
(1967) 02 MAD CK 0009
In the Madras High Court

R. Venkata Subbu and Others

APPELLANT

Vs

The Director of Enforcement and Another

RESPONDENT

Date of Decision : 02-02-1967

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 12(2), 4(1)

Citation : (1968) ILR (Mad) 18 : (1969) 1 MLJ 281

Hon'ble Judges : M. Anantanarayanan, C.J;Natesan, J

Bench : Full Bench

Judgement

M. Anantanarayanan, C.J.—This group of writ petitions arises from orders of the Director of Enforcement, New Delhi, exercising powers

under the Foreign Exchange-Regulation Act (VII of 1947), and the Adjudication Proceedings and Appeal Rules,, 1957, formulated by the Central

Government u/s 27 of the Act. In all these cases, we propose to deal, in these judgments, with certain general grounds and issues that have been

elaborately argued before us, the individual cases will then have to be taken up and dealt with, in the light of our judgments. The main reason for

this procedure, which has commended itself to us as the course best adapted to the ends of justice in these cases, is that there are also special

issues of fact relevant to individual instances, that would require separate treatment. For instance, in one case at least, the learned Advocate-

General, appearing for the Government of India, has been fair enough to concede that the very basis of the figures on which the adjudication was

made and penalties levied by the Director of Enforcement, in that case, was misconceived; the adjudication has, therefore, to be necessarily set

aside. In other individual cases, there are special grounds such as an alleged absence of adequate opportunity to show cause, or uncertainty with

regard to the firm or individual really penalised, etc. This explains why the present procedure has been adopted, and also the scope of the present judgments.

2. As a separate enclosure to this judgment, a table is appended, with regard to the first six out of these cases, as an illustrative statement. The

columns relate to the names of the parties or firms concerned, the value of the exports as per the G.R. 1 forms, the amounts realised, the amounts

outstanding, the purchase of foreign exchange by the party in contravention of Section 4 (1) of the Act, the value of the import licences obtained,

figures relating to the sale of such import" licences by the party, where these were available and, finally, the penalty or penalties imposed by the

Director of Enforcement. Better than any description, these figures will show the true state of affairs, revealed during the course of the adjudication

proceedings, but only if the figures themselves are scrutinised in the light of the developments that occurred prior to these proceedings, and the

relevant provisions of the Foreign Exchange Regulation Act, particularly Sections 4 (1), 12 (1), 12 (2) and 23 of the Act. Otherwise, the table itself

is likely to prove hardly intelligible,

3. Both in the orders, or, at least, in several of them, and in his detailed counter-affidavit on record, the Director of Enforcement has set forth a

prologue or synopsis, of the formulations of policy and the developments, which led to these adjudication proceedings. We shall first set forth the

substance of this aspect, shorn of superfluous details, and without descending to particular cases. We shall then formulate the general issues or

propositions seriatim, which are included in the scope of our judgments, and after this, we shall pass on to an analysis of these grounds, including a

detailed interpretation of Section 12 (1) and 12 (2) of the Act which is essential for these cases, and which has certainly occasioned us some

difficulty and anxious consideration.

4. The Government of India apparently inaugurated an export promotion scheme, some time prior to these adjudication proceedings, particularly

with reference to textiles and handicraft goods. Under this scheme, export licences were issued with reference to sale of such goods at Malaya and

Singapore, mainly on the basis of the G.R. 1 forms and declarations furnished by the exporters to which we shall make detailed reference later.

The idea was that these same exporters were to be given the benefit of import of raw materials relevant to their branches of production, on the basis of their export performance?, in order to stimulate exports. One fact which emerges crystal-clear and beyond all controversy, from the record, is that such import licences were indeed valuable and even capable of being assigned to others for considerable profit. Apparently, the exporters were permitted to export, on the basis of their declarations, and even import licences were issued in advance of the realization of the value of the export. These import licences could either be up to the full declared value of the exports, or up to a formulated percentage thereof. In any event, these proved to be not merely incentives, but a great temptation to exporters or intending exporters. A major and indisputable fact, in all these cases, is that the relevant declarations and licences were upon the scale of figures that were heavily over invoiced, at the moment, using purely neutral expressions, we may state that these figures did not represent any existing or even remotely probable contracts for sale and purchase at the foreign markets, but were fictitious.

5. Naturally, in many of these cases, nothing even amounting to a fraction of the ex facie export values could be realised or brought home to this country, as repatriated foreign exchange. On the contrary, what happened was that, in certain cases, goods to a very small extent were sold, and some foreign exchange was thus obtained and repatriated. In other cases in order to meet the legal obligations of the situation under the Foreign Exchange Regulation Act, the exporters tried to obtain extra foreign exchange by other and surreptitious means but this, as would be obvious to any student of economic trends, proved a self-limiting situation, or a vicious circle. By reason of the very demand for surreptitious modes of acquiring this extra foreign exchange abroad, the rates in the unauthorised or in official market registered a sharp increase. Certain of these developments were revealed to the Directorate, and it was in this situation the directives were issued, for obtaining particulars from the firm concerned.

6. Two further developments are of great importance, at this stage. When these directives were issued for obtaining information or, at least, it became known that such an investigation was afoot, these parties literally threw themselves upon the mercy of the authorities, by not merely

invoking, but even earnestly inviting, in many cases, the adjudication of the Directorate under the Act and the Rules. This is very clear from the record. It is equally clear from the records that, in many cases, long and full voluntary statements or disclosures were made, of the relevant facts. To charges framed u/s 4 (1) of the Act, and u/s 12 (2) of the Act, we may take it that pleas of guilty were made by the concerned parties or firms, in most of these cases. The Director of Enforcement then proceeded to take the relevant facts into consideration, which in his view, included the value of the import licences obtained on the basis of the declaration forms, and levied the penalties in the manner he deemed most appropriate. At least in one case, where it was argued before the Director that the ingredients of Section 12 (2) were not established, the Director has brought it necessary to expatriate upon what he deemed to be the true connection, between the over invoicing of exports already referred to and the failure to repatriate foreign exchange to the requisite extent which is the crux of the offence embodied in Section 12 (2) of the Act. In most of the cases he was content to set forth the prologue, that we have earlier referred to, and to accept and act upon the pleas of guilty. It is, nevertheless, strenuously contended by learned Counsel before us that the Director has altogether failed to exercise his true jurisdiction, which is to discover whether the facts established the substance of the charge u/s 12 (2), has misconceived the ingredients of that section, and thereby promulgated orders, which are vitiated by errors apparent on the face of the record, and which are indeed self-contradictory. For this reason, the orders are liable to be struck down in certiorari notwithstanding the fact that the parties invoked and invited the adjudication, and the further fact that they pleaded guilty to the charges.

7. Per contra, to put it very briefly, the learned Advocate-General contends that the orders of the Director ought not, in fairness, to be viewed in a perspective which excludes the situation from which they arose. The parties invited adjudication, made voluntary and full disclosures and with full knowledge and consciousness of their acts, pleaded guilty to charges u/s 4 (1) and Section 12 (2) of the Foreign Exchange Regulation Act. The entire question of a failure to exercise jurisdiction on the part of the Director or a misconception of the ingredients ought to be considered with this

background kept in view. Apart from this, the learned Advocate-General contends that the substance of the charge was made out on the

established facts, if, as the Director had every right to do, he ignored the fraudulent contrivances of the parties, euphemistically termed as over-

invoicing, held them to the consequences of their own declarations. Further, the learned Advocate-General has powerfully urged that the writ of

certiorari, though it is, sometimes issued *ex debito iudicis*, is not a writ of course, but is discretionary; certainly, it is not independent of the

conduct of the parties, in relation to the very proceeding, who pray for the relief. Where that conduct is tainted by fraud, that is, where the parties

have come with unclean hands to Court, the Court would have every justification to decline redress. The other aspects are (i) whether Section 23

(1) is violative of Article 14 of the Constitution; (it) whether the intrusion of extraneous or prejudicial matter has affected the orders of the Director,

or the orders themselves indicate a bias in consequence of such intrusion; (Hi) whether the relevant sections of the Act would justify the imposition

of penalties upon a firm as a legal person; and (iv) whether the existence of alternative remedies, under the statute itself, would preclude the

exercise of our jurisdiction, or, at least, render it less expedient in the interests of justice.

8. At this stage, we may immediately proceed to formulate these issues or grounds, in the shape of certain propositions. As I think that this may be

the most desirable way of achieving this purpose, I have included in these formulations, some broad statements about the rival contentions relevant

to them.

(i) The petitioners not only submitted to this jurisdiction, but actually invited the adjudication by the Director of Enforcement in these cases. In most

of the cases, there have been pleas of guilty to the relevant charges u/s 12 (2) of the Act which are the crux of the controversy, since they form the

basis of the considerable penalties indicated in the last column of the table. Such pleas have also been made in response to charges u/s 4(1) of the

Act in most instances. According to the learned Advocate-General, these facts ought to determine the perspective of our approach to the orders of

the Director of Enforcement. Learned Counsel for petitioners contend, per contra, that these facts cannot extenuate, the alleged failure of the

Director to truly exercise his jurisdiction, which is to ascertain whether the ingredients of Section 12 (2) were evident from the facts, and the

substance of the charge u/s 12 (2) was established, irrespective of the pleas of the petitioners.

(ii) The interpretation of Section 12 (2), in relation to the procedures and the facts, forms the substance of this ground. According to the learned

Advocate-General, the charge u/s 12 (2) was established, and was rightly held to have been established by the Director of Enforcement.

