

(1983) 06 KAR CK 0020
In the Karnataka High Court
Case No : M.F.A. No. 610 of 1976

Parvathi Textiles and Another

APPELLANT

Vs

Director, Enforcement Directorate.

RESPONDENT

Date of Decision : 14-06-1983

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 12(2)

Citation : (1984) 1 KarLJ 145

Hon'ble Judges : R. S. Mahendra, J;G. N. Sabhahit, J

Judgement

G.N. Sabhahit-This appeal by Messrs. Parvathi Textiles, is directed against the order dated 12-2-1975 passed by the Foreign Exchange Regulation Appellate Board in Appeal No. 73 of 1965, dismissing the appeal of the present appellants, on confirming the order dated 24-7-1965 passed by the Director of Enforcement against the present appellants.

2. Messrs. Parvathi Textiles is a partnership firm, of which, Sri V. Perumalchettiar is the active partner, the other two partners being merely sleeping partners. This firm was carrying on textile business and admittedly they exported two shipments of handloom silk, zari brocades and handicraft zari thread worth of Rs. 2.95,195 as per the declaration made by them in the relevant G.I.R. forms. They were issued licence on condition that they should credit the proceeds in foreign exchange within six months in the prescribed manner. It appears that thereafter, they got the time for credit extended by the Reserve Bank of India till the end of 31-12-1963. But inspite of it, they did not credit a single paise. The Assistant Director, Enforcement Directorate, Ministry of Finance, Government of India, called for information by issuing directive under S. 19(2) of the Foreign Exchange Regulation Act, 1947 to which, the present firm inter alia replied thus:

"However Sri V. Perumal Chettiar is a partner of the firm, M/s. K.M.S. Mari Chettiar, Cloth Merchants, Vembadithalam who have made exports of art silk sarees and fabrics, ready-made garments and handicraft goods. Since Sri V. Perumal Chettiar looks after the business and resides at Bangalore only, the full

and complete details of the exports effected could not be furnished, for which we regret."

It was further stated that it was V. Perumal Chettiar who dealt with the export business of M/s. Parvathi Textiles and Sri P. Krishnaraj and Smt. S. Venkatalakshmi were benamidars for Sri V. Perumal Chettiar. They also attached the statement of export bills to the information supplied. In continuation of the information they also filed on 24th of May, 1965, another statement before the Deputy Director, stating inter alia thus:

"In continuation of our letter of 17-5-1965 furnishing the information called for in your Directive issued under S. 19(2) of the Foreign Exchange Regulation Act, 1947, we beg to submit that we had overinvoiced our export invoices to the extent of ten times the realisable value of such exported goods at Singapore where the goods have been exported and we feel that we may not be able to repatriate any value of the exports made.

The amount shown as outstanding under column 9 of the Statement of exports Bills Outstanding Realisation enclosed along with the directive already sent represents an intangible asset, and thus, we submit that we may be permitted to write off as the dues do not really represent any tangible assets.

In view of the above facts and circumstances of the case, we beg to submit that the matter of non-realisation of the export proceeds may be kindly adjudicated upon by the Hon"ble Director, Enforcement Directorate Ministry of Finance, Govt. oil India, New Delhi, and we hereby undertake to abide by the decision of the Hon"ble Director. We further add that we shall not go in appeal on decision of the Hon"ble Director."

Thereafter, the Director of Enforcement issued the showcause notice to the firm thus:

"Whereas it appears that during the year 1963 M/s. Parvathi Textiles, 138, First Block, Jayanagar, Bangalore-11, effected shipments of textiles valued at Rs, 2,97,195-00 and realised a sum of Nil towards the export value leaving a balance of Rs. 2,97,195-00 unrealised.

And whereas the said M/s. Parvathi Textiles, have admitted that the amount outstanding as above would never be realised. And whereas failure to realise the full export value of the goods from the country of destination within six months from the date of shipments of the goods in the prescribed manner is a contravention of the provisions of the S. 12(2) of the Foreign Exchange Regulation Act, 1947 as amended upto 1964 read with Central Government Notification No. 6(8) ENF. 11/52 dated 22nd April 1952.

And whereas by failure to realise the full export value of the said shipments from the concerned foreign consignees within six months from the date of the said shipments in the prescribed manner the said M/s. Parvathi Textiles and being the partners of the said firm Sri V. Perumal Chettiar, P. Krishnaraj and Smt. S.

