
(1996) 02 MAD CK 0067

In the Madras High Court

Case No : Appeal Against Order No. 445 of 1984

P.S. Nooruddin and Co.

APPELLANT

Vs

Additional Director and another

RESPONDENT

Date of Decision : 19-02-1996

Acts Referred:

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

Citation : (1999) 95 CompCas 67 : (1996) 55 ECC 56

Hon'ble Judges : P. Sathasivam, J; Abdul Hadi, J

Bench : Division Bench

Advocate : P.M. Jummakhan, for the Appellant; Mrs. Veeraraghavan, for the Respondent

Judgement

Abdul Hadi, J.—This appeal u/s 54 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the new Act") is against the

concurrent orders of the first respondent-Enforcement Directorate and the second respondent-Foreign Exchange Regulation Appellate Board,

levying a penalty of Rs. 3,600 for contravention of section 12(2) of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as "the old

Act").

2. The charge against the appellant-firm is that it exported during 1970-71, nine consignments of sharkfins and fishmaws to Singapore, of the total

value of Rs. 56,783 and realised only Rs. 20,690.97 leaving a balance of Rs. 36,092.03. To the show-cause notice dated June 11, 1973, issued

by the Directorate to the firm and its partners, they by their reply dated July 11, 1973, denied the charge, stating, inter alia, as follows :

The nine shipments were effected by us to S. K. Abdullah and Co., and Maideen Trading Agency ... Singapore-2, only on consignment basis

and not as sale to the foreign buyer. The values of each consignment mentioned in the G. R. 1 forms were.....not real values and those values were

mentioned only at the instance of the customs authorities sharkfins have no internal market and they are highly perishable Singapore market

fluctuates highly according to seasons and festivals The abovesaid consignee have remitted the entire sale proceeds to us after deducting the

expenses and commission due to them they (consignee) had realised only Rs. 20,690.97 as sale price....entries in the G. R. 1 forms themselves

clearly prove the above facts and that the true value of the goods was ascertained only on sale made by the consignee and the full values of the

goods have already been repatriated.

3. The order of the first authority also shows that the appellant filed copies of the account sales relating to the abovesaid nine shipments received

from the abovesaid consignees. No doubt regarding the abovesaid account sales, the said order says thus :

As regards the account sales produced there is no evidence to show that the prices mentioned therein, were in fact the prices obtained by the

agents by means of tenders. The agents have not furnished a declaration to that effect. Even the certificate of the Singapore Indian Chambers of

Commerce recorded on the account sales does not certify to the correctness of the prices indicated therein. The certificate of the Chambers of

Commerce runs as follows :

"Certified to the best of our knowledge and belief to be correct and without prejudice."

It is only a certificate of the correctness of the account sales as appearing in the books of the agent or consignee. It cannot be considered as

evidence of the prices fetched in the Singapore market.

4. The order of the first authority proceeded on the footing that in the G. R. 1 forms, the full export value having been declared at Rs. 56,873 the

said entire amount should have been repatriated, but not done to the extent of Rs. 36,092.03 and that even if any deduction is claimable for that,

permission of the Reserve Bank should have been obtained, as per section 12(2) itself, but not so obtained. The decisions cited before the first

authority, like R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, and Krishnaswamy v. Government of India, AIR

1970 Mys 3, were held to be inapplicable. The Appellate Board also gave similar reasons, while confirming the order of the first authority.

5. Learned counsel for the appellant reiterates that the export was only on consignment basis and not outright sale and what has been actually

realised from the consignee in Singapore, is only the above said sum of Rs. 20,690.97 and that the said consignee only sold the goods at

Singapore, realised the sale proceeds and repatriated the same after deducting his own commission and other incidental expenses borne by him in

effecting the sales at Singapore. That is why, according to learned counsel, despite the G. R. 1 forms, declaring the export value of the above said

goods exported, at Rs. 56,783 in order to satisfy the customs authorities, the actual sale proceeds realised thereon were only Rs. 20,690.97 which

has been repatriated. Therefore, according to learned counsel, there is no contravention at all u/s 12(2). He also points out the difference between

the terminology used in section 12(2)(b) of the old Act and the corresponding section 18(2)(A)(b) of the new Act. In other words, while under the

new Act, the term used is "full export value", which has to be repatriated, the term used in the old Act, with which alone we are concerned is, "the

full amount payable by the foreign buyer" which alone has to be repatriated, no doubt, in both the cases, subject to the above referred to

deductions permitted by the Reserve Bank. He also took us to the above referred to G. R. 1 forms, which were submitted by the appellant under

rule 3 of the Foreign Exchange Regulation Rules, 1952. He also relied on R. Venkata Subbu and Others Vs. The Director of Enforcement and