According to learned Counsel for the petitioners, particularly Mr. M. K. Nambiyar, Mr. Govind Swaminathan and Mr. R. M. Seshadri, who made

this the main plank of their arguments the Director hopelessly misconceived the true ingredients of the offences. They cannot follow from the facts,

which he has accepted in the detailed prologue, since over invoicing cannot, by any interpretation, be an offence rendered punishable u/s 12 (2).

There is thus a failure of jurisdiction, or an error of law apparent on the face of the record. Irrespective of the pleas, the orders are liable to be

struck down.

(iii) According to the learned Advocate-General, it is very clear that the petitioners have approached the Court with unclean hands, in respect of a

discretionary remedy like certiorari which is not available *ex debito justitiae*, to a party thus seeking to pollute the very fountains of justice. The

maxim ex turpi causa non oritur actio applies in this case, and there are ample authorities to support this view. The learned Advocate-General

would also place reliance on the other equally well-known maxim, *nullus commodum capere potest de injuria sua propria* (no man can take

advantage of his own wrong). According to learned Counsel for the petitioners, these maxims do not apply, since the general moral depravity of

the petitioners is irrelevant, it is only the legal depravity of conduct, in the course of the very proceeding before the Courts of justice, that can act as

a bar or obstacle to the issue of the writs, and that does not exist here. Apart from this, the petitioners would be entitled to the writs *ex debito*

justitiae.

(iv) Section 23 of the Act is sought to be impugned as violative of Article 14 of the Constitution, upon three main grounds : (a) It confers an

arbitrary unguided and naked power upon the Director of Enforcement, either to

choose to impose a penalty in terms of Section 23 (1) (a), or to institute a complaint in a criminal Court, upon which a conviction by that Court could follow, in terms of Section 23 (1) (b); there is absolutely no guidance afforded by statute with regard to the exercise of this discrimination. (6) Equally u/s 23 (1) (a) itself, the Director could either impose a penalty; not exceeding three times the value of the foreign exchange involved in the contravention, or Rs. 5,000 whichever is more. Mr. K. Srinivasan, in particular, has stressed that this is left as an unascertained maximum, with no statutory guidance with regard to the fixation of the penalty, the provision is, therefore, violative of Article 14 of the Constitution. (c) It has been argued by Mr. R. M. Seshadri that the exercise of the discretion by the Director of Enforcement, in the different cases, amounts to a violation of Article 14, because there is no discernible and consistent basis of differentiation. Also, the value of the import licences should not at all have intruded, as a factor of consideration, in levying the penalties.

(v) The orders of the Director are vitiated by the intrusion of irrelevant matter, and by an evident cloud of prejudice arising from such intrusion. Terms have been used by the Director in his order, which are strong expressions, and which ought not to be used by a quasi-judicial authority exercising powers under the Act; they reveal the bias or prejudice, and the orders are liable to be struck down for this reason also. This point was urged elaborately by Mr. R. M. Seshadri, in particular, with the support of certain decisions, to which we shall later refer.

(vi) The existence of alternative remedies under the Act has been canvassed during arguments. It is urged for the petitioners that the alternative remedy is onerous, since it requires the full deposit of the penalty, before the appeal can even be heard, and that where the alternative remedy is thus a very heavy burden on the party seeking relief, its mere existence would be no bar to the exercise of writ jurisdiction.

(vii) The question whether, in certain of these cases, a firm can be penalised as a person has been canvassed by Mr. Srinivasan who has also sought to argue, with reference to his party, that the offence u/s 4 (1) is not made out, on the facts, and the true interpretation of that section; this is special to his case, though in other cases this was not adverted to.

9. We shall proceed to consider seriatim these grounds, and in dealing with the

second ground, a somewhat elaborate analysis of the procedure

and the terms of Section 12 (2) will be necessary. In a very real sense, the true interpretation of Section 12 (2), in relation to the facts of these

proceedings, forms the crux of the petitions, as argued before us. Similarly detailed treatment is necessary with regard to the plea of the learned

Advocate-General that the petitioners, having approached this Court for redress with unclean hands, are not entitled at all to the issue of the writ of

certiorari.

10. With regard to the matter of jurisdiction, the learned Advocate-General has placed considerable reliance upon *Rex v. Williams, Philips, Ex*

park L.R. (1914) 1 K. B. 608. In that case, in the light of the requirement of the law that a person following a particular profession, and accused of

an offence, could challenge the participation in the proceedings by any Justice of the Peace of the same avocation in the private life, argument was

advanced that one of the Justices of the Peace was disqualified, because he was also a baker, like the delinquent. On the petition of the party

affected, the High Court declined relief, holding that this point ought to have been advanced before the Bench, and that since the party failed to do

so, he could not later claim the writ *ex debito justitiae*. In *Gandhinagar Motor Transport Society Vs. State of Bombay*, , the principle has been

reaffirmed that, before the question of jurisdiction is raised on a petition, the objection to jurisdiction must be taken before the Tribunal, whose

order was sought to be challenged. Another case of interest is *Satya Narayan Transport Co. Ltd. Vs. Secretary, State Transport Authority, West*

Bengal and Others, , where the objection related to a ground of extraneous consideration, which was not actually taken before the appellate sub-

committee, the petitioner was held precluded. Reference may also be made to *Harihar Tiwari v. State* ILR (1953) All. 855, and *V.M. Syed*

Mohamed and Co. and Another Vs. The State of Madras and Another, . In *Rejina v. The South Holland Drainage Committee Men, Ex parte*

(1838) 8 L.J. Q.B. 64, an applicant for certiorari was held precluded by his prior conduct that, in the dispute respecting the very land, he had not

mentioned the interest of his wife, or the nature of the tenure, at the earliest stage.

11. Equally with regard to the plea of guilty advanced by these parties, who may

be expected to possess the requisite degree of wordly knowledge and consciousness of the substance of the charge levelled against them, it is argued that the orders of the Director ought not to be minutely dissected and criticised, without reference to the basic fact that these pleas were made. Per contra, it is argued that a plea of guilty is never with reference to the formal semblance of the charge, but with reference to its substance. For instance, even if the plea is there, if the substance has been misconceived or the ingredients are patently lacking, a party cannot be punished on his plea alone, and Courts of appeal will not uphold this. This is a familiar phenomenon in criminal jurisprudence, in particular; a man may plead guilty to a charge of murder, but his conviction therefore will not be upheld, if the facts established that he is guilty only of the lesser offence of culpable homicide not amounting to murder. Here, we think that the true answer is that both the invitations to adjudication, which appear to have been earnestly made in these cases, and the -actual pleas, will necessarily have to be kept in mind by this Court, in interpreting the orders of the Director of Enforcement, and in considering whether he misconceived his jurisdiction, or the ingredients of the law. But these grounds are not any absolute bar to a party seeking redress, if he can otherwise show that he is entitled to the issue of the writ *ex debito justitiae*, because the order is vitiated by any evident and fundamental error of law, or by any patent misdirection.

12. The second ground involves the entire question of the procedure that has to be followed in these cases. Upon the phraseology of Section 12

(2), in particular, which has occasioned us real difficulty, we are indebted to Sri V.K. Thiruvengkatachari for drawing our attention to an explanatory

passage in Foreign Exchanges 1963 edition) by Norman Crump, and also to passages, in Halsbury's Laws of England (Simonds edition) Volume

28, pages 123 and 127. As the latter source clearly shows, the law in the United Kingdom is that

...no person resident in the United Kingdom, who is entitled to sell or procure the sale or procure the importation, must, without treasury

permission, do or refrain from doing any act with the intent to secure that the sale or importation, as the case may be, shall be delayed to an extent

which is unreasonable having regard to the ordinary course of trade, or that

payment for the sale shall not be made in the manner indicated by the condition or statement.

The effect of this phraseology upon the term of our own Section 12 (2) of the Foreign Exchange Regulation Act, is self-evident, and need not be

further, stressed. However that might be, it is clear enough that Section 12 (2) is explicable, only in terms of the actual procedure that prevails, in

respect of the obtaining of export licences and the fulfilment of legal obligations by the exporter, whether he be the actual seller of the goods or a

consignor, with regard to securing that the sale itself is effected with reasonable expedition, and that the concerned foreign exchange is duly

repatriated. Before dealing with the procedure, it may be convenient, in this context, to set out this vital part of the Foreign Exchange Regulation

Act and no apology is needed for this, as it is the interpretation of this part of the Act, which has involved the greatest debate. We are hence,

hereby extracting verbatim, Section 12 (1) of the Act, Section 12 (2) of the Act, Section 12 (3) of the Act, and, omitting Section 12 (4) which may

not be very relevant, Section 12 (5) and Section 12 (6) of the Act. Following this, we are setting forth Section 23 (1) Sub-clauses (a) and (b)

Section 23; (2), Section 23 (3) (a), Section 23 (c) (in entirety and Section 23 (d) (1), all of which are relevant in the discussion. We are further

extracting Rule 6 of the Foreign. Exchange Regulation Rules, 1952, dated 22nd April, 1952.

12. (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.

(2) 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.

(Note.--The amendment introduced to Section 12 (2) by Act LV of 1964, with effect from 1st April, 1965, admittedly is not applicable to the

present cases.)

(3) Where in relation to any such goods, the said period has expired and the goods have not been sold and payment therefore has not been made

as aforesaid, the Reserve Bank may give to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be

expedient for the purpose of securing the sale of the goods and payment therefore as aforesaid, and without prejudice to the generality of the

foregoing provision, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.

