
(1986) 12 MAD CK 0029

In the Madras High Court

Case No : A.A.O. No"s. 798 and 799 of 1982

P. Varada Reddy

APPELLANT

Vs

The Additional Director, Enforcement Directorate

Unimax International Vs The Additional Director,
Enforcement Directorate

RESPONDENT

Date of Decision : 15-12-1986

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 18, 23, 50, 54, 58

Citation : (1988) 17 ECC 190 : (1988) 1 LW 434

Hon'ble Judges : Sengottuvelan, J;David Annoussamy, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

David Annoussamy, J.—The Second Civil Miscellaneous Appeal is by the company and the first appeal is by the Managing Partner.

2. The facts leading to the present appeals succinctly are as follows:-- The appellant-company effected shipments of readymade garments valued

at Rs. 2,18,096 to M/s. Reddy Textillion and M/s. Peanuts Sportswear Mode Ltd., West Germany during March--June 1978 on D. P. Basis.

Since the exporter did not report the receipt of the money within the period of six months, a show cause notice was issued to him on 6th October,

1980. In that show cause notice, it is stated that

the company has refrained from doing any thing or refrained from taking any action which has the effect of securing that payment for the goods

representing the full amount payable by the foreign buyer is delayed beyond the prescribed period.

The prescribed period is a period of six months as per Rule 8 of the Rules made

under the Foreign Exchange Regulation Act. 1973. Therefore, the company as well as the Managing Partner were called upon to show cause why action should not be taken against them for violation of Section 18(2) of the Foreign Exchange Regulation Act, 1973, hereinafter called the Act. In reply, the company gave the following explanation:--

My clients state that they had consigned garments worth Rs. 1,15,200 to Mr. T.V. Raja Reddy representing M/s. Reddy-Textiles, 8000 Hunchen 40, Elisabethstrabe, II, West Germany vide invoice A.W.B. 098/23813875 dated 23-3-1978 and A.W.B.098/23964603 dated 26-4-1978. My clients further consigned garments worth Rs. 1,00,896 to M/s. Peanuts Sportswear GMFH represented by Mr. T.V. Raja Reddy Medo-Und Textile Centre, Mann 1/20 Iggolatadkar Strabe 55,8000 Munchen 45 West Germany vide invoices A.W.B. 098/24986500 dated 5-6-1978 and A.W.B. 098/24086931/dated 19-6-1978. My clients state that the total value of the garments exported is Rs. 2,16,096 and the export was in consonance with Reserve Bank of India's regulations. Since payments were not forthcoming as contracted, my clients state that they had caused legal notice dated 17-11-1979 to be issued to the aforesaid parties at. W. Germany claiming the amounts due from them but the same were returned unserved. Further copies of the aforesaid notices were also issued to Mr. T.V. Raja Reddy, C/o Sri T. Venkataramana Reddy, Co-operative Colony, Madanapalle, Andhra Pradesh, 517325 but were returned with the endorsement "Left India". My clients had also lodged a complaint against Mr. T.V. Raja Reddy for cheating and breach of trust with the Asst. Commissioner of Police, Crime (General), Police Commissioner's Office, Egmore, Madras-8. It is evident from what has been stated above, that my clients have taken all possible steps for the recovery of their dues from the foreign buyers. It is therefore needless to mention that the allegation in your memorandum that my clients have violated Section 18(2) of the Foreign Exchange Regulation Act bears no substance. Consequently, the averments that my clients and their partners are punishable under Sections 50 and 58 of the F.E.R.A. is untenable." Then the company and the Managing Partner were given the benefit of personal hearing. It was stated in the course of the hearing that the consignments were sent on D.P. basis on 7-7-1978 and they received a telex