Another, and Krishnaswamy v. Government of India, AIR 1970 Mys 3, and the subsequent Supreme Court decision in Enforcement Directorate

v. Krishnaswamy [1980] 1 MLJ 47, confirming Krishnaswamy v. Government of India, AIR 1970 Mys 3. He also relied on T. K. M. Company

v. Foreign Exchange Regulation Appellate Board [1982] T. L. N. J. 96 and an unreported judgment of this court dated September 21, 1981, in

N. A. M. Abdullah v. Foreign Exchange Regulation Appellate Board (A.A.O. Nos. 472 to 477 of 1979).

6. On the other hand, learned counsel for the respondents reiterates the reasonings of the authorities below and submits that the concurrent order

should be confirmed by this court.

7. We have considered the rival submissions. The abovesaid G. R. 1 forms, duly filled up have been filed by the appellant when the abovesaid nine

shipments were made pursuant to the above referred to rule 3 of the Foreign Exchange Regulation Rules, 1952. The said rule says thus :

A declaration u/s 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may, by notification in the Gazette of

India, specify as appropriate to the requirements of a case.

8. Rule 4 therein, inter alia, says :

The original of the declaration shall be furnished to the Collector of Customs The documents pertaining to every export passed by the

customs shall, within 21 days from the date of the export, be submitted, to the authorised dealer mentioned on the relevant declaration form

9. After going through the abovesaid G. R. 1 forms, it is clear to us that the abovesaid export through nine shipments was only on consignment

basis. In all the said forms, though there is provision for making the declaration that the exporter is the seller or consignor of the goods, the term

seller"" is scored out. That apart, the portion in the said form stating ""that the invoice value declared is the full export value of the goods and it is the

same as that contracted with the buyer"" has also been scored out. Further, in some of the forms, we also find the appellant saying that ""the export

value of the goods is not ascertainable at the time of the export and that the value declared is that which I, having regard to the prevailing market

conditions, expect to receive on the sale of the goods in the course of international trade.

10. So, the values mentioned in the abovesaid G. R. 1 forms, as against the column relating to ""total invoice value"", cannot be the actual sale price

at which the goods were subsequently sold to the foreign buyer in the sales effected by the consignee at Singapore. Even, as per section 12(2),

only the ""full amount payable by the foreign buyer"" in respect of the goods has to be repatriated and not the ""full export value of the goods."" No

doubt in the corresponding provision under the new Act, a change has been effected in this regard. In other words, as per section 18(2)(A)(b) the

full export value of goods"" and not merely the full amount payable by the foreign buyer as under the old Act, has to be repatriated.

11. This aspect has been considered by the above unreported judgment of this

court in A.A.O. Nos. 472 to 477 of 1979. The relevant observation therein is as follows :

There cannot be any dispute that in the case of consignment sales of the exported goods, mentioned in the G.R. 1 form, can only be approximate.

Though, normally, the exporter is expected to give a fair value of the goods in the G. R. 1 forms having regard to the market conditions and the

quality of the goods exported, it may be that by the time the goods are made available in the foreign market, the price may come down and the

quality of the goods also might have deteriorated and this may result in the goods being sold at a lesser price than the value mentioned in the G. R.

1. forms. Therefore, the exporter cannot be prosecuted for non-repatriation of the amount mentioned in the G. R. 1. forms, in the case of consignment sales.