(5) Where in relation to any such goods, the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank

represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain

possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or v person authorised by the

Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve

Bank the full export value of the goods.

(6) For the purpose of ensuring compliance with the provisions of this section and any orders or directions made thereunder, the Reserve Bank

may require any person making any export of goods to which a notification under Sub-section (1) applies to exhibit contracts with his foreign buyer

or other evidence to show that the full amount payable by the said buyer in

respect of the goods has. been, or will within the prescribed period be,
paid in the prescribed manner.

23. (1) If any person contravenes the provisions of Section 4, Section 5" Section 9, Section 10, Sub-section (2) of Section 12, Section 17,

Section 18-A or Section 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.

(2) Notwithstanding anything contained in Section 32 of the Code of Criminal Procedure (V of 1898), it shall be lawful for any Magistrate of the

First Class, specially empowered in this behalf by the State Government, and for any Presidency Magistrate to pass a sentence of fine exceeding

two thousand rupees on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance:

(a) of any offence punishable under Sub-section (1) except upon complaint in writing made by the Director of Enforcement....

* * *

23-C. (1) If the person committing a contravention is a company every person who, at the time the contravention was committed, was in charge

of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of

the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment, if he proves that the contravention took place

without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in Sub-section (1), where a contravention under this Act has been committed by a company and it is

proved that the contravention has taken place with the consent or connivance of,

or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purposes of this section,:

(a) " company " means any body corporate and includes a firm or other association of individuals and

(b) " director " in relation to a firm, means a partner in the firm.

23-D (1) For the purpose of adjudging under Clause (a) of Sub-section (1) of Section 23 whether any person has committed a contravention, the

Director of Enforcement shall hold an enquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if on

such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the

provisions of the said Section 23:

Provided that if, at any stage of the inquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the

penalty which he is empowered to impose would not be adequate, he shall instead of imposing any penalty himself, make a complaint in writing to

the Court.

Rule 6. Period within which export value of goods is to bepaid.--The amount representing the full export value of goods exported shall be

received from the country of final destination of the goods, unless permitted otherwise by the Reserve Bank in its discretion, and shall be paid to

the exporter within six months from the date of shipment of the goods:

Provided that in the case of goods exported to Pakistan or Afganistan, the amount representing the export value shall be received within three

months from the date of export:

Provided further that the Reserve Bank, in its discretion, may, for sufficient and reasonable cause shown, extend the said period of six months or

three months, as the case may be.

The procedure is that the intending exporter applies in the G.R. 1 Form, which is of great importance for a true understanding of the terms of

Section 12 (2) of the Act. The following particulars are relevant. He states:

I hereby declare that I am the seller /consignor of the goods in respect of which this declaration is made and that the particulars given above are true and

(a) that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer.

(b) that this is a fair valuation of the goods which are unsold.

13. The record makes it very clear that where he applies as the seller, which is the relevant fact in these instances, he furnishes certificate (a) in the

above form, and strikes out certificate (b). It is only if he is a mere consignor, that he strikes out certificate (a) and furnishes certificate (b). He also

undertakes to deliver to the bank foreign exchange resulting from the export of the goods, on or before the specified date, and the directions in the

form, render these matters very clear. In page 4 of the form, there is a certificate by the authorised dealer, usually a reputed bank, to the effect that

they have received for collection the requisite bills, and also the letter of undertaking specified in the second clause of this certificate. Rule 6 which

we have earlier extracted, applies to determine the specified date within which the amount representing the full export value of the goods has to be

received from the country of final destination, and paid to the exporter.

14. In the light of these procedures and this practice, the intendment of the Legislature in enacting Section 12 (2) becomes clear. There are, of

course, difficulties of interpretation. For instance, the obligations embodied in Section 12 (2) may relate, depending on the interpretation, either to

the seller of the exported goods, or to a mere consignor or to both. The relevant certificates in the G.R. 1 Form, and the direction to strike out the

certificate not appropriate, however, make this matter clear. The prescribed procedure and the certificates in the declaration, throw a flood of light

on the terminology of Section 12 (2), and in our view, clearly prove that the legal obligations of Section 12 (2) attach themselves either to the seller

or to "the consignor, not necessarily only to the consignor, but, of course, where any export of goods has been made. An argument was sought to

be advanced by Sri R.M. Seshadri, at one stage, that property in the goods may pass to the buyer the moment the goods are put on board, and

hence that the words no person entitled to sell or procure the sale of the said goods occurring in Section 12 (2), will no longer apply once this

stage in the transactions has been reached thereafter, at least, no action or inaction on the part of the seller, can render him liable for a charge u/s

12 (2). But, obviously, this depends, partly at least, on the further question whether the contracts are c.i.f. contracts or f.o.b. contracts; the

incidents of these contracts were explained by Cotton, L.J., in *Mirabita v. Imperial Ottoman Bank* (1878) 3 Ex. D. 164. The learned Advocate-

General has been at some pains to gather the authorities on this aspect, and, in particular, he has placed before us the decision in *Smyth & Co. v.*

Bailey & Co. (1940) 3 All E.R. 60 , *Commissioner of Income Tax, Delhi Vs. P.M. Rathod and Co.*, , and *B.K. Wadeyar Vs. Daulatram*

Rameshwarlal, . Our conclusion, on this aspect, must be that there can be no rigid line of demarcation in this respect; since such commercial

contracts are of two broad categories, every thing would depend upon the particular terms, whether the property does or does not pass to the

buyer, when the goods are placed on board the vessel for export.

15. Certain inferences, however, would appear to be fairly clear. The words no person entitled to sell, or procure the sale of the said goods, are

clearly descriptive; they refer to the person in the capacity of the seller of the goods, or to a person entitled to procure the sale of the same, after

the export of the goods has been made. But this does not necessarily imply, as far as we can gather, that the export must only be to a nominee of

the consignor at the other end. On the contrary, any such interpretation would render meaningless the certificate in the G.R. I Form furnished in

these cases, that not only is the invoice value declared as the full export value of the goods, but that it is the same as that contracted with the buyer.

Any person in this situation has two legal obligations. He must see that the sale of the goods is not delayed to an unreasonable extent. He must

further see that payment for the goods is made in the prescribed manner representing the full amount payable by the foreign buyer in respect of

goods, and also that such payment is not unduly delayed.

16. The crux of the present argument by learned Counsel for the writ petitioners really arises from the terminology employed by the Director, both

in the charges themselves and in his final proceedings. The Director repeatedly states that the concerned parties failed to repatriate the foreign

exchange representing the full export value of the goods; That is the charge to

which the pleas of guilty have been made. Learned Counsel for the writ petitioners have rightly emphasised that, though the full export value of the goods may very frequently be equivalent to the full amount payable by the foreign buyer in respect of the goods, the words occurring in Section 12 (2) (b), the two may conceivably vary, owing to a variety of circumstances, not all of them within the control of the seller. For instance the rates of foreign exchange themselves may be adversely affected between the dates when the contracts were made with the foreign buyer, and the dates with reference to which the foreign buyer incurs the obligation to pay the value, interpreting this in terms of Indian currency. Again, Section 12 (5), that we have earlier extracted, shows that the Reserve Bank has the power to require the person holding the shipping documents to retain possession of them until the exporter makes arrangements, for the Reserve Bank to receive or procure, an amount which represents in the opinion of the Reserve Bank the full export value of the goods; in other words, this is a check on what is known as under-invoicing. It is, therefore, strenuously contended that the Director did not at all address himself to the true question, whether these parties really failed to repatriate the exchange value, of the full amount payable by the foreign buyer. On the very facts of over-invoicing found by the Director it is argued that there were no such amounts at all; the amounts payable were only with regard to goods actually sold, and they represented only a fraction of the originally declared, full export value. They were repatriated, at least in some cases, and hence the orders have to be set aside.

17. This, I think, confuses two distinct arguments. On a question of interpretation;, it seems clear that, in the light of the certificate furnished in the G.R. 1 Form, the full export value would certainly be the full amount payable by the foreign buyer, except, indeed, where other circumstances, such as an adverse rate of exchange, have affected the liabilities of the foreign buyer. If such circumstances were germane to the present issues, it must certainly be held that the Director has failed to address himself to the proper question, or to the establishment of the proper ingredients. But, in all these cases, solemn certificates were furnished by these parties, not merely to the effect that a particular amount was the full export value but also specifically that this represented the bargain or contract with the foreign

buyer. The argument now is not that the two have varied, owing to other supervening causes. The argument based upon under-invoicing relevant to Section 12 (5), again seems to be a quite distinct matter, and such a power of control may be vested with the Reserve Bank. But that does not affect the legal obligations of the party, in the position of the consignor or seller, with regard to Section 12 (2) (a) or Section 12 (2) (b). Where this party fails to repatriate the foreign exchange, which would ordinarily be the full export value, it may certainly be considered whether the full amount payable by the foreign buyer is a different sum owing to some circumstance for which the party is not responsible, and the party has, therefore, to be exonerated; or at least, to be dealt with only with regard to the later sum. But, where it has been declared that there is a foreign buyer liable to pay this sum, the question is not this, but whether the Director will not be justified in holding the party to his word or assurance and in requiring him to repatriate the full amount payable by the foreign buyer, which is the same as the full export value of the goods. On a matter of interpretation, there can be no possible difficulty. The two descriptive terms are not precisely equivalent, and they may vary. But the mere fact that the Director uses the wrong terminology, certainly cannot cloud or affect the main issue. That is, whether, on the facts, these parties did not fail to repatriate foreign exchange representing the full amount payable by the foreign buyer. They declared this to be a particular amount, and they failed, in most cases, to repatriate the foreign exchange, even to a fraction of this amount; can they be permitted to plead their own fraudulent contrivances in over-invoicing, as a justification for this Court, and as an answer to the charge?

