

(1971) 02 CAL CK 0022
In the Calcutta High Court
Case No : Matter No. 428 of 1970

G. Ambalal (Export) Private Ltd.

APPELLANT

Vs

The Assistant Collector of Customs, Calcutta and Others

RESPONDENT

Date of Decision : 11-02-1971

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 113, 2(14)

Citation : AIR 1971 Cal 444

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : Bajoria, for the Appellant; Mitter, for the Respondent

Judgement

Sabyasachi Mukharji, J.—The petitioner at all material times carried on business in jute goods. In the course of the said business the petitioner entered into several contracts with one Reliance Commercial Corporation, Bombay, for sale of hessian cess bags. The said contracts with Reliance were on F.O.B. basis. The said Reliance Commercial Corporation, Bombay, it has been alleged, in its turn used to enter into contracts with the foreign buyers. According to the petitioner's case the petitioner had nothing to do with the contracts of Reliance Commercial Corporation, Bombay, with the foreign buyers. I am not here concerned actually whether the petitioner had anything to do with the foreign buyers and I do not decide that question. From the tenor of the show cause notice it appears that it is the case of the respondents that the petitioner had something to do with the sale to the foreign buyers but as mentioned hereinbefore, I do not decide this question in this application. It has been further alleged by the petitioner that the petitioner used to get the contracts with the said Reliance Commercial Corporation, Bombay, registered with the Export Contract Registration Committee. On the 4th May, 1967, the petitioner presented four shipping bills along with the declaration u/s 12(1) of the Foreign Exchange Regulation Act, 1947, for the purpose of effecting shipment of goods to Yugoslavia for and on account of the said Reliance Commercial Corporation.

Bombay. On the 26th July. 1967, the petitioner presented three shipping bills for effecting shipment of goods for and on account of the said Reliance Commercial Corporation, Bombay, to Yugoslavia along with the declarations u/s 12 (1) of the Foreign Exchange Regulation Act, 1947. The values declared in the said shipping bills and declarations u/s 12 (1) of the Foreign Exchange Regulation Act, 1947, were on the basis of the values mentioned in the contracts of the petitioner with the Reliance Commercial Corporation, Bombay. That is an admitted position. It has further been alleged by the petitioner that the values mentioned were the market price on the material dates. It is not necessary for me to decide if they were so. On the 31st August, 1967, a show cause notice dated the 26th August, 1967, issued by the respondent No. 1, namely, the Assistant Collector of Customs for Exports, Calcutta, was received requiring the petitioner and the said Reliance Commercial Corporation Bombay, to show cause why the goods covered by the said shipping bills should not be confiscated u/s 113(d) of the Customs Act, 1962, and why penal action should not be taken against the petitioner u/s 114(1) of the Customs Act, 1962. It was alleged in the said show cause notice that the goods that were sought to be exported without declaring the full export value on the shipping bills and G.R.I. forms were in contravention of the provisions of Sections 11, 14(1) and 50(2) of the Customs Act, 1962, read with Section 12 (1) of the Foreign Exchange Regulation Act, 1947 and the notification thereunder and Sections 23A and 23B of the Foreign Exchange Regulation Act, 1947. It appears that in respect of the shipping bills as mentioned hereinbefore presented on the 4th May, 1967, the duty payable on the goods to be exported was paid on the 13th November, 1967. In January. 1968, the said export duty paid by the petitioner had been refunded. Prior thereto on the 18th November, 1967, another show cause notice was issued by the respondent No. 1, namely, the Assistant Collector of Customs, requiring the petitioner and the said Reliance Commercial Corporation, Bombay, to show cause why the goods should not be confiscated u/s 111(d) of the Customs Act, 1962 and why penal action should not be taken u/s 112 of the Act for violation of Section 12 (1) of the Foreign Exchange Regulation Act, 1947, read with Section 11 of the Customs Act. The petitioner replied to the said notices and thereafter on the 5th September, 1968, moved this Court under Article 226 of the Constitution and obtained a Rule Nisi being Matter No. 616 of 1968 challenging the aforesaid show cause notice. Matter No. 616 of 1968 was heard and disposed of by S. P. Mitra, J. and by judgment delivered on the 17th June, 1970. S. P. Mitra, J. made the Rule absolute but liberty was given to the respondents to proceed under the Customs Act, 1962, if they were so entitled under the law without prejudice to any of the petitioners' rights and contentions in the matter. Thereafter it appears that on the 10th July, 1970, another show cause notice was issued. It is this show cause notice which is the subject-matter of the challenge in this application under Article 226 of the Constitution,