12. Further, while interpreting the expression ""the full amount payable by the foreign buyer in respect of the goods"", occurring in section 12(2)(b)

of the old Act, the Supreme Court in Enforcement Directorate v. Krishnaswamy [1980] 1 MLJ 47, which confirmed the decision in Krishnaswamy

v. Government of India, AIR 1970 Mys 3, observed as follows (page 49) :

The expression "the full amount payable by the foreign buyer in respect of the goods" occurring in clause (b) would mean merely the total amount

which is due from the foreign buyer in respect of the goods actually exported; and what would be due from a foreign buyer has to be merely the

price which he has agreed to pay and not any fanciful, unreal or inflated price which the exporter may choose to falsely incorporate in the invoice

with any ulterior motives. The foreign buyer cannot, by any stretch of imagination, be held to be liable to pay any amount over and above the price

which he has promised to pay for the goods received by him and any difference between that price and the price given in the invoice can,

therefore, not have the attribute of having become "payable" by him. And if that be so and the price actually agreed upon has been paid to the

exporter, clause (b) does not come into operation in the case of the latter.

13. Further, in T. K. W. Company v. Foreign Exchange Regulation Appellate Board [1982] T. L. N. J. 96, the facts are quite similar to the

present one. The appellant therein sent four consignments of fishmaws and sharkfines to Singapore and in the concerned G.R. 1 form, the full

export value had been given as Rs. 34,715. As against the said declared export value, the appellant has repatriated only a sum of Rs. 20,444.69.

The enforcement directorate, taking note of the difference of Rs. 14,270.31 between the amount of the full export value, declared in the G. R. 1

form and the amount actually repatriated, issued a notice to the appellant to show cause why the appellant should not be held guilty of

contravention of section 12(2) of the Foreign Exchange Regulation Act, 1947, for non-repatriation of the full amount of the sale proceeds received

from the foreign buyer. The case of the appellant therein was that the full amount of the consideration paid by the foreign buyer in respect of the

four consignments have been fully repatriated and, therefore, no contravention of section 12(2) of the Act has taken place. The relevant

observation therein is as follows :

To substantiate his (appellant's) plea that the goods realised on the foreign market only a sum of Rs. 20,444.69 the appellant has produced a

certificate from the Singapore Indian Chamber of Commerce indicating the market rate for the goods sold at the relevant date as also the accounts

rendered by the Singapore agent to the appellant in respect of the sales at Singapore of the goods covered by the four consignments. Though the

Appellate Board has accepted the certificates given by the Singapore Indian Chamber of Commerce by similar exporters on earlier occasions, in

this case the appellate board has not considered the relevancy of the said certificate

But so long as the department is not able to show that the appellant has refrained from repatriating any portion of the sale proceeds paid by the

foreign buyer, the appellant cannot be taken to have contravened section 12(2) of the Act. Admittedly, the department is not in a position to say

what is the actual price fetched by the sale of the goods in the foreign market. The department has merely proceeded on the basis of the

assumption that the appellant has not repatriated the full sale proceeds realised from the foreign buyer. When the appellant specifically says that all

the amounts received from the foreign buyer have been repatriated, to hold him liable for contravention of section 12(2) of the Act the department

should positively show that the amounts released or repatriated by the appellant fell short of the specified amount paid by the foreign buyer

towards the sale price of the goods.

14. These observations also would apply to the present case subject to one qualification regarding the above referred to deduction made by the

consignee for commission and expenses. While no such deduction was claimed in the abovesaid decision, in the present case there is such claim.

15. In this regard, one decision of the Kerala High Court, which we came across, though not cited by any of counsel, observes that with reference

to such commission and expenses of the consignee, prior permission from the Reserve Bank, is not necessary as prescribed u/s 12(2) of the old

Act. The said decision is *N. A. Paul and Co. v. Foreign Exchange Regulation Appellate Board* [1982] 52 Comp Cas 345 (Ker). But, for the

following reasons, with due respect, we are unable to agree with the said observation of the Kerala High Court. The relevant observation of the

Kerala High Court in the said decision is as follows (page 351) :

In the case of transactions bona fide effected as consignment sales the "full amount payable by the foreign buyer in respect of the goods" under

clause (b) of sub-section (2) of section 12 of the Act, can, therefore, be only the amount due to the consignor under the statement of account