18. This line of reasoning will apply, with equal force, to the other argument that the Director has failed to exercise his true jurisdiction. Certainly, the Director was not concerned with over-invoicing at all, in the context of the charge u/s 12 (2) of the Act. He has referred to these facts, in the prologue or preliminary discussion, and, apparently, he believes the statements of voluntary disclosure, and thinks that these events did occur. But, it would be doing him an injustice to presume that he was not aware that the failure to repatriate the foreign exchange representing the full amount payable by the foreign buyer, is quite distinct from the obtaining of export and

import licences by fictitious figures declared, which is over-invoicing.

Irrefutable evidence to this effect can be found in one of the cases argued by Sri R.M. Seshadri, where learned Counsel appeared before the

Director, and pressed the argument that the offence u/s 12 (2) was quite distinct from over-invoicing and, indeed, that the two were not particularly

reconcilable. The Director then stated in his order as follows:

It was however argued by Shri R.M. Seshadri, Advocate, that mere over-invoicing by itself is not punishable u/s 12 (2) of the Foreign Exchange

Regulation Act and that the mere inability of an exporter to repatriate the full export proceeds without any violation or omission on his part would

not constitute an offence.

In my opinion the above arguments are untenable. For one thing the charge in this case is not for mere over-invoicing on exports but is one u/s 12

(2) which does not refer to any over-invoicing at all. u/s 12 (2) (a) (as it stood before 30th December, 1964) an exporter should not do or refrain

from doing any act with intent to secure that the sale of the goods is unreasonably delayed, or the payment of the goods does not represent the full

amount payable by the foreign buyer in respect of the goods. In this particular case, there is clear admission of the party (exporter) that the

valuation given in the G.R. 1 Forms did not represent the correct or real value of the goods, and that the outstanding was the direct result of

deliberate over-invoicing, which was intentionally done for the purposes of securing import entitlement from the Government, on the basis of the

over-invoiced exports....obviously, the exporter cannot take advantage of his own fraud or wrong and plead that no amount is repatriable....

Sri K. Srinivasan contended on the facts of his cases that Section 12 (2) (a) alone is applicable to consignment sales, and that Section 12 (2) (b)

cannot apply to consignment sales, but only to sales with the ex facie record relating to the obligations undertaken by a foreign buyer. But he

himself admits that, in the relevant G.R. 1 Form, his clients have retained the first part of the declaration or certificate, which is explicitly to the

effect that the invoice value is the same as that contracted with the buyer. After this, it is difficult to see how it is open to the parties to plead that

there is no foreign buyer, and that they were merely consigning to their own nominees abroad, who might or might not be later able to market the

goods in the foreign market. Another point advanced is that Rule 6, earlier extracted, is only a rule u/s 12 (1), and not a rule u/s 12 (2), whereas

Section 23 (1) (a) enables the imposition of penalties only for contravention of Section 12 (2) or the Rules made thereunder. Rules have been

made under the delegation of power embodied in Section 27 of the Act, and they can validly apply to all obligations in the main statute itself. The

argument cannot be sustained that, for this reason, Rule 6 could not be invoked in these cases.

The main argument has, throughout, been this. When the Director tacitly accepts over-invoicing in his narrative of the prior events, it is claimed that

there is a manifest inconsistency between this, and his finding that the offence u/s 12 (2) has been established. But the true answer to this is that, in

the one instance where the Director had justification for considering this argument, since other instances were covered by pleas admitting the guilt,

he makes it clear that he is aware of this distinction. But he holds the parties, in effect, to their assurance in the relevant certificates. In terms of

these assurances, though the terminology might have been erroneous in one or other context, what he finds is that these persons manifestly failed to

repatriate the foreign exchange representing the full amount payable by the foreign buyer, which has to be taken in the light of the certificates as

identical with the full export value. In the light of this interpretation Section 12 (2) itself becomes clear, and we are unable to see that the order is

vitiated by any failure to exercise jurisdiction in the proper manner, or any error of law apparent on the face of the record. It has to be reiterated

that the orders have to be construed in the situations in which they were made, the parties having invited the adjudication, and deliberately pleaded

guilty to the charges u/s 12 (2) of the Act. Even if there be a formal defect in the charge, in the light of those facts, the Court will clearly be justified

in declining to exercise its jurisdiction under Article 226 of the Constitution.

We now come to the ground relating to turpitude. Here, it seems to me that the matter is clear beyond all doubt. The nature of the writ of certiorari

has been considered in several authorities, and perhaps it is sufficient to refer to the decision of Ramachandra Ayyar, J., (as he then was) in

Issardas Somamal Lulla Vs. The Collector of Madras and Additional Custodian of Evacuee Property, Madras, . Undoubtedly, the writ of

certiorari is issued at the discretion of the superior Court and is ordinarily not a writ of right, except in the United Kingdom, where the situation-is

different when the Attorney-General prays for the issue of this prerogative writ. But the law has been stated in Halsbury's Laws of England,

Volume XI (Simonds edition), page 140, in the form that the writ issues ex debito justitiae, though it is discretionary,

...Where it is shown that the Court below has acted without jurisdiction, or in excess of jurisdiction, if the application is made by an aggrieved party

and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief...

Obviously, here the metaphor of clean hands is essential and pertinent. If in relation to the proceedings a party approaches this Court for the issue

of a writ of certiorari with a record of depravity of conduct intrinsic to the very proceedings, the Court has every right and, indeed, the duty to

decline him relief.

19. Mr. Nambiyar has referred to the observations of Crutten, L. J., in Rex v. Secretary of State for Home Affairs O'Brien Ex parte L.R. (1923)

2 KB. 361 to the effect:

A man undoubtedly guilty of murder, must yet be released if due forms of law have not been followed in his conviction.

The argument is that it is legal depravity alone that will so disentitle a man; not moral depravity, even if it be with regard to the proceeding at the

prior stage of events. The decision in Rex v. Kensington, Income Tax Commissioners, Ex parte De Polignac (Princess Edmond) L.R. (1917) 1

K.B. 486 is heavily relied upon. Where a party deliberately abstains from stating facts, which are pertinent, in the very proceedings, the principle of

uberrima fides is contravened, and the Court will not grant relief; this is intrinsic legal depravity. But a number of decisions have been cited in

support of the proposition that this category of conduct alone will disentitle petitioner and that the maxim Ex turpi Causa non oritur actio will have

no application to other cases though the Court might well recoil from the previous admitted conduct of the party at a prior stage of the history of

the case. I think it will be sufficient to cite the authorities here : U. C. Rekhi v. The Income Tax Officer AIR 1951 Simla 1 Ratan Chandra Nayak

Vs. Adhar Biswas, , Kaboolchand Vs. Deputy Custodian, Alwar, . Deptylal V.

Collector of Nilgiris (1959) 2 M.L.J. 208 : AIR 1959 Mad, K.

Marappa Gounder, K.M.S. Bus Service Vs. The Central Road Traffic Board and Others, , Manibhai Hathibai v. C. W. E. Arbuthnot AIR 1947

Bom. 413, Hindustan Motors Ltd. Vs. Union of India (UOI) and Another, and Baldev Singh V. Government of Pepsu AIR 1954 Pep98.

20. But, as the learned Advocate-General contends, I think with great force and plausibility, on the facts of the present matter, the case is very

strong against the petitioners. In a recent decision of the The Public Passenger Service Limited Vs. M.A. Khader and Others, , their Lordships

have expressed the principle thus at page 492:

...the maxim (*Ex turpi causa non oritur actio*) does not mean-that every improper conduct of the applicant disentitles him to equitable relief. The

maxim may be invoked where the conduct complained of is unfair and unjust in relation to the subject-matter of the litigation, and the enquiry sued

for.

21. It appears to us that this test is precisely fulfilled in the present cases. It is only by giving recognition to the fraudulent contrivances as over-

invoicing, resorted to by these petitioners, and, indeed, by basing our action of relief on the fraud, that we are in a situation to strike down these

orders, because the ingredients of Section 12 (2) were not *prima facie* established. This fraud is intrinsic to the very proceeding, and the defence

itself is based upon the fraud and the false declarations; without recognising the fraud and the falsity of the declarations, the petitioners will have to

be held to their certificates, and the failure to repatriate the foreign exchange in terms of the declared value, which is also the full value payable by

the foreign buyer, is incontrovertible. The learned Advocate-General has referred to the following authorities in this connection : (i) Snell's

Principles of Equity (Twenty fifth edition) pages 30-31, where it is, however, declared that the maxim need not be taken too widely, and that "...it

does not mean that a plaintiff in a Court of Equity will fail unless he has led a blameless life." (ii) Extract from Administrative Law, by H. W. R.

Wade (1961, edition at page 161; (iii) Broome's Legal Maxims (Tenth edition) page 238, *Nullus commodum capere potest de injuria sua propria*

(no man can take advantage of his own wrong), (iv) Modern Equity--The Principles of Equity, by Greville Halsbury (Eighth edition), page 121, (v)

A.M. Allison Vs. B.L. Sen, , (vi) The Public Passenger Service Limited Vs. M.A. Khader and Others, , (vii) Haji Abdul Shakoor Vs. The Rent

Control and Eviction Officer, Kanpur and Others, ; where the learned Judge has quoted the dicta of Wilmot, C.J. in Collins v. Blantern 95 E.R.