2. By the said notice dated 10th July. 1970, it has been alleged that the F.O.B. Values declared on the shipping bills were on the basis of the sale contracts

entered between the two firms, viz., the petitioner and the Reliance Commercial Corporation, Bombay. It has been further alleged that the F.O.B. price declared in the shipping bills were not the actual sale prices at which the goods were sold to the foreign buyers. It has been stated that the F.O.B. values should have been on the basis of the sale contracts entered between the Reliance Commercial Corporation and M/s. Jugotaksil Impex, Yugoslavia, the foreign buyer. It has been further stated that the goods sought to be exported under shipping bills appeared to have been misdeclared in respect of material particulars and value and thereby an attempt had been made to export the goods without declaring the correct F.O.B. value of the goods in the shipping bills in contravention of Section 50(2) of the Customs Act, 1962. It has been stated that the alleged misdeclaration of value in the shipping bills resulted in a loss of foreign exchange to the extent of about Rs. 78,295/-, particulars whereof were mentioned in the said notice. Thereafter the notice further stated that the goods, therefore, appeared to be liable to confiscation u/s 113(i) of the, Customs Act, 1962 and that M/s. Reliance Commercial Corporation also were liable to penal action u/s 114(i) of the Customs Act, 1962, The petitioner was asked to show cause against the proposed action. After certain correspondence the petitioner moved this High Court under Article 226 of the Constitution on the 29th of July, 1970 and obtained a Rule Nisi, as mentioned hereinbefore.

3. Appearing in support of this petition Mr. Bajoria, learned Advocate for the petitioner, contended, firstly, that u/s 113(i) of the Customs Act, 1962 an order for confiscation could only be passed if the goods were dutiable goods or prohibited goods and did not correspond in any material particulars with the entry made or in case of baggage with the declaration u/s 77 of the Act. It was argued by Mr. Baioria that in the facts and circumstances of the case these goods in question were not dutiable goods inasmuch as no duty remained to be paid in respect of such goods and as such would not attract the provision of Section 113(i) of the Customs Act, 1962. It was secondly, urged that even assuming that the allegations in the said notice to be true the alleged misdeclaration of the values of the contract with the foreign, buyer were not in respect of material particulars and as such the provision of Section 113(i) of the Customs Act, 1962 could not be attracted. Thirdly, it was contended that there was no obligation on the part of the petitioner to declare the value on the basis of the price paid by the ultimate foreign buyer. Lastly it was submitted that Section 114(ii), under which the petitioner was prosecuted, could not be attracted in this case in the facts and circumstances of this case,

4. The first question, therefore, that requires consideration in this case is whether the goods in question in the facts and circumstances of this case were dutiable goods. In order to decide this question it will be necessary to refer to the relevant statutory provision. Section 2(14) defines dutiable goods as follows;--

" "dutiable goods" means any goods which are chargeable to duty and on which

duty has not been paid."

Section 2(33) provides the definition of prohibited goods. "Prohibited goods" meant any goods the import or export of which was subject to any prohibition under the Act or any other law for the time being in force but did not include any such goods in respect of which the conditions subject to which the goods were permitted to be imported or exported had been complied with. It may be mentioned here that it is the common case that the goods in question were not prohibited goods. Section 2(41) defines value by stating " "value" in relation to any goods means the value thereof determined in accordance with the provisions of Sub-section (1) of Section 14 of the Act." Section 12 of the Act which is in Chapter V of the Act dealing with levy of and exemption from customs duties provides as follows:

"Section 12 -- Dutiable goods:-- (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act, 1934 (32 of 1934), or any other law for the time being in force, on goods imported into, or exported from India,

(2) The provisions of Sub-section (1) shall apply in respect of--

(a) all goods belonging to the Central Government; and

(b) all goods belonging to the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business; as they apply in respect of goods not belonging to any Government."