message from Raja Reddy stating that he was extremely disappointed to note that it was mentioned in the Airway Bill as ""Peanuts Sportswear, Munich A/c. Mypo Bank, Munich"" and that on account of the mention of the name of the Bank, on the airway bill, Raja Reddy required the permission of the bank and so he requested them to alter the same by issue of a telex to Air India or Air Freight. Again by another telex message dated 15-8-1978, Raja Reddy requested the appellants to send a telex to Air India, Madras or Lufthansa, asking them to hand over the documents to him. Further, since the season was coming to an end, Raja Reddy stated that the buyers were not accepting the goods delivered late and that he was not taking delivery of the consignment. So, the appellant had to oblige Raja Reddy and requested Air India to delete the name of the Bank in the Airway Bill so that the goods could be taken delivery of by Raja Reddy directly in order to avert the possibility of the goods being auctioned by Air India. Accordingly, Raja Reddy took delivery of the goods subsequently and in spite of repeated calls by the appellants through phone and by personal meeting with him whenever he happened to visit India, he did not make any payment. They also obtained an undertaking letter from Raja Reddy during March 1979 when he was in India that he would sell the goods immediately and remit the corresponding amount by 30-4-1979 in full or otherwise, he would hand over the entire goods to him in Germany. The appellants issued lawyer's notice to Raja Reddy but it was returned undelivered. The consignments were ultimately auctioned by the customs due to the non-clearance of the consignments.

3. The Additional Director of Enforcement Directorate, who heard the appellants, passed an order on 8th December, 1980. In his order he observed that the appellants should have taken the permission of the Reserve Bank of India before altering the terms of payment, that it is not clear as to whether the proceeds of the auction of one consignment only or if all consignments were used to meet the storage and demurrage charges and that if the documents had not been delivered in the manner it had been the worst that could have happened was that the goods could not have been delivered and they could have been brought back to India. He came to the conclusion that there was violation of Section 18(2) of the Foreign Exchange Regulation Act, 1973 and accordingly imposed a penalty of Rs. 5000 on the company and Rs. 2,500 on the Managing Partner. On

appeal, the Foreign Exchange Regulation Appellate Board by order dated 29th September, 1982 confirmed the order of the Additional Director.

Aggrieved by that order, the appellants have come before us u/s 54 of the Act as per which only questions of law can be agitated before this Court.

4. The learned Counsel for the appellants urged before us two points:--

(1) As per the findings of the Appellate Board as well as the Additional Director, the appellants were guilty of having allowed the goods to be released without insisting on payment as per the D.P. terms agreed to earlier and that such an act would not constitute a violation of Section 18(2) of the Act which, is intended to punish only delay in payment; and
(2) There is no MENS REA proved in this case so as to justify the penalty.

5. Point No. 1:--It was argued on behalf of the appellants that as per the show cause notice issued to them, the Enforcement Directorate called

upon them to explain as to why action should not be taken against them for delay in payment which would be a violation of Section 18(2)(A)(a)(ii)

of the Act and that the orders of the Appellate Board as well as the Additional Director finding that the appellants acted wrongly in allowing the

goods to be released, did not disclose that there was delay in payment so as to invite the penalty imposed. In this case it is clear that the

proceeding was taken by the Enforcement Directorate for delay in payment. In order to justify the delay in payment, the appellants came forward

with a version which could not be accepted by the Directorate. In the course of their discussions, they have observed that the appellants ought not

to have resorted to the course of releasing the goods under changed terms without the previous permission of the Reserve Bank of India. But, that

does not mean that there was no delay in the payment. That fact remains uncontroverted and has been clearly recorded by both the authorities. In

fact, the Appellate Board in its order has pointed out as follows:--

“½the fact that the appellant was tricked by Raja Reddy and that they had done everything within their means to secure payment from him

subsequently does not appear to be relevant, in the circumstances.

Of course, it was possible for the Enforcement Directorate to take action against the appellants for changing the conditions of the payment without

the prior permission of the Reserve Bank of India as well. They have preferred not to resort to such a course and they were satisfied with the imposition of the penalty on the appellants, which is mostly of a symbolic nature, after the reduction of the penalty by the Appellate Board, for the reason of the delay in payment. Therefore it cannot be said in this case that there is contradiction between the show cause notice and the finding and that there is no violation of Section 18(2) of the Act. The first point urged by the appellants has no merit whatsoever.