847, to the effect. "" no polluted hand shall touch the pure fountains of justice."" (viii) Co-operative Marketing Society v. Sriramulu (1960) 1

An.W.R. 57, (ix) In re-Lush's Trusts (1869) Ch. App. 591, (x) Gill v. Lewis (1956) 1 All E.R. 844, (xi) Ex parte Fry (1954) 2 All E.R. 118. The

last is a case of great interest, where punishment was inflicted on a member of the fire service for alleged indiscipline, and relief was declined on the

ground that the conduct of the concerned officer did not merit the grant of the relief, apart from the substance of his contentions on the law.

22. On a careful consideration of this aspect of the case I think it is clear that there were two kinds of bars in equity, if I may so term it, with regard

to a relief, by way of issue of writ of certiorari, which does not issue ex debito iustitiae, except within the well-recognised limits of the law. One bar

certainly is that the party is disentitled by his depravity of conduct in the very proceeding, such as the filing of a false affidavit, or any other conduct

which might be characterised as a resort to the Court of justice with unclean hands, pertinent to his conduct of the cause itself. That principle has

been recognised in the decisions cited by Mr. M. K. Nambiar, including Rex v. Kensington, Income Tax Commissioners, Ex parte de Poligaac

Princes Edmond (1917) 1 K.B. 486. But this category is not necessarily exhaustive. Equally, a party cannot pray to the Court for relief, based on

the recognition of his own fraud or fraudulent contrivances, the substance of his defence being that the recognition of this fraud-will preclude the

application of some other provisions of law to his case; in these instances, Section 12 (2) of the Foreign Exchange Regulation Act. This is also

depravity arising out of the very Us, and not at all irrelevant thereto, or merely some-extraneous immorality of conduct. In all these cases, on this

ground alone, the : Court would be justified in declining the relief. This must be the general conclusion, but of course, it may be subject to orders to

a different effect in individual instances, where the facts may be such that there is no order at all in law, owing to a mistake of fact, or on allied

considerations.

23. I shall next deal with the aspects relevant to Article 14 of the Constitution, in its impact upon Section 23 (1) of the Act, as the arguments were

presented by R.M. Seshadri and K. Srinivasan who particularly dealt with this aspect. Mr. R.M. Seshadri has relied on several decisions, both for

the general principle that the statute itself exhibits no rational basis for a possible hostile discrimination, and in support of his contention that the

Director failed to exercise a quasi judicial discretion in awarding the penalties. With regard to the latter aspect, the decisions, cited are : (i)

Collector of Customs v. Gokuldas ILR (1955) Mad. 1248 : (1955) 1 M.L.J., (ii) Sha Rikabdoss Bhavarlal v. Collector of Customs (1961) 2

M.L.J. 443 : (1961) M.L.J. 675 : ILR (1962) Mad. 229 (iii) Implications of certain observations of their Lordships of the Supreme Court in

Ramchand Jagadish Chand Vs. Union of India (UOI) and Others, . With regard to the mode of proof of an inequality pertaining to Article 14,

Pannalal Binjraj Vs. Union of india (UOI), , particularly paragraphs 30 and 31 has been cited, as well as P.J. Irani Vs. The State of Madras, . We

think it is sufficient to observe, as stressed by the learned Advocate-General that, upon the general impact of Article 14, this very matter was

considered with respect to Section 23 (1) (a) of this Act is Shanti Prasad Jain Vs. The Director of Enforcement, , and that the argument was

repelled. That was, no doubt, not upon the present reasoning in its precise form, but the section was certainly examined, and held not to offend

Article 14. Indeed, it is difficult to see how the section offends Article 14, in the sense of a statutory discrimination without a reasonable

classification or basis. It is true that u/s 23 (3) (a) a Court cannot take cognizance of an offence punishable u/s 23 (1), except on a complaint in

writing by the Director of Enforcement. But the Director is not left without any statutory guidance in respect of the exercise of his discretion,

whether to act u/s 23 (1) (a) or to resort to a complaint to Court, which may ultimately lead to a conviction u/s 23 1 (b). u/s 23 (d) (1) proviso, the

Director is to have regard, with reference to its scope, to the circumstances of the case and the fact that the penalty, which he is empowered to

impose would not be adequate. Sri K. Srinivasan has argued that this refers to another category of cases, and not to cases where ab initio the

Director desires to make a complaint. However, that might be, the statute itself furnishes the guidance and we are, hence, quite unable to hold that

Section 23 (1) (a) per se offends Article 14 of the Constitution.

24. The next argument is that advanced by Mr. Srinivasan that Section 23 (1) (a) is violative of the Article 14, because it furnishes no basis for the

Director to exercise the quasi-judicial discretion between the minimum of Rs. 5,000 and an unascertained maximum. As observed by the Supreme

Court in *F.N. Roy Vs. Collector of Customs, Calcutta*, , the discretion is certainly not uncontrolled or unreasonable. There are statutory appeals

provided including an appeal on a point of law to this Court, and the imposition of the fine is a quasi-judicial act; the test of the quantum must

clearly be in the gravity of the offence.

25. The learned Advocate-General rightly contends, with regard to the other argument of Mr. Seshadri that the penalties imposed in these cases

infringe Article 14, that the normal approach must be that the authority did not act with an evil eye or unequal hand. Reference may be made here

to *Sunday Lake Iron Co. v. Wakefield* 62 L.ed. 1154, *Snowden v. Hughes* 88 L.Ed, 497 and *Kailash Agencies, Madras Vs. Collector of*

Customs, Madras and Others, Certainty, as stressed by Mr. Seshadri, on the authority of paragraph 30 in *Pannalal Binjraj Vs. Union of India*

(*UOI*), , the presumption that the authority does not act with an evil eye or unequal hand, cannot be stretched too far. But this kind of

discriminatory treatment, to justify our inference, must be clearly established on the facts and strictly proved. We cannot deal with it as a general

argument, except to hold that we are unable to see any justification for conceding it as such, applicable to the generality of these proceedings. A

particular instance, in which this has been established to have occurred, is, of course, a different matter.

26. We shall next deal with the argument relating to the intrusion of extraneous facts or matter in the orders of the Director, and to a cloud of bias

said to have been thereby occasioned. It is pointed out by learned Counsel that certain terms and expressions used by the Director betray this. I

do not think it is necessary to recapitulate them here. It is urged that these words are perjorative and that such evidence of bias, in a quasi-judicial

authority, must not be tolerated. Mr. Seshadri has relied upon the following decisions (i) *Dhirajlal Girdharilal Vs. Commissioner of Income Tax*,

Bombay, , 273, (ii) *Swami Motor Transport Ltd. v. Raman and Raman Ltd.* (1961)

2 M.L.J. 127 : ILR (1961) Mad. 110, (iii) Suraj Mall Mohta

and Co. Vs. A.V. Visvanatha Sastri and Another, . There is, here, one important fact stressed by the learned Advocate-General, which must be

held to be practically conclusive. Certainly, of the facts set forth by the Director as a prologue to his proceedings, some are likely to prejudice any

Tribunal against the concerned parties; they relate to fraudulent contrivances, which Courts will certainly not countenance notwithstanding an

argument of Mr. Srinivasan that we may notice here, for this purpose, that the misconceived or illadvised export promotion scheme of the

Government, itself virtually forced the parties to over-invoicing. But the learned Advocate-General stresses that, apart from some objective events,

such as proceedings initiated or investigations conducted on certain dates, the rest of this narrative is really culled from facts disclosed in the

statements of the parties; those were the sources which the Director has drawn upon and, even now, the parties do not claim that their statements

could not have been acted upon. Where, the extraneous matter, so-called, truly relates to statements made by parties in the very proceedings,

which are relevant material, we do not see how this argument of intrusion of prejudicial matter can be sustained. It may be that, here and there, the

Director has used somewhat strong expressions; they represent his reactions to the disclosures, and cannot be termed unnatural, though it may be

claimed that he should have been more careful, and that he should have Used more neutral terms. However that might be, such facts, as the

procurement of import licences on the basis of fictitious declarations and possible profits from those licences (whether directly or by assignment-

sales) have been, mainly taken by the Director into consideration, with regard to the penalties to be imposed in these cases. Surely, those facts are

not irrelevant for that purpose, though over invoicing per se is not the offence punishable u/s 12 (2) at all. We are unable to see how, on this

ground, the orders are liable to be struck down.

27. I shall now very briefly deal with the existence of alternative remedies under the statute, which, again, appears to me to be a very pertinent

consideration. Section 23-E provides for Appeals, and it is difficult to see how the existence of such remedies can be ignored by this Court, merely

because the Appellate Board can entertain the appeal only if the deposit is made,

or at the highest for the party, if the deposit is actually made before the hearing of the appeal is taken up. These may be hard terms, but the Legislature has deliberately enacted them, as part of the statutory procedure for appeals, which are themselves creatures of statute, in *Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta*, it was held that merely because such deposit has to be made, the assessee cannot bypass the statutory remedies. There is a further, appeal to this Court on any question of law, u/s 23-EE of the Act. These are relevant considerations, though the Court certainly do have the power, which may be said to be a power reserved in this Court to interfere, by way of writ even where there are specific alternative remedies, and they have not been pursued. In the present case, it is represented that, in some instances at least, appeals may be in the process of institution.

