

(1972) 05 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Original Order No. 2 of 1970

Jute Investment Co. Ltd.

APPELLANT

Vs

S.K. Srivastava and Others

RESPONDENT

Date of Decision : 04-05-1972

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 113(1), 113(d), 114, 2(12), 2(14)

Citation : 77 CWN 501

Hon'ble Judges : Sabyasachi Mukherji, J;Arun Kumar Mukherjee, J

Bench : Division Bench

Advocate : R.C. Deb, Somnath Chatterjee and R.N. Bajoria, for the Appellant;G.P. Kar and A.K. Banerjee, for the Respondent

Judgement

Sabyasachi Mukherji, J.—This appeal arises out of an order and judgment of Banerjee, J., dated 8th of September, 1969 in an application under Article 226 of the Constitution by the petitioner challenging the show cause notice dated 1st of December, 1965 issued by the Additional Collector of Customs of Calcutta. The petitioner is a partnership firm and carries on business of exporters and importers. On or about 2nd December, 1965, the petitioner was served with the said show cause notice and was called upon to show cause why penal action should not be taken against it u/s 114 of the Customs Act, 1962. The show cause notice was based on two allegations, namely (1) contravention of section 12(1) of the Foreign Exchange Regulation Act, 1947, and the goods were therefore liable to confiscation u/s 113(d) of the Customs Act, 1962, and the petitioner was liable to penalty u/s 114 of the Customs Act, 1962, and (2) the particulars given in the shipping bill filed in support of the goods to Customs House were not correct and as such the goods were liable to confiscation u/s 113 (i) of the Customs Act, 1962, and the petitioner was liable to penalty u/s 114 of the Customs Act, 1962. Counsel for the respondent contended that goods from the very beginning were, in view of the facts alleged in the show cause notice, meant and intended to be sent by the petitioner to Bunderabbas, Iran. But E.P.I. Form

was filed alleging that the goods were being sent to Afghanistan in transit to Karachi. Therefore, it was contended that there was a direct contravention of section 12(1) of the Foreign Exchange Regulation Act, 1947, because there was no declaration that the amount representing the full export value would be paid in "the prescribed manner." It was further contended that "the prescribed manner" meant manner prescribed by the Rules. It was submitted that the forms which had been prescribed under Rule 3 of the Rules said, how with regard to any particular country and in what manner the full export value had to be repatriated. In the premises, counsel for the respondent, urged that the truth or validity of the amount of exported value that had been declared, was not the question here but the question involved here was how and in what manner such value had to be repatriated or otherwise adjusted against such exports. It was, therefore, urged, it came within the mischief of section 12(1) of the Foreign Exchange Regulations Act, 1947. It was alleged that the manner in which the true exported value had to be brought had been contravened by the petitioner by not filing the prescribed form. Therefore, section 113(d) of the Customs Act, 1962, was attracted because such declaration which did not follow the prescribed manner was prohibited u/s 12(1) of the Foreign Exchange Regulation Act, 1947. It has to be remembered that section 12(1) before its amendment in 1969 did not require that the declaration should be in any prescribed form. Section 12(1) of the Foreign Exchange Regulation Act, 1947, provided as follows before its amendment by Act 40 of 1969: 12. Payment for exported goods--(1) The Central Government may, by notification in the official Gazette, prohibit the taking or sending out by land, sea, or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner.

By Act 40 of 1969 the sub-section (1) of Section 12 was substituted as follows:

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

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

(ii) If the full export value of the goods is not ascertainable at the time of export the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the course of international trade, and affirms in the said declaration that the full export value of the goods

(whether ascertainable at the time of export or not) has been, or will within the prescribed period be, paid in the prescribed manner.