Section 14 of the Act provides that for the purpose of the Indian Tariff Act, 1934 or any other law for the time being in force whereunder customs duty was chargeable by reference to their value, the value of such goods should be deemed to be the price at which such or like goods were ordinarily sold or offered for sale or delivered at the time and place of importation or exportation as the case may be in the course of international trade and where the seller and the buyer had no interest in the business of each other and the price was the sole consideration in the sale. It is not necessary to refer to the other provisions of the said Section. Section 28 provides for the notice for payment of duties not levied, short-levied or erroneously refunded and the manner of their recovery, Section 50 deals with the entry of goods for exportation and provides that the exporter of any goods should make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft a shipping bill and in the case of goods to be exported by land a bill of export in the prescribed form. The exporter of any goods while presenting the shipping bill or bill of export should at the foot thereof make and subscribe to the declaration as to the truth of the contents. Section 51 of the Act provided for clearance of the goods and stipulated that if the proper officer was satisfied that any goods entered for export were not prohibited goods and the exporter had paid the duty, if any

assessed thereon and any charges payable under this Act in respect of the same the proper officer might make an order permitting clearance and loading of the goods for exportation. Section 113 provides "confiscation of goods attempted to be improperly exported, etc.,--The following export goods shall be liable to confiscation:--

(i) any dutiable or prohibited goods which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77,

....."

Section 114(ii) provides penalty for attempt to export goods improperly, etc. --- Any person 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 113, or abets the doing or omission of such an act. shall be liable,--

(i)

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding five times the duty sought to be evaded on such goods or one thousand rupees, whichever is greater;

(iii)"

Section 117 deals with imposition of penalties for contravention of the Act not expressly mentioned and provides that any person who contravenes any prohibition of the Act or abets any such contravention and who fails to comply with the provision of the Act which was his duty to comply with, where no expressed penalty is elsewhere provided for such contravention or failure, should be liable to a penalty not exceeding Rs. 1,000/-Section 125 provides for option to pay fine in lieu of confiscation. Sections 132 and 135 which are in Chapter XVI deal with offences and prosecutions and provide for punishment for false declaration, false document and evasion of duty or prohibitions and provide for personal punishment of the offender. It is an admitted fact that in this case as a result of the alleged misdeclaration no duty was being evaded. It is also an admitted fact that the duty in this case had to be paid on the basis of the relevant provisions of the Indian Tariff Act guiding the exportation of the goods in question. There is also no dispute that the goods in question were not prohibited goods in the sense that export of these goods had not been prohibited under any provisions of the Customs Act, 1962. It is upon these facts that the controversies in the present case have to be decided and it has to be seen whether the show cause notice is without jurisdiction or is liable to be quashed. The first question as mentioned hereinbefore is whether the goods in question are dutiable goods. The definition as noted, must fulfil two conditions: reading, it by itself and literally, that is to say, the goods in question should be chargeable to duty and further the goods must be such on which the duty has not been paid. The qualification must be referable to the time when goods are being actually