(account sales) by way of the balance of sale proceeds after deduction of expenses and the agreed commission. It is not contended on the side of

the department that the case put forward by the appellants regarding the rate of commission agreed as between them and the consignee is not bona

fide and true. Inasmuch as it has been found by the Appellate Board that the transactions in question were truly consignment sales and there being

nothing to show that the deductions made by the consignee in respect of expenditure and commission were not factually true and not commercially

reasonable, it cannot, in our opinion, be said that the payments received in India by way of repatriation did not represent the full amount payable to

the appellants by the foreign buyer in respect of the goods. In our opinion, the permission of the Reserve Bank is necessary under clause (b) only if

any deduction is to be made from out of the amount payable to the consignor by the foreign buyer. In the case of consignment sales the amount

payable to the consignor can be only the net proceeds left after deducting the expenses incurred by the consignee as well as his commission. The

amount payable to the consignor being thus only the balance left after

appropriation of the commission, the deduction of the commission is not from out of "the full amount payable by the foreign buyer" in respect of the goods and hence there is no necessity for the exporter to obtain the prior permission of the Reserve Bank for entering into such a transaction of consignment sale involving the payment of commission to the consignee which is a necessary incident of such a transaction. We are supported in this view by the observations of a Division Bench of the Mysore High Court in *Krishnaswamy v. Government of India*, AIR 1970 Mys 3, with which we are in respectful agreement.

16. With respect, we would like to observe that the observation, ""In the case of consignment sales the amount payable to the consignor can be only the net proceeds left after deducting the expenses incurred by the consignee as well as his commission,"" in the above extracted passage, is rather misleading, particularly in the light of the relevant expression ""full amount payable by the foreign buyer in respect of the goods"" used in section 12(2)(b) of the old Act. We would like to emphasise that the ""full amount payable"" referred to therein is that which payable ""by the foreign buyer in respect of the goods."" In a ""consignment sale"", by which goods are sent to the consignee at the foreign destination, if the consignee sells the goods, say for Rs. 10 and gets Rs. 10 from the foreign buyer, and, after deducting, say Re. 1 towards his (consignee's) commission and expenses, and repatriates the balance of Rs. 9 to the consignor, it cannot be said, the full amount payable ""by the foreign buyer"" is only Rs. 9 and not Rs. 10, the goods having been sold to him only for Rs. 10 and not for Rs. 9. No doubt in the abovesaid illustration, the full amount payable by the consignee to the consignor is only Rs. 9 on the ground that the consignee is entitled to deduct his own commission and incidental expenses incurred by him in respect of the sale effected by him, on behalf of the consignor, to the foreign buyer. But, what is relevant u/s 12(2)(b) is the full amount payable by the foreign buyer and not full amount payable by the consignee.

17. Further, if it is held that for the above referred to commission and expenses no permission is required from the Reserve Bank of India, u/s 12(2)(b), there is also likelihood of the consignor, in collusion with the consignee, boosting up the abovesaid commission and expenses, illegally

depriving the legitimate inflow of foreign exchange to our country. No doubt in the abovesaid Kerala decision, there was no contention by the

department that the rate of commission agreed as between the consignor and consignee is not true. But, there may be cases where there may be

dispute regarding the genuineness of the rate of commission charges by the consignee or the other incidental expenditure incurred by the consignee

in effecting the sale to the foreign buyer.

18. Further, in our respectful view, the abovesaid observation in the abovesaid decision that the abovesaid deduction ""is not from out of the full

amount payable by the foreign buyer"" does not appear to be correct. Further, *Krishnaswamy v. Government of India*, AIR 1970 Mys 3, also does

not deal with the abovesaid deduction-aspect and so no support can be derived from the said decision. In view of the clear language used in

section 12(2)(b), if any deduction is claimed from the full amount payable by the foreign, buyer, necessarily permission has to be obtained in that

regard from the Reserve Bank of India. In the present case, admittedly, there was no such permission.

19. We may also add that in *M.G. Wagh and Others Vs. Jay Engineering Works Ltd.*, , it has been observed thus :

The avowed and the evident object of section 12 is to ensure that the nation does not lose foreign exchange which is very much essential for the

economic survival of the nation. The exporter cannot be allowed to syphon away a part of the foreign exchange or to deprive the nation of the

foreign exchange earned by the exports. Such is the philosophy of section 12.

20. Therefore, in view of the fact that the abovesaid permission from the Reserve Bank of India has not been obtained, to that extent a nominal

penalty at least, has necessarily to be levied. Therefore, we reduce the penalty from Rs. 3,600 to Rs. 500. To that extent, the appeal is allowed. In

the circumstances, there will be no order as to costs.