6. Point No. 2:--As far as the second point is concerned, it was argued on behalf of the appellants that for levying a penalty, there should be a proof of MENS REA. In this connection, reliance was placed by the learned Counsel for the appellants on a decision of a Division Bench of this Court in M/s. Samuel and Co. Represented by its Managing Partner v. Foreign Exchange Regulation 93 LW 633. It is true that in that decision, taking into account the section under which the penalty was levied, it was held that the MENS REA was necessary for the purpose of levying such a penalty. For doing so, the Court in that decision relied on a passage in the decision of the Supreme Court in State of Maharashtra v. Mayer Hans George (1965) 35 Company Cases 557 at pages 571 and 572. The concluding sentence of the passage extracted reads thus:--

The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

In the same decision, while concluding the matter, the Supreme Court observed as follows:--

In our opinion, the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into Section 8(1) of Section 23(1-A) of the Act qualifying the plain words of the enactment, that the accused should be proved to have knowledge that he was contravening the law before he could be proved to have contravened the provision.

Further, as far as this question is concerned, there is a section in the Act itself, which is Section 59, which reads as follows:--

59. Presumption of culpable mental state.--(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part

of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no

such mental state with respect to the act charged as an offence in that prosecution.

Explanation-- In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

Sub-section (2) reads as follows:--

For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when

its existence is established by a preponderance of probability.

(2) For the purposes of this section, a fact, so far as may be, apply in relation to any proceeding before an adjudicating officer as they apply in

relation to any prosecution for an offence under this Act.

This obviously is a reference to Sub-section (3) of Section 59""--Ed.

(2) The provisions of this section shall, so far as may be, apply in relation to any proceeding before an adjudicating officer as they apply in relation

to any prosecution for an offence under this Act.

It is clear from Sub-section (1) that MENS REA, would be necessary only when it is ingredient of the offence concerned. If the nature of the

offence is such that the offence is complete without MENS REA, the question of MENS REA would not arise at all. In case MENS REA is one of

the ingredients of the offence, the Court shall presume the existence of the mental state, giving to the accused the opportunity of proving that he did

not act on such mental state. Sub-section (1) deals with such offences. Sub-section (3) which deals with the penalty to be levied by an adjudicating

officer, stipulates that the provisions of the section shall apply in relation to any such proceeding, so far as may be. The last phrase would indicate

that the question of MENS REA would arise only if the act to be punished required MENS REA by its very nature or by express provision of law,

and in such case MENS REA shall be presumed to exist, with an opportunity to be afforded by the Adjudicating Officer to the other party to

adduce proof that it does not exist before deciding whether penalty is to be levied or not. Now, in the present case, we are concerned with an

offence u/s 18(2)(A)(a)(ii) of the Act, which reads as follows:--

(2) Where any export of goods, to which a notification under Clause (a) of Sub-section (1) applies, has been made, no person shall, except with

the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing--

(A) in a case falling under Sub-clause (i) or Sub-clause (ii) of Clause (a) of Sub-section (1),--

(a) that payment for the goods--

(i)***

(ii) is delayed beyond the period prescribed under Clause (a) of Sub-section (1)

It is clear from the above provision that MENS REA is not. at all required. The only question which arose before the authority is whether any

action or omission took place. If it is proved that any action or omission had taken place, there is violation of the section justifying the penalty. Even

if any MENS REA was necessary in such a case, as per Section 59 of the Act such MENS REA would be presumed to exist. In this case, the

appellants have attempted to show that there was no such MENS REA, that the delay occurred on account of circumstances beyond their control

and that they were constrained to alter the terms of payment. But that latter course, they should not have adopted without the prior permission of

the Reserve Bank as rightly pointed out by the authorities below. So, on this point also,"" the appellants fail.

7. In the result, both the appeals are dismissed. No costs.