exported. In view of Section 51 until and unless the Customs duties have been paid the authorities would not permit exportation of these goods. In this case Mr. Mitter, learned counsel for the department, sought to argue that factually duty had not been paid originally at the time when the shipping bills were presented. I do not think, that the respondents are entitled to take that position. Duties were ultimately refunded but it is not the case that clearance was objected to because the duty had not been paid. It appears to me that in order to be dutiable goods the goods in question must fulfil two conditions. The conditions or qualifications are mentioned in the definition in a conjunctive manner. Mr. Mitter contended that the expression "and" in the definition of the "dutiable goods" should be read as "or", alternatively and as "and/or" in order to give meaning to the intention of the legislature. Mr. Mitter drew my attention to Maxwell's Interpretation of Statutes 1969 Edition, p. 232 and to several decisions, viz. *The King v. Governor of Brixton Prison* (1937) 1 KB 305 at p. 313, *J. W. Dwyer v. Metropolitan District Receiver* (1967) 2 QB 970, *Attorney-General for New Zealand v. Brown*, AIR 1917 PC 133 *Mazagaon Dock Ltd. Vs. The Commissioner of Income Tax and Excess Profits Tax*, and *S. Krishnan and Others Vs. The State of Madras*, . On the basis of the aforesaid decisions and the authorities Mr. Mitter contended that the Court had the power in a proper case to construe the expression "and" as "or" and vice versa. In so far as the legal proposition, contended by Mr. Mitter is concerned it is correct. The Court undoubtedly has the power, if reading the Act as a whole the Court comes to the conclusion that such a construction should be made to avoid either absurdity or to avoid defeating the clear intention of the legislature. It has been pointed out by the Supreme Court in the case of *Babu Manmohan Das Shah and Others Vs. Bishun Das*, that the ordinary rule of construction was that a provision of a statute should be construed in accordance with the language used therein unless there were compelling reasons such as, where literal construction would reduce the provision to absurdity or prevent the manifest intention of the legislature from being carried out.

5. Bearing the above principles in mind, therefore, the present question has to be considered. It has to be noted that the expressions "dutiable goods" and "prohibited goods" appear only in Sections 111 and 118 of the Customs Act, it is in respect of imposition of certain penalties upon an offender that these expressions have been used in the Act, Therefore, they must receive strict construction unless compelled otherwise by the context and purpose of the Act. It has to be noted that if the expression "and" is read as "or" then in a sense the definition clause would become absurd because dutiable goods would mean goods which are chargeable to duty or on which the duty had not been paid, that is to say, all goods whatsoever would become dutiable by virtue of this definition. That would be an absurd position. Therefore, Mr. Mitter contended that it should be read as "and/or". Reading the expression "and" as "and/or" would make the first part of the definition redundant Mr. Mitter contended that for violation of Section 50, that is, for giving a false declaration in the shipping bills, though it might have no effect on the question of duty, no punishment was provided and

Section 50 would become nugatory if the expression "and" in the definition Clause 2 (14) was not read as "or". I am unable to accept this contention. Firstly, if the expression "or" is read in the definition" Clause of Section 2(14) then the person who has paid the duty would be placed at a disadvantageous position than the person who has not paid the duty, which could not have been the intention of the Legislature. Secondly, it would not be proper to state that no penalty has been provided for violation of Section 50 of the Act. Penalty of fines can be imposed and also that of imprisonment. If the legislature has thought it fit not to provide for penalties on the goods it is not for the Court to impose another form of punishment for violation of Section 50 of the Act. Mr. Mitter also contended that unless the expression "and" was read as "or" the definition clause, namely 2 (14) would be in conflict with Section 12 of the Act. I am unable to accept this contention also. Section 12 does not define dutiable goods. Section 12 only provides how the duties will be levied in respect of the dutiable goods. For indicating that in the marginal note of Section 12, the expression "dutiable goods" have been I mentioned. Section 12 is not an additional definition of dutiable goods to Section 2(14) of the Act, Mr. Bajoria further contended that in case of a possible doubt this being in a penal section, it should be resolved in favour of citizen and such a construction should be made which would be favourable to the citizen. Mr. Baoria referred me to certain decisions of the Supreme Court in support of this proposition. In the view I have taken it is not necessary for me to discuss this question in any greater detail. I am of the opinion that the contentions raised on behalf of the respondents cannot be accepted on the question of "dutiable goods" and it must be held that the goods in question, in the facts and circumstances of this case, were not dutiable and as such Section 113(i) would not be attracted to this case.