28. Finally, we shall deal with the arguments of Mr. K. Srinivasan, though they would not appear to be of a general character. In most of these

cases, the conviction u/s 4 (1) of the Act has not been canvassed before us. But Mr. Srinivasan argues that Section 4(1) has to be read with

Section 2 (d), defining Foreign Exchange, and that it cannot be said that the petitioners, in these cases, purchased or otherwise acquired foreign

currency. Mr. Srinivasan has relied on a case in the United Kingdom *H.P.C. Productions Ltd. In re* (1962) 2 W.L.R. 51. But it is very pertinent to

note that the terms of that Act (Exchange Control Act, 1947) were more restricted, and certainly not any exact replica of the terms of Section 4

(1) of the Act under consideration. The terms of Section 4 (1) are wider, and presumably, deliberately made so. It is difficult to follow the

argument that these persons did not acquire foreign currency, though the *modus operandi* may have been such that, finally Indian rupees alone

came into this country. It is the nominee or the agent who appears to have obtained the foreign currency for the concerned petitioners; and

converted the foreign currency into Indian currency. But even this may well fall within the ambit of Section 4 (1) of the Act.

29. Concerning the last point, that the word person may not include a firm at all, the matter would appear to be concluded by the definition of that

word in Section 3 (42) of the General Clauses Act. Indeed, it was not argued in any of the other cases that a firm was not a person and was not

liable as such; the argument was the other way round, that the liability of partners, who were not directly concerned, should have been carefully scrutinised, within the scope of Section 23-C of the Act. But this is a matter to be dealt with, upon individual petitions.

30. We would, therefore, find these grounds accordingly. Individual proceedings should be posted before us for disposal, in the light of these findings, and after copies of these judgments are made available to the learned Advocate-General and learned Counsel concerned.

Natesan, J.

31. While I am in respectful agreement with my Lord the Chief Justice in his conclusions in the judgment just now delivered, which I had the

privilege of reading in advance, having regard to the importance of the questions raised and the learned arguments we heard for several days, I am

expressing my views on certain aspects of the matter under controversy in my own words. Shorn of details and refinements which may have to be

considered at a later stage when each case is taken up for consideration on its merits, as typical of the cases which give rise to the questions

considered by me I shall take up the broad facts of Writ Petition No. 3651 of 1965 as basis for the discussion. The applicants, a partnership firm

consisting of six persons, had admittedly taken advantage of loopholes for fraud and malpractice in the export promotion scheme introduced by the

Central Government to secure much needed foreign exchange and profited themselves considerably from the import licences they were granted.

Under the scheme textile and handicraft exporters were issued licences for import of raw materials on the basis of their export values. This idea of

the Government was to promote exports and earn foreign exchange and as an incentive import licences were issued. In total disregard of the

serious consequences of the infraction and malpractice on the economy of the country, it is clear, unscrupulous exporters abused the concessions

and made false declarations as regards the value of the exported goods. The values were exaggerated by inflation beyond measure and in

consequence when it came to the actual realisation of the values by earning foreign exchange to the country, little foreign exchange was earned.

Investigation by the Enforcement Directorate is stated to have revealed that the highly inflated and exaggerated values had brought only huge profits

to the exporters from the import licences based on these false figures and relatively little foreign exchange. Under Rule 6 of the Foreign Exchange

Regulation Rules made by the Government of India under the Foreign Exchange Regulation Act, VII of 1947, published in notification ENF. II/52,

dated 22nd April, 1952, the amount representing the full export value of the goods shall be received from the country of final destination of the

goods and shall be paid to the exporter within six months from the date of shipment through the authorised dealers unless permitted otherwise by

the Reserve Bank. The applicants in Writ Petition No. 3651 of 1965 admitted that the firm exported handicraft goods (zari brocades) to

Singapore, that they had grossly over valued the goods in the invoices, that the values mentioned in the invoices did not represent the correct value

of the goods, that based on the values mentioned in the invoices they got import entitlements, and that a portion of the values mentioned in the

invoices were alone repatriated to this country even the amount repatriated being something more than the actual value of the goods. The

difference, the applicants stated, was made up by acquisitions of foreign exchange from other sources. The total value of goods exported by the

applicants as per their invoices is Rs. 4,68,359. Out of this a sum of Rs. 55,622 is said to have been repatriated as earned from the goods

exported leaving outstanding Rs. 4,12,737. As against the exports, the applicants had received import entitlements valued at Rs. 3,45,145.

Unabashedly the applicants state in the affidavit in support of the writ:

Ex hypothesi the goods were not worth even a fraction of Rs. 4,68,559. Even the remittance of Rs. 55,622 against this is ex hypothesi being made

by purchase of foreign exchange in respect of which offence a composite penalty of Rs. 4,000 has been levied. Therefore Rs. 4,12,737 is not in

any sense of the term payment which does not represent either the value of the goods or part thereof, nor does it represent any payment from

buyers.

It is stated in the affidavit that the amount of Rs. 4,12,737 shown as outstanding and not repatriated by them represents the difference between the

invoice value and the actual repatriation due to over-invoicing.

a mythical figure which does not represent the value of any existing goods or assets out of which anything can be realised.

The deponent swears that the applicants deliberately inflated the value of the goods exported with a view to benefit by the import licences they could get thereon, and that as the goods exported are relatively trash and practically have no market, they have not and cannot repatriate the foreign exchange in terms of the assurances they had given when getting permission for exports. It is stated that when an investigation was started by the Directorate of Enforcement, the applicant hoping to avoid heavy penalties and expecting leniency made voluntary disclosure of the true position. On the admission that the amount outstanding would never be realised, a show cause notice was issued to the applicants on the 9th of July, 1965 by the Enforcement Directorate, the material part of which runs as follows:

And wheras....Shri Chenna Krishna 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 the prescribed manner is a contravention of a

provision of Section 12 (2) of the Foreign Exchange Regulation Act, 1947 as amended up to 1964 read with Central Government Notification No.

6 (8) ENF. II/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 the prescribed time as

aforesaid in the prescribed manner the said....Shri Chenna Krishna Textiles, appear to have contravened the provisions of Section 12 (2) of the

Foreign Exchange Regulation Act, 1947 as amended up to 1964 read with the Central Government Notification No. 6 (8) ENF.II/52, dated 22nd

April, 1952 and have thereby rendered themselves liable to be proceeded against u/s 23 (1) (a) of the said Act.

Now, therefore, the said Messrs. Chenna Krishna Textiles, Vembadithalam and their partners mentioned below 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

contraventions as contemplated in Section 23 (2) of the Foreign Exchange Regulation Act, 1947.

On this the applicants referring to the facts set out in their voluntary statements pleaded guilty to the charge of having contravened the provisions of

Sections 12 (2) of the Act in respect of the outstanding bills of the f.o.b. value of Rs. 4,12,737--prayed for an enquiry and submitted themselves

for adjudication. On 27th July, 1965 the Director of Enforcement, New Delhi, passed the impugned order. A penalty of Rs. 4,000 was imposed

on the applicants for violation of Section 4 (1) of the Foreign Exchange Regulation Act. . This part of the order is not questioned by the applicants

in Writ Petition No. 3651 of 1965. The Director of Enforcement took note of the fact that every shilling of foreign exchange which had been

purchased a broad unauthorisedly and at high premiums has been brought into India under the guise of export sale proceeds and the parties should

have incurred substantial loss on account of those unauthorised purchases of foreign exchange which on repatriation has substantially benefited the

country. Coming to the charge u/s 12 (2) of the Act, in the view that the parties did not deserve any sympathy as the outstandings were heavy and

the import entitlements they got were heavier, he levied a penalty of four lakhs of rupees on the partnership of the applicants and on three of the six

partners jointly and severally. It is the validity of this penalty of four lakhs that is challenged on several grounds, one of the grounds being that when

in truth and effect the export value is inflated or as it is called, the goods are over-invoiced, there is no contravention of Section 12 (2) of the Act

for visiting the exporter with penalty. It is argued that failure to release and remit the whole or a portion of the real or trade value of the goods

without the permission of the Reserve Bank may alone amount to a contravention of Section 12 (2). An examination of this plea involves the

interpretation of Section 12 (2) and I shall take it first for consideration.

32. The Foreign Exchange Regulation Act (VII of 1947) herein referred to as the Act, was enacted as it was considered expedient in the

economic and financial interests of India to provide for the regulation of certain payments, dealings in foreign exchange and securities and the

import and export of currency and bullion. Section 12 provides:

(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.

(2) 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:

(The Act as it stood before 1st April, 1965, prior to its amendment by Act LV of 1964 being the relevant Act is set out here).

Provided that no proceedings in respect of any contravention of this subsection 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.

(3) Where in relation to any such goods the said period has expired and the goods have not been sold and payment therefore has not been made

as aforesaid, the Reserve Bank may give to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be

expedient for the purpose of securing the sale of the goods and payment therefore as aforesaid and without prejudice to the generality of the

foregoing provision, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.

(4) Where any goods are assigned in accordance with Sub-section (3), the Central Government shall pay to the person assigning them such sum in

consideration of the net sum recovered by or on behalf of the Central Government in respect of the goods as may be determined by the Central

Government.

(5) Where in relation to any such goods the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank

represents the full export value of these goods, the Reserve Bank may issue an

order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods.

(6) For the purpose of ensuring compliance with the provisions of this section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under Sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods has been, or will within the prescribed period be, paid in the prescribed manner.