Venkatalakshmi appear to have contravened the provisions of S. 12(2) of the Foreign Exchange Regulation Act, 1947 as amended upto 1964 read with Central Government Notification No. 6(8) ENF. 11/52 dated 22nd April 1952, and have thereby rendered themselves liable to be proceeded against under S. 23(1)(a) of the said Act.

Now therefore the said M/s. Parvathi Textiles are required to show cause in writing within 10 days of the receipt of this Memorandum why adjudication proceedings should not be held against them for the said contravention as contemplated in S. 23(D) of the Foreign Exchange Regulation Act, 1947."

3. The firm appeared before the Director, Enforcement Directorate, New Delhi and at the hearing which took place at Madras on 14-7-1965 Sri N.C.S. Raghavan, Advocate and Chartered Accountant appeared for the firm and pleaded guilty to the charge. Accordingly, the Director accepting the plea of N.C.S. Raghavan found M/s. Parvathi Textiles and its partner Sri V. Perumal Chettiar, guilty of having contravened the provisions of S. 12 (2) of the Foreign Exchange Regulation Act, 1947. As regards the other two partners namely, Sri Krishnaraj and Smt. S. Venkatalakshmi they were accepted as mere benamidars of Sri V. Perumal Chettiar; they were not aware of the transactions nor they were benefited by the exports. The Director giving them benefit of doubt, acquitted them.

4. The Director, taking also into consideration that the firm was unlawfully benefited by the receipt of import entitlements, by way of incentive licences to the extent of nearly Rs. 3,00,000/- levied penalty on the firm and Sri V. Perumal Chettiar jointly and severally Rs. 2,00,000/- by its order dated 24th July 1965. Aggrieved by the said order, the firm and Sri V. Perumal Chettiar went up in appeal before the Foreign Exchange Regulation Appellate Board in appeal No. 73 of 1965 on its file. The Board, on hearing the arguments, delivered its order on 12-2-1975 confirming the order passed by the Director, Enforcement Directorate, New Delhi. Aggrieved by the said order of the Appellate Board, the firm M/s. Parvathi Textiles and its partner Sri V. Perumal Chettiar have instituted the above appeal before this Court.

5. Sri Srinivasan, learned counsel appearing for the appellants strenuously urged before us that the Director of Enforcement as well as the Appellate Board was wrong in coming to the conclusion on the facts of the present case that the appellants committed breach of the provisions of S. 12(2) of the Foreign Exchange Regulation Act, 1947 as amended upto 1964. Elaborating his argument, he submitted that the said provision would not cover the case of a perfected sale as in the present case. It covers according to him only the export shipment by way of consignment upto the stage of sale and not beyond. Alternatively he argued that even assuming that the provisions applied to the present transaction, there was no mens rea established on the facts of the present case and as such the impugned order was liable to be set aside. As against that, Sri Shivashankar Bhat, learned Central Government Advocate

argued supporting the order passed by the Director of Enforcement confirmed by the Appellate Board. He pointed out that the material on record did not reveal that the goods were exported on the sale being completed; the shipments were by way of consignments against orders before sale was completed. He also pointed out that the question whether S. 22(2) of the Act covers the completed sales would not arise for consideration on the facts of the present case. He submitted that the Director of Enforcement and Appellate Board had reached the correct conclusion in the matter. The points, therefore, that arise for our consideration in this appeal are:

(1) Whether S. (12)2 of the Foreign Exchange Regulation Act, 1947 as amended upto 1964 would be applicable to the facts of the present case?

(2) If so, whether the Director and the Appellate Board were justified in holding that the firm and its partner committed breach of the provision contained in S. 12(2) of the Act?

(3) Whether the punishment awarded is just" and proper?

6. S. 12(2) of the Foreign Exchange Regulation Act, 1947, as amended upto 1964, reads:

"Where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of, the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that.

(a) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade; or (b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid:

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner."

7. The words "no person entitled to sell, or procure the sale of the said goods" have been the subject-matter of divergent interpretation by two different High Courts, viz., the High Court of Calcutta and the High Court of Madras.