6. The next question is whether even assuming, the value which has been declared to be incorrect, is it such an incorrect particular as to attract the provisions of Section 113(i)? Mr. Baoria contended that material in this clause must mean and refer to those particulars which were material for the purposes of the Act, that is to say, Customs Act, 1962. The Customs Act, 1962 was concerned primarily with two objects, that is to say, to levy duty, to realise duty and secondly, to prevent exportation or importation of certain prohibited goods. If any mis-declaration or false declaration was made to defeat or delay the payment of duty or which was calculated to evade any prohibition as provided by the Act, then such a declaration might amount to a misdeclaration of certain material facts as contemplated by the section. But in this case, the admitted position was, the alleged misdeclaration did not in any way affect the question of prohibition of any goods and did not affect the question of payment of any duty. Mr. Mitter on the other hand contended that the value which the petitioner should have declared in the shipping bill namely, F.O.B. value, was the value at which the goods were exported abroad. According to Mr. Mitter, the declaration which was required to be given under G.S.R.I. was such a declaration, which was also required by Section 50(2) of the Customs Act, 1962. Any declaration which was

false in respect of the Foreign Exchange Regulation Act would also attract the provisions of Section 50(2) of the Act, according to Mr. Mitter. In other words, what Mr. Mitter contended was that any violation of the provisions of the Foreign Exchange Act, would also involve the violation of Section 50 of the Customs Act, 1962, and as such it would be material for the purposes of this Act., I am, however, unable to accept this contention of Mr. Mitter. Material for the purpose of a particular Act should be in relation to the objects of that particular Act. Preamble of the Customs Act. 1962 did not provide that it was to regulate the purpose of the foreign exchange regulation, it was to an Act to consolidate and amend the law relating to Customs. Neither the preamble nor the terms of the different sections warrant the conclusion that the declaration of value for foreign exchange purpose was material for the purpose of Customs Act, 1962. Therefore the alleged misdeclaration did not amount to any misstatement of any "material particular" which would attract the provisions of Section 113(i) of the Customs Act, 1962. On this ground also I am of the opinion that this notice is liable to be quashed.

7. The next contention of Mr. Baoria was that his client was under no obligation to declare the value of the goods on the basis of the price to be paid by the foreign buyer. Mr. Baoria referred me to Section 14(a) of the Act and to the definition of the value. In this connection reference was made to the definition of F.O.B. value in the Export Trade of Schmitthoff (4th Edition) at page 17. It is not necessary for me and I do not intend to decide whether the petitioner was at all under any obligation to declare the value at which the goods were ultimately purchased by the foreign buyer.

8. The last contention that was urged was that Section 114(ii) could not be attracted in this case, because in order to impose penalty it should be either a penalty not exceeding five times of the duty sought to be evaded on such goods or Rs. 1,000/-, whichever was greater. Now in this case no duty was going to be evaded, that is the admitted position. Therefore, whether Rs. 1,000/- or any other sum was greater or less than the duty sought to be evaded cannot be found out. Unless a comparative assessment was possible the section could not be applied. Mr. Mitter had on this point sought to refer to the decision of the Bombay High Court in the case of Mohandas Issardas and Others Vs. A.N. Sattanathan and Others, . There, however, the language of the section was different; therefore, it is not necessary for me to discuss the case. In view of the fact that no duty was sought to be evaded in this case penalty u/s 114(ii) could not be imposed because the test whether any particular sum of money would be greater than the tax sought to be evaded could not be applied. On that view of the matter, the notice is liable to be quashed.

9. Regulation of foreign exchange is vitally connected with the exportation and importation of goods from this country and as such Customs authorities should have powers to enforce foreign exchange regulation. Economic laws to be effective must have an integrated machinery for enforcement. Economic crimes

are also often inter related. It is time for the Parliament to consider the desirability of an Economic Code to fulfil the integrated purpose of economic planning, control and development. That power, is a matter for a proper legislative provision.

10. In view of the provisions of the Customs Act, 1962 as they are, it must, however, be held that the show cause notice as it was only on the two grounds mentioned hereinbefore, is liable to be quashed for the reasons mentioned hereinbefore.

11. In the result, the said notice dated 10th of July, 1970 being Annexure G to the petition, is hereby quashed and the respondents are restrained from proceeding with the said notice. Let appropriate writs in the nature of certiorari and mandamus be issued accordingly.

The Rule is made absolute to the extent indicated above.

There will be no order as to costs.

The operation of this order is stayed for five weeks.