33. On the case of the applicant that the invoice value was deliberately and heavily inflated and that there is no possibility of selling the goods and realising the full export value as invoiced, or any further amount over and above that has been repatriated, Sub-sections (3) and (4) have no application. Sub-section (5) clearly does not apply to the case on hand, the crucial question for consideration is whether there has been contravention of Section 12 (2). Section 23 which provides penalty for contraventions ran thus before its amendment by Section 23, Act LV of 1964:

(1) If any person contravenes the provisions of Section 4, Section 5, Section 9 or Sub-section (2) of Section 12 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 hereafter 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.

(1-A) Whoever contravenes,

(a) any of the provision of this Act or of any rule, direction or order made thereunder, other than those referred to in Sub-section (1) of this section

and Section 19 shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(b) any direction or order made u/s 19 shall, upon conviction by a Court be punishable with fine which may extend to two thousand rupees.

Section 22 provided that no person shall, when making any application or declaration to any authority or person for any purpose under the Act,

give any information or make any statement which he knows or has reasonable cause to believe to be false, or not true, in any material particular.

Notification No. 6 (8) ENF. II/52, dated 22nd April, 1952 issued under the powers conferred u/s 27 of the Act, with reference to declarations u/s

12, provides by Rule 5 (1):

The Reserve Bank, or subject to such directions, if any, as may be given by the Reserve Bank, the Collector of Customs or the postal authorities,

may, to satisfy themselves of the due compliance with Section 12 of the Act, require such evidence in support of the declaration as may satisfy

them that the exporter is a person resident in India, or has a place of business in India.

(2) the Reserve Bank, or subject to such directions if any, as may be given by the Reserve Bank, the Collector of Customs, or the postal

authorities may require any exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them

(i) that the destination stated on the declaration is the final place of destination of the goods exported;

(ii) that the invoice value stated in the declaration is the full export value of the goods; and

(iii) that the amount representing the full export value of the goods has been or will be paid to the exporter.

Rule 6 reads:

The amount representing the full export value of goods exported shall be received from the country of final destination, of the goods, unless

permitted otherwise by the Reserve Bank in its discretion, and shall be paid to the exporter within six months from the date of shipment of the

goods:

Provided further that the Reserve Bank, in its discretion, may, for sufficient and

reasonable cause shown extend the said period of six months....

Rules 7 runs:

The amount representing the full value of goods exported to the countries specified in the second schedule shall be paid through an authorised

dealer and unless otherwise authorised by the Reserve Bank shall be paid in the manner specified in the said schedule.

The declaration necessary u/s 12 (1) of the Act for permit to make export was under Rule 3 to be in form G.R. 1. It requires a statement of the

invoice value of the goods stating the currency and other particulars. The actual declaration in the form runs:

I hereby declare that I am the Seller / Consignor of the goods in respect of which this declaration is made and that particulars given above are true

and

(a) that the invoice value declared is the full export value of the goods and it is the same as that contracted with the buyer,

(b) that this is a fair valuation of the goods which are unsold.

I/my principals undertake that I/they will deliver to the Bank mentioned below foreign exchange/rupee proceeds resulting from the export of these

goods on or before....

It is stated that the Director of Enforcement in all the cases finds that the exported goods had been sold abroad for a very low price and the

amount realised which was only the real value has been duly repatriated. He, it is also stated, finds that the balances shown as outstandings not

repatriable by the exporters are fictitious figures and unreliable and that obviously even at the time of export the exporters had no intention of

repatriation of the export proceeds. At this stage I am considering the matter purely with reference to the contentions and not in relation to the facts

of each case. Whether the Director of Enforcement has accepted the truth of the voluntary statements made by the exporters and has proceeded

with the adjudication on that basis is a matter to be ascertained from a scrutiny of the impugned orders. That will have to be done when each case

is taken up for individual consideration.

34. Now what falls for my discussion first is, whether when the facts are as pleaded; it could be said that there is contravention of Section 1 for

adjudging penalty u/s 23 of the Act. Section 12 (1) places an embargo on export of the notified goods, unless an assurance is given 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. The amount representing the full value of goods exported to the specified countries has to be realised only through an authorised dealer in foreign exchange, usually a bank. The documents relating to the export of the goods must pass through the medium of the bank. A declaration is taken from the exporter that he would deliver the proceeds of the export to the specified bank. Section 12 (2) comes into play after the export of goods has been made. The exporter by virtue of his declaration, is under an obligation to repatriate foreign exchange within the prescribed time. Under Clause (a) of the declaration in the G.R. 1. form he declared that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer. This declaration on its phraseology will apply to goods when the export is on a sale, and there is already a buyer with whom a contract has been entered into. Where the goods have not already been sold and exporter is a consignor for sale without a firm offer from the foreign buyer then declaration (b) which provides that the invoice value is a fair valuation of the goods which are unsold would apply. When filling up the G.R. 1. declaration form, the exporter has to strike out the clauses inapplicable in the context of the particular export. We may state that in all the cases before us the declaration is as if the export is on sale. Clause (b) of the declaration form has been struck off. The language of the last clause of the declaration, the undertaking is rather important. The undertaking is that the exporter will deliver to the specified bank the foreign exchange /rupee proceeds resulting from the export of the goods by the specified date. The bank which has to collect the proceeds of the export in case of consignments for sale when delivering the shipping documents takes an undertaking or trust receipt from the consignee for payment for the goods by the prescribed date. The contravention alleged in all these cases in express terms is the failure of the exporters, to realise the full export value of the goods from the country of destination within the prescribed time and manner in contravention of Section 12 (2) read with the notification dated 22nd April, 1952. The question is, is there a contravention falling u/s 12 (2).

35. With reference to the case under consideration, the material part of Section 12 (2) if extracted will read:

Where any export of goods has been made--no person....shall, except with the permission of the Reserve Bank, do or refrain from doing any act

with intent to secure that....payment for the goods.... does not represent the full amount payable by the foreign buyer in respect of the goods...

There is no question here of the sale of the goods being delayed to an unreasonable extent or there being delay in the payment for the goods, or

payment being made otherwise than in the prescribed manner. I proceed on the assumption that it is nobody's case that the goods have been sold

and the full foreign exchange due thereon not realised; nor anybody's case that the goods remaining unsold could be sold. One thing is made out

that the invoice value has not been realised and brought into this country.

36. I find no difficulty in holding that Section 12 (2) applies to cases both of export on sale and export for sale, that is, consignment sale as referred

at the Bar, though there was considerable discussion on this Section 12 must be read in its entirety and Sub-section 12 (2) interpreted in the

context. The language no doubt is rather unhappy, but the legislative intent is clear. The person referred to as the person entitled to sell or procure

the sale of in the first part of Section 12 (2) is only descriptive and can include a case where the person has actually sold or procured the sale of

the goods. In the Indian Sales of Goods Act, the words Buyer and Seller subject to the context, may mean both a person who buys or agrees to

buy and a person who sells or agrees to sell as the case may be. In the context of the provisions under consideration it appears to me that it can,

without violence to the language and bearing in mind the scope and object of the Act, include a person who sells or has sold, or a consignor for

sale who offers for sale the goods exported. There is nothing incongruous or incompatible in applying Section 12 (3) (a) or (b) to the case of an

export on sale, that is to a case where there is a contract of sale with a foreign buyer. Even where there is a firm contract of sale with a specified

buyer, the completion of the sale may be delayed for various reasons and property may not pass immediately on the goods being placed on board

the ship. The sub-section, of course, ex facie applies to the case of consignment for sale, that is, an export by a consignor of goods to a consignee

for sale; but it clearly takes in also cases where there are firm contracts of sale.

37. Certain possibilities in the interpretation of the expression full amount payable by the foreign buyer in Section 12 (2) (b) have also to be

examined. The expression manifestly applies to a case where there is a seller and a specified buyer who has contracted to buy the export being on

sale. To my mind the words full amount payable by the foreign buyer, may conceivably also take in a possible buyer or would be buyer in the case

of an export to a consignee for sale. The assurance given by the exporter in his G.R. 1. form, a statutorily prescribed form, to repatriate the foreign

exchange proceeds resulting from the export of goods by a fixed date, provides a key to such interpretation. It is a determinable objective value,

and may be more or less than the full export value. It is what actually results from the export, of course, which is bona fide earned on the export. In

that view the fact that the person entered as buyer in the form turns out to be in fact a consignee for sale, or a nominee of the buyer, as is claimed,

for some of the exporters may not be material. Foreign buyers must obviously be in contemplation of the exporter when the invoice value is given in

the G.R. 1. form. Declaration (a) in the form brings out clearly that every dollar or shilling of foreign exchange available by the export must be

secured to the country. The four expressions therein, invoice value, full export value, the value contracted with the buyer and proceeds resulting

from the export are all intended to convey the same central theme. The related Rule 7 in the rules uses the phrase full value of goods exported. The

Act, the rules and forms thereunder are applicable, by and large, to trade and business people and must be construed, if possible, not finding strict

or nice distinctions of looking for the nuances and shades in the meaning, but giving a reasonable and business interpretation bearing in mind the

governing object of the legislation. The intention is clear, that an assurance is taken from the exporter to secure to the country the full value of the

goods on export, and the same idea is expressed in different terms choosing phraseology related to the context. The exporter is made to declare

solemnly that the value contracted with the buyer is the invoice value to provide against secret understandings between the buyer and the seller and

false invoice values. The expression full export value is nowhere defined and due significance must be given to the adjective full. By full export value

is obviously meant the maximum value the exported goods can earn to the country the value a bona fide exporter in this country would expect for

the goods and the value a bona fide importer in the foreign country would pay for the export. It is not some notional or fictitious value the exporter

may choose to give in filling up the form. The word export in the phrase is also used only as an adjective qualifying the noun value. The exporter

cannot knowingly undervalue the goods or deliberately inflate the values.

