 (supra), the penalty contemplated u/s 112(a) of the Act for the violation in question is of a civil obligation, remedial and

corrective in its nature and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the criminal or penal laws.

The regulation which is sought to be provided for, and the violation of which is to be dealt with under Sections 111 and 112 of the Act, are in

respect of the laws of great and serious importance in conserving the economy of the Nation and have to be, therefore, viewed in their proper

perspective so as not to result in abnegation or abrogation of the avowed object and purpose of the Legislation, which is not only regulatory, but

prohibitory in nature, the mandate contained therein being in the larger interests and general welfare of the Nation.

12. The learned Senior Counsel for the applicant repeatedly urged that if the element of mens rea is held to be irrelevant for purposes of Sections

111 and 112 of the Act, the Authorities enforcing law are likely to act arbitrarily and unreasonably exposing even innocent persons to severe

penalties. We are unable to appreciate the reason of it. The Adjudication proceedings are quasi judicial in nature with forums higher in the

hierarchy including a Judicial Tribunal, expected to act judiciously and the Courts of Justice at the State and National level and cases of any such

arbitrary exercise of power could be effectively contained and remedied, but the taking of the other view, in our opinion, will make the country full

and flooded with smuggling spree activities undermining the economy of the Nation and render ineffective the enforcement of the laws in question.

This reasoning of ours is even de hors the interpretation we were obliged to place on the scope of Sections 111 and 112 of the Act, in tune with the law declared by the Apex Court.

13. We will now take up for consideration the submission made by the learned Senior Counsel appearing for the applicant that the importer -

applicant cannot be accused of, or for that matter, there are not sufficient materials to prove any abetment on its part or of any positive role in the

violation alleged as such, warranting the levy of personal penalty. The Collector of Customs in his order dated 28-4-1980, particularly in

paragraph 14, has dealt with this aspect and has chosen to find that the applicant was also guilty of the violation on account of the obvious facts on

record and the circumstance that the importer unquestionably had a vital interest in the relevant date of bill of lading in view of the sudden clamping

down of licensing on the import of edible oils from 2-12-1978 and they stood to gain far more by fraudulent manipulation of the date of bill of

lading, than the supplier. The very import depends upon the entitlement of the applicants only and the exporter in the Country outside could not by

himself bring those goods into this Country without the involvement of the Importer. Even that apart, we find that but for the clearance of the

goods, which the applicant was able to secure in this case, they could not have escaped an order of confiscation and imposition of consequent

redemption fine and it is only on account of the fact that the clearance has been made even before the Department came to know of the fraudulent

act of ante-dating the bill of lading by which it was able to get the goods imported and cleared, the Department had no other go, but to impose

only a personal penalty. Viewing this case and the facts in this context also, we are of the view that no exception could be taken to the imposition

of personal penalty in question or the quantum thereof upon the applicant.

14. For all the reasons stated above, we answer the question referred to us for our consideration by holding that the Tribunal was correct in

holding that no mens rea as such was required as a condition precedent for levying a personal penalty u/s 112(a) of the Customs Act, 1962. There

will be no order as to costs.