8. According to the Madras High Court, the obligations under S. 12(2) attach both to the seller and the consigner. The words "no person entitled to sell, or procure the sale of the said goods" occurring in S. 12(2), according to the High Court are descriptive and refer to persons in the capacity of sellers of goods or to persons entitled to procure the sale of the same after the export has been made, vide: R. Venkata Subba v. The Director of Enforcement, Enforcement Directorate,

New Delhi, (1969) 1 Mad. L. J. 281. The same view is affirmed by the High Court of Madras in M/s. Rai Bahadur Shreeram Durga Prasad Private Ltd. v. The Union of India, Represented by the Secretary to the Government of India, Ministry of Finance, New Delhi, (1969) 1 Mad. L.J. 547.

9. As against that, the Calcutta High Court has held that the stage in the process of export and the sale contemplated by sub section (2) is a stage after the export of goods but before the sale has taken place and completed vide: The Jay Engineering Works Ltd., v. M.G. Wagh AIR. 1973 Calcutta 33. The same view is affirmed by the Full Bench of the Calcutta High Court in The Jay Engineering Works Ltd., v. M.G. Wagh's case.

10. The learned counsel invited our attention to the Calcutta decisions in submitting that the provisions of S. 12(2) could not be invoked against the present appellants as sale was completed before the export of goods took place.

11. The learned Central Government Senior Advocate, however, urged on us that there is no factual foundation to come to the conclusion that the sale was already complete at the time when the shipments were effected.

12. It is not in dispute that exports could be made on sale or on consignment. S. 4 of the Sale of Goods Act speaks of sale and agreement of sale. It reads:

"Sale and agreement to sell: (1) A contract of sale of goods is a contract whereby the seller transfer or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

13. Thus, it is obvious that a mere contract of sale does not become a sale unless the property in the goods is transferred from the seller to the buyer.

14. In the instant case, in the appeal memo filed before this court, while stating the facts, it is stated thus:

"During the year 1963 M/s. Parvathi Textiles (hereinafter referred to as the firm) exported two shipments of handloom silk, zari brocades and handicraft zari thread to Singapore under the Export Promotion scheme. The invoice value of the aforesaid consignments as given in the G.I.R. forms was Rs. 2,97,195. The firm exported these goods against orders.....

15. Thus, it is clear from what is stated in para-2 of the appeal memo. that they

constitute two consignments. It is further added that they were sent against orders. Merely sending the goods against orders would not constitute sale. The property in the goods would not be transferred in favour of the buyer. The shipments were in the nature of consignments. That is further made clear in the show cause notice issued to the firm.

16. The relevant portion in the show cause notice reads:

".....And whereas by failure to realise the full export value of the said shipments from the concerned foreign consignees within six months from the date of the said shipments in the prescribed manner the said M/s. Parvathi Textiles and being the partners of the said firm Shri V. Perumal Chettiar, Shri P. Krishnaraj and Smt. S. Venkatalakshmi, appear to have contravened the provisions of S. 12(2) of the Foreign Exchange Regulation Act, 1947....."

17. Thus, it is made very clear, in the show cause notice that shipments were in the nature of consignments and the firm was represented by Shri N.C. Raghavan. Advocate & Chartered Accountant, before the Director, Enforcement Directorate, New Delhi, at Madras, and he pleaded guilty to the charge as made out in the show cause notice. That clearly means that the present appellants admitted that the shipments were by way of consignments and not on absolute sale. That is further confirmed by the contents of the appeal memo in para-2 as quoted above.

18. There is absolutely no evidence placed on record to show that the property in the goods stood transferred to the buyer any time before the shipments. If really, the property in the goods was transferred to the buyer, if any, the proper person who should have applied for export licence should have been the buyer and not the intending sellers. That being so, we have no hesitation to hold that on the facts of the present case, the shipments for export were by way of consignments and not on absolute sale. Hence, the question whether S. 12(2) covers export after sale would not arise for our consideration on the facts of the present case.

19. Even assuming that the export was on sale, we are of the considered view that even so the same is covered by the provisions of S. 12(2) of the aforesaid Act.