Before its amendment in 1969, section 12(1) did not require that particulars given in the declaration must be true or correct in all respects and the requirement of the said section, therefore, would have been complied even if the particulars given in the declaration were incorrect. Section 27 (2) (a) of the Foreign Exchange Regulation Act, 1947, empowered the Central Government to prescribe the forms and circumstances of their use for the purpose of the Act by rules made under the Act Rule 3 of the Foreign Exchange Regulation Rules, 1952, provided that the declaration u/s 12(1) of the said Act should be in one of the forms set out in the First Schedule to the Rules, as the Reserve Bank might by notification in the Gazette of India specify as appropriate to the requirements of a case. By a notification dated 16th May, 1952, the Reserve Bank of India in exercise of the powers under rule 3 of the Foreign Exchange Regulation Rules, 1952, had specified that the various forms in the First Schedule to the said Rules would be used for the purpose of declaring the exports to the various countries as specified in the said notification as appropriate to the requirement of the case. It appears therefore that non-submission of the declaration u/s 12(1) of the Act in the form prescribed by rule 3 of the Foreign Exchange Regulation Rules, 1952, read with the notification dated 16th of May, 1952, would not amount to any contravention of the provision imposed by section 12(1) of the Foreign Exchange Regulation Act, 1947, it might amount to contravention of rule 3 of the said Rules and the notification dated 16th of May, 1952. The powers and the jurisdiction of the Customs Authorities for contravention of the provisions of the section 12(1) of the Foreign Exchange Regulation Act, 1947, before its amendment in 1969 have come up for consideration by the Supreme Court in the case of (1) Union of India and others v. Raj Bahadur Shreeram Durga Prasad (P) Ltd. and others etc. AIR (1970) S.C. 1957. In that case the petitioners who were exporters of manganese ore had exported large quantities of manganese ore after ostensibly complying with the formalities of law but in reality they had under-invoiced the various consignments sent by them and had failed to repatriate foreign exchange of the value of about three crores of rupees obtained by them as the price of manganese ore exported. The Customs authority issued several notices to the petitioners to show cause why action should not be taken against them for contravening Section 12(1) read with section 23A of the Foreign Exchange Regulation Act and section 19 read with Section 167(8), Sea Customs Act. The petitioners applied under Article 226 of the Constitution for quashing those notices and prohibiting further action on those notices. The appellate Bench of the Madras High Court reversing the decision of the learned Single Judge allowed the petitions. On further appeal the Supreme Court held dismissing the appeal that the notices issued were invalid as the offences alleged did not fall within Section 23A. It was held further that before a case could be held to fall within the scope of section 23A it should be shown that there had been contravention of the restrictions imposed by section 12(1) of the Act. The requirement of section

12(1) was satisfied if the stipulated declaration in the form prescribed by Rule 3 of the Foreign Exchange Regulation Rules, 1952, was furnished and was also supported by evidence prescribed in Rule 5. It was further held that the scheme of the Act made it clear that so far as the Customs authorities were concerned all that they had to see was that no goods were exported without furnishing the declaration prescribed u/s 12(1). Once that stage was passed the rest of the matter was left in the hands of the Reserve Bank and the Director of Enforcement. In the case of (2) Becker Gray and Co. (1930) Ltd. and Others Vs. Union of India (UOI) and Another, , the Supreme Court observed at page 117 of the report as follows :--

Mr. Bindra, however, urged that, in these cases, there was the distinctive feature that the Board also found that the declarations were further incorrect inasmuch as the goods were declared to have been sold, while they were being exported on consignment as unsold goods, and it was further stated in the declarations that the full export value of the goods in the value shown instead of stating that it was the fair valuation of unsold goods. The finding recorded by the Board, no doubt, shows that the declarations, required to be made under the Rules in Form G.R.I. contained incorrect information, but that incorrect information related to points on which Sec. 12(1) does not require a declaration. A declaration, which is in contravention of the Rules or the Forms prescribed under the Rules, may be penalised u/s 23 of the Act, but such contravention will not attract the provisions of the Sea Customs Act. Under sec. 23A of the Act, only a breach of restrictions imposed by Sec. 12(1) of the Act is to be deemed in contravention of restrictions imposed by Sec. 19 of the Sea Customs Act. An incorrect declaration in contravention of the Rules made under Sec. 27 of the Act is not to be deemed a contravention of any restriction imposed by Section 19 of the Sea Customs Act. It is, therefore, quite clear that, in these cases, the imposition of the penalties u/s 167(8) of the Sea Customs Act was totally unjustified. Consequently, these appeals are allowed with costs, and the orders of the Adjudicating Officer, and the Board imposing the penalties under Sec. 167(8) of the Sea Customs Act are set aside. Penalties, if recovered, shall be refunded.

Therefore in this case as section 12(1) did not prescribe any particular form and the forms were prescribed by the rules, assuming that there had been contravention of the forms prescribed by the rules that would not attract the jurisdiction of the Customs authorities in view of the aforesaid judgment of the Supreme Court.

As mentioned hereinbefore, there was a second allegation in the show cause notice. It was alleged that the particulars given in the shipping bill were not correct and as such the goods were liable to confiscation u/s 113(1) of the Customs Act, 1962. Section 113(1) of the Customs Act, 1962, provides as follows :--

113. The following export goods shall be liable to confiscation.

(i) any dutiable or prohibited goods which do not correspond in any material particulars with the entry made under this Act.

The goods in the instant case are neither dutiable nor prohibited. Section 2(14) defines dutiable goods as goods which are chargeable to duty and on which duty has not been paid. In the instant case, the entire amount of the duty had been paid and after payment thereof the goods had been exported. Furthermore the show cause notice does not also allege that the goods were dutiable goods or that the duty had not been paid. The next question, is whether the goods were prohibited goods within the meaning of section 2(33) of the Customs Act, 1962, As the only condition subject to which the goods could be exported, namely filing a declaration u/s 12(1) of the Foreign Exchange Regulation Act, 1947 had been complied with, and there was no other prohibition on the export of the said goods apart from section 12(1) of the Foreign Exchange Regulation Act, 1947, the goods were not prohibited goods in terms of section 2(33) of the Customs Act, 1962. Apart from the items No. 8 and 9 of annexure "F" of the show cause notice, the other particulars in relation to which it has been alleged that there had been a misdeclaration related to the country of final destination, name of exporter and the port of discharge of these goods. In the case of (3) Assistant Collector of Customs (Preventive) and others v. Acharyya Bros. Appeal from Original Order 228 of 1969 my Lord sitting with myself held that these particulars were not material particulars relating to the goods within the meaning of section 113(1) of the Customs Act, 1962. Counsel for the respondent relied on a judgment in the case of (4) S. K. Srivastava and others v. Vallabdas Kalyanji (Private) (Appeal from Original Order No. 42 of 1969) delivered by D. Basu, J. and A. K. Basu, J. The aforesaid Division Bench judgment has been considered by us in the aforesaid case referred to hereinbefore. In view of the aforesaid judgment of us referred to hereinbefore, it must be held that these were not the material particulars. Further more, it appears that goods are not export goods as defined u/s 2(12) of the Customs Act, 1962. Section 2(12) of the Customs Act, 1962 defines "export goods" as goods which are to be taken out of India to a place outside India. The goods which had already been exported pursuant to orders made u/s 51 of the Customs Act, 1962, cannot therefore be deemed to be "export goods" within the meaning of Customs Act, 1962. It has been so held by me in the case of (3) G. Ambalal (Export) Private Ltd. Vs. The Assistant Collector of Customs, Calcutta and Others, . For the reasons mentioned hereinbefore proceedings u/s 113(d) or section 113(1) or section 114 of the Customs Act, 1962, cannot be initiated against the respondents in this case on the facts alleged in the show cause notice. For the reasons mentioned hereinbefore, it appears that the show cause notice is without jurisdiction on undisputed facts. Counsel for the respondents contended that the petitioners had an alternative remedy and further more in the instant case when the petitioner had shown cause this Court should not entertain this application under Article 226 of the Constitution. We are unable to agree. Where on undisputed facts the proceeding of the show cause notice is without jurisdiction, it is not necessary for the party to exhaust

the whole proceeding before moving for relief under Article 226 of the Constitution. Counsel for the respondents further contended that by the proceeding had been allowed, therefore, the appellate court at this stage should not quash or stop the proceedings. There is no substance in this. Even if by the interim order the proceedings were not stopped by virtue of that interim order an invalid proceeding does not become valid one.

2. For the reasons aforesaid, the show cause notice is without jurisdiction and proceedings taken thereunder are liable to be quashed. In the premises, the show cause notice dated 1st of December, 1965, is hereby quashed and set aside and all proceedings so far taken thereunder are also quashed and set aside. In the premises the appeal is allowed. Banerjee, J. passed his order in this case following his judgment dated 8th of September, 1969, in matter No. 454 of 1967 (6) (Messrs. M. Abhechand & Co. v. S. K. Srivastava & Ors.) For the reasons mentioned hereinbefore, we are unable to accept the conclusion reached by Banerjee, J. in the said judgment. The order of Banerjee, J. in the instant case, is therefore, set aside and there will be order quashing the show cause notice dated 1st of December, 1965, and all proceedings taken thereunder. Respondents are restrained from proceedings taken thereunder. Respondents are restrained from proceeding further with the said show cause notice. Let writs in the nature of certiorari and mandamus issue accordingly. The rule nisi issued under Article 226 of the Constitution is made absolute to the extent indicated above. In the facts and circumstances of this case there will be no order as to costs,

Arun K. Mukherjee, J.

I agree.