20. It is true that there are divergent views of the High Court of Calcutta and the High Court of Madras on this point. But, in our considered view, the controversy is set at rest by the authentic decision of the Supreme Court of India in the case, *The Union of India v. M/s. Rai Bahadur Shreeram Durga Prasad (P) Ltd.* A.I.R. 1970 Supreme Court 1597. The Supreme Court, speaking through His Lordship Hegde, J. had occasion to analyse the scheme of S. 12 in detail to determine the question at issue whether the facts of the case fell within the purview of S. 12(1) of the said act or it was covered under S. 12 (2) of the said Act. Examining the Section analytically and considering the scheme of the Act, the Supreme Court has held that the words "no person entitled to sell, or procure the sale of the said goods" include even the seller of goods on sale. In that case, large quantity of manganese ore had been exported after complying with requirements of law,

But, in fact, the goods were under invoiced and the exporter had failed to repatriate the full amount of foreign exchange of the value of about Rs. 3,00,000 obtained by the exporters as price of the manganese ore exported. The Customs Authorities issued several notices to the exporters to show cause why action should not be taken against them for contravening S. 12(1) read with S. 23A of the Foreign Exchange Regulation Act and S. 19 read with S. 67(8) of the Sea Customs Act. The question before the Supreme Court was whether S. 12(1) had been violated. It was in that connection that the Supreme Court had to examine the scheme of the Act and the scope of Ss. 12(1) and 12(2) and the Supreme Court, after examining the scheme of the Act and the scope of sub-secs. (1) and (2), came to the conclusion that it was not S. 12(1) of the Act that applied but it was S. 12(2) of the Act that applied to the facts of the case. In dealing with the appeal, the Supreme Court also noted that there were two facets in every export one relating to the goods exported and the other relating to the foreign exchange earned as a result of the export and that so far as the Customs Authorities were concerned, all that they have to see is that no goods are exported without furnishing the declaration prescribed under S. 12(1) of the Act and that once that stage was over, the rest of the matter was left in the hands of the Reserve Bank and the Director of Enforcement. That was also a case where manganese ore was sold. Thus the Supreme Court has clearly opined that even when goods are exported on sale, the provisions of S. 12(2) of the said Act would be attracted.

21. The High Court of Calcutta has no doubt felt that it was merely obiter and that it could not be considered as law declared by the Supreme Court as contemplated under Art. 141 of the constitution of India. With great respect, we are of the considered view that it cannot be dismissed as mere obiter, for the observation was necessary in order to decide the crucial point before the Supreme Court, viz., Whether on the facts of the case, it was S. 12(1) of the Act that applied or S. 12(2). In that connection, the Supreme Court had to examine the scheme of the Act, the intendment of it and the purpose of it and, in doing so, the Supreme Court has ruled that even an export of goods on sale, fell within the purview of S. 12(2) of the Act, which is a part of the ratio decidendi of the case-Hence, the law on the point is declared by the Supreme Court as contemplated under Art. 141 of the constitution of India and it becomes binding on this Court.

22. Even otherwise, even an obiter of the Supreme Court deserves the utmost respect. It is not necessary that decisions of the Supreme Court should be in the nature of ratio decidendi. It is enough if the Supreme Court considered a question of law and rendered a decision on the subject. Art. 141 of the Constitution provides that a law declared by the Supreme Court shall be binding on all the Courts within the territory of India.

23. In *The Corporation of Calcutta v. Liberty Cinema*, A.I.R. 1955 Supreme Court 1107, it was pointed out that the High Court was in error in accepting the contention that the observations in *Banarsi Das v. State of M.P.*, A.I.R. 1958

Supreme Court 909, do not form part of the actual decision of the case and they need not be given that weight which they would otherwise have been entitled to. The Supreme Court pointed out that the acceptance of the contention would result in by-passing the judgment of the Supreme Court, which could not be supported-

In *Ram Singh v. State of Delhi*, 1951 SCR 451, it is held that when a point of law is settled by a majority decision of the Supreme Court, no High Court or other court in India can seek to avoid that decision by discovering supposed conflicts and illegalities.

In *Income Tax Commissioner v. Vazir Sultan & Sons*, A.I.R. 1959 S.C. 814, it is held that not merely the decision of the Supreme Court, but the law declared by it, that is the principles enunciated by the Supreme Court, including even obiter dicta, when they are stated in clear terms would be binding.

In *B.M. Lakani v. Malkapur Municipality*, AIR 1970 SC 1002, it has been ruled that the decision of the Supreme Court is binding on the High Court and the High Court could not ignore it because the relevant provision was not brought to the notice of the Supreme Court.

24. Thus, it is clear that it is not only the ratio decidendi of a case decided by the Supreme Court that is binding but any declaration of law even by way of obiter dicta, if it is clear and unambiguous, binds all the courts in India. That being so, we are of the considered view that the law declared by the Supreme Court in the aforesaid decision, reported in (A.I.R. 1970 SC 1597), binds this Court and that the provision in S. 12 (2) of the Foreign Exchange Regulation Act, 1947, includes even an export on sale by a seller.

25. The view that we have taken finds full support in a Division Bench decision of the Madras High Court in *M/s Jayalakshmi Textiles etc.*, decided on 7-3-1975, (Vide: AAO No. 267 of 1974).

26. There cannot be any dispute that when the exporter does not repatriate foreign exchange earned as a result of the export or if he credits amount less than the amount earned or he delays in crediting the amount, he would be guilty of breach of S. 12(2) of the aforesaid Act. That is what the Supreme Court of India, in the aforesaid quoted decision, has ruled.

27. In the instant case, the facts on record show that the present appellants, though they have declared the value of the goods exported at Rs. 2,97,195/-they have not credited a single pie by way of repatriation. Even on the showing of the present appellants in their further statement, referred to above, the goods were over invoiced and that their real worth was only 1/10th of the invoice value. Even so, it is obvious that they must have realised or could realise, on their own showing, 1/10th of the value declared of the goods. But they have not credited even a single pie by way of repatriation. On the other hand, they have asserted that nothing could be repatriated. That clearly constitutes breach of the provision

of S. 12(2) of the aforesaid Act.

28. It is true that in order to prove the guilt under S. 12(2) of the Act, it was necessary that mens rea or the guilty intention must be established. As rightly pointed out by the Appellate Board, mens rea or guilty intention has to be inferred by the facts proved. It is now well established that goods declared as worth Rs. 2,97,195/- were exported by the present appellants. They even took time to make the repatriation till the end of December 1964. But, they have not credited a single pie. On the other hand, they have now started saying that no repatriation was possible. That clearly shows the intention and the guilty mind. That constitutes the mens rea. That is what the Appellate Board has held and we agree with the said finding.

29. Moreover, in the show cause notice, it is clearly stated that the facts constitute breach of S. 12(2) of the Act. The learned Advocate and Chartered Accountant appearing for the firm and the partners before the Director of Enforcement, has pleaded guilty to the charge. He has clearly admitted that the firm has committed breach of the Section, which means and includes that there was mens rea in committing the breach. Hence, the Director of Enforcement had no occasion to separately discuss that aspect.

30. In the circumstances, therefore, we are satisfied that the present appellants have committed breach of S. 12(2) of the aforesaid Act and are guilty of the offence and that they are liable for penalty contemplated in S. 23(1) of the Act as it then existed.

31. The relevant portion of S. 23 of the Act states:

"(1) If any person contravenes the provisions of Ss. 4, 5, 9 and 10 sub-sec. (2) of Ss. 12, 17, and 18-A or S. 18-B or of any rule, direction or order made thereunder, he shall, (a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provided, or (b) upon conviction by a Court, be punishable, with imprisonment for a term which may extend to two years, or with fine, or with Both."

32. Thus, S. 23 of the aforesaid Act contemplates penalty which shall not exceed three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more.

33. The learned Counsel appearing for the appellants no doubt submitted that the real value of the foreign exchange was 1/10th of the declared value, meaning thereby that it was worth only Rs. 29,750/- and, according to him, the penalty should not exceed three times that value.

34. The argument so advanced was successfully met by the learned Central Government Senior Advocate by submitting that this theory of 1/10th value has come at a later stage, probably, with the intention of reducing the penalty, if

possible. He pointed out that in the reply to the show cause notice, the firm and its partners have pleaded guilty and in the show cause notice it is very clearly stated that the worth of the foreign exchange was Rs. 2,97,195/- It was this charge that was admitted by the learned Advocate and Chartered Accountant representing the firm and its partners.

35. Even in the reply given to the show cause notice by the firm and its partners, it was shown that the balance was Rs. 2,97,195/- That being so, we are not persuaded to accept the argument advanced by the learned Counsel appearing for the appellants that the real value of the goods is only Rs. 29,750/-.

36. The penalty levied in this case is only Rs. 2,00,000/- It may be noted in this context that the appellants have obtained import licence worth Rs. 2,22,896/- on the basis of the likely foreign exchange that they were to repatriate. Thus, they have taken the advantage of the import licence. In the circumstances, therefore, Rs. 2,00,000/- levied as penalty, in our considered view, is quite reasonable. We have no reason to interfere.

37. In the result, the appeal fails and is dismissed as devoid of merits.

No costs of this appeal.