38. Here, according to the case of the parties the major part of the invoice value or full export value of the goods as shown in the G.R. 1. form has

not been repatriated or realised and it is not possible at all to realise, as the exporter never intended to realise the same and knew full well even

before the export that the invoice value or full export value is not the real or true value of the goods. His original declared value of the goods would

normally be taken as the full amount payable by the foreign buyer in respect of the goods. May be in certain circumstances, bona fide there may be

difference between the declared value and the actual realisation; it may be due to causes beyond the control of the exporter. I need not consider

here such contingency. But I would interpret the full amount payable by the foreign buyer found in Section 12 (2) (b) as the amount which a sale of

the goods in the open export market would fetch for the goods where the buyer and seller are independent of each other and the price is their sale

consideration and they are not influenced by any commercial or financial or other relationship except as buyer and seller. Also no part of the

proceeds or profits by re-sale or use or disposal of the goods should accrue either directly or indirectly to the seller;

39. Now to come to the contravention of Section 12 (2), assuming for the moment that the exporter should be held to his declaration and will not

be permitted to plead otherwise, can it be said, that after the export he has done or refrained from doing any act with intent to secure that the

payment for the goods does not represent the full amount payable by the foreign buyer in respect of the goods? What is it the exporter can be said

to have done or refrained from doing after export of the goods with intent that the full amount as declared is not realised? If his case is accepted, he

had exported goods which could not fetch in the market anything like the invoice value. Nothing he could do thereafter, will alter the position.

There is no lawful action he can take after the export to ensure the realisation of the declared export value for him to be charged with any non-

action in the matter. Does the Act contemplate the failure of the exporter to enforce the undertaking secured for the exporter by the bank in case of

consignment sales an inaction in contravention of the section. One thing is clear. It is not every inaction that would amount to contravention of

Section 12 (2). The exporter must refrain from doing an act, that is, there must be abstention from an act or from taking a step and the abstention

or inaction should be with a view to secure that the full amount is not realised. The intention in this regard is a necessary element. Can we postulate

continuance of an intention not to secure the full declared value when there is no possibility at all of securing the full value after the export? It was

stated by the learned Advocate-General at one stage of the arguments, that the failure of the exporter to enforce the letter of undertaking which the

authorised dealer in India through whom the related bills are negotiated or collected or through whom payment for the goods is received, is the

inaction. The immediate answer to this is that the letter of undertaking is taken only in cases of consignment for sale--see the certificate by the

authorised dealer on the duplicate of the G.R. 1. form. In the case of export on sale, which the cases on hand apparently are, the bills are

negotiated through or taken for collection by the bank for realisation, documents against bills, or there is letter of credit. Even if there is any

undertaking, if it should be found as a fact that the whole thing is false and a make-believe and the invoice value or the so-called contracted value

with the foreign buyer are fictitious figures how can there be enforcement of any undertaking to secure the full amount? When we speak of action

or non-action with intent to secure something, we contemplate a possibility of the thing going awry otherwise? True the exporter declares that the

amount representing the full export value of the goods will be paid to him within the prescribed period. But even while making the declaration he

has seen to it that the goods exported are not any where the value declared and that they can have no market. In fact his plea is that they are not

marketable goods at all. No further intent is necessary after the export to secure that the full amount, why even a fair fraction of it, is not realised.

40. True, interpreted in this manner, the exporter escapes from his obligation and his contravention will not fall u/s 12 (2). It may be that he is

pleading his own fraud and falsity to escape from the penalty provided under the section, a deliberate dereliction of duty and an offence to society

in the present context of the country's economy of a very grave nature. But penalties are purely creatures of the Legislature. They cannot be created by judicial implication and must be expressly imposed by a statute. For the imposition of a penalty the provision of law must be clear and free from doubt. Laws imposing penalties cannot be extended by construction to anything beyond the letter of the law even though within their spirit. It must be noted that in this case Section 23 provides also for criminal prosecution where heavy punishment is necessary. The language of the statute cannot be construed as having one meaning if criminal proceedings are brought and a different meaning when penalties are imposed. As pointed out in *Shanti Prasad Jain Vs. The Director of Enforcement*, proceedings under the Act are quasi criminal in character and it is the duty of the department as prosecutor to make out beyond all reasonable doubt that there has been a violation of the law. Their Lordships of the Supreme Court referred to the decision in *H. P. C. Productions Ltd., In re* (1962) 2 W.L.R. 51. No doubt a statute should not be so construed so as to narrow the words, of the statute to the exclusion of cases which those words in their ordinary acceptance would comprehend. The principle of interpretation quoted from the observations of the judicial Committee in *Dyke v. Elliott*, the gauntlet (1872) L.R. 4 P.C. 184 in *Craies on Statute Law*, sixth edition, may be : usefully referred to;

No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where

such doubt or ambiguity would clearly not to be found or made in the same language in any other instrument.

We have to construe a penal provision like any other provision fairly according to the legislative intent as expressed in the enactment and brought

out by the language used. We have to refuse to extend the penalty to cases which are not clearly embraced in them, while firmly avoiding

exoneration of parties plainly within the scope of the language by forced construction of the language on so-called equitable grounds.

41. One possible approach which the Director of Enforcement may adopt is to preclude a declarant from affirming anything contrary to his

assurance, to ignore the plea that the goods even at the time of the export had no value in the market, to hold the declarant to the value he has

assured to repatriate and charge him with failure to repatriate funds in terms of his undertaking. The Director may consider that the so-called

confession of fraud and falsity may itself be false and refuse to accept the same. As this is a possible approach by the Director of Enforcement,,

consideration of this aspect of the matter will have to be taken up when examining the orders of the Director individually. In interpreting the orders,

the Court has to bear in mind the manner in which adjudication has been invited by voluntary disclosure the so-called confession and the plea of

guilty to the charges framed. Scrutiny of the facts of each individual case and sifting of evidence by the Director has been avoided by the parties by

their conduct in the proceedings. When we take up the individual cases for examination, we have to see whether apart from referring to the

confessions, their truth is accepted by the Director. It is one thing to narrate and refer to the confessional statement for adjudicating penalty; it is

quite a different thing to accept it as true and found a contravention in law on the facts as confessed. The Director of Enforcement is not bound to

accept the explanation submitted, their alleged malpractice as the reason for their inability to secure the declared value. But if as stated by the

applicants, the Director in his orders is satisfied about the truth of the plea and find that the applicants had at the very outset deliberately over-

invoiced and inflated beyond measure the export value of the goods, the applicants are on firmer grounds in their defence to the charge of

contravention of Section 12 (2). If the inference from the orders is that the Director accepts the truth of the confession, then he would be ignoring

the facts which he finds true for the purpose of levying penalty. The state of things as originally declared when securing permit for export and getting the benefit of import licences are taken as true and the declarant notwithstanding that the truth is known, estopped from asserting the contrary. The question is whether that can be done when adjudicating penalty. For levying a penalty the department has to establish contravention of the law or rules made thereunder. Unless the statute specifically provides for it, it will be negation of all principles of jurisprudence to hold a man guilty on a fictitious state of affairs. A false declaration under the Act has been specifically made an offence, and there are provisions for punishing such transgression of the Act.

42. Can the principle of estoppel be applied in quasi criminal proceedings to shut the mouth of the delinquent and turn a Nelson's eye to truth?

May be the facts of the case before me require that that should be the state of law. But even in civil actions estoppel by representations have rarely been held to provide a cause of action by itself. In *Burkinshaw v. Nicolls* (1878) L.R. 3 App. Cas. 1004, Lord Blackburn observes at page 1026:

When a person makes to another the representation " I take upon myself to say such and such things do exist, and you may act upon that basis that they do exist" and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action.

The principle of estoppel, it has been said, has always been made for righteousness and operated to defeat grossly dishonest claims or defence.

When an exporter is being proceeded against for contravention of Section 12 (2), in the proceedings the exporter does not make any claim of his own. He seeks to avoid the penalty that may be levied or defend against the conviction. Offences are defined by statutes and have to be founded on facts proved or established or deemed by statutes to have been proved or established and not on presumptions or assumed state of circumstances. Justice has to be administered according to law and even a felon has to be judged only under the law. Then only is justice rendered.

A man cannot be convicted even on his own confession of guilt if the Court finds

that the confession is not true or on the facts confessed he is not guilty of the offence to which he pleads guilty. If in a particular case before us it is found that the foreign exchange proceeds actually resulting from the export of goods, is not the invoice value or full export value of the goods as declared and the proceeds of the export realised, fall considerably short of the declared value, the exporter, in my view, cannot be held to be guilty of contravention of Section 12 (2) by not repatriating the full amount payable by the foreign buyer if he had not done anything to secure that result after the export. I may reiterate what I have said earlier that in interpreting the orders of the Director, the circumstances in which the orders were made have to be borne in mind. The parties have pleaded guilty and one of the orders shows that the Director was aware that over-invoicing as the fraud played by the applicants, has been euphemistically called, by itself, will not be an offence u/s 12 (2) of the Act. That being so, unless the Court is convinced that the Director clearly erred in law and the error of law is apparent on the face of the record, this Court will not exercise its prerogative jurisdiction in certiorari. Formal or technical errors or slips in the terminology used by the Director, even though they appear to be errors in law, will not be sufficient to attract the extraordinary jurisdiction of this Court if in substance the orders could be maintained in accordance with law.

43. The other point I take up for consideration is the plea by the learned Advocate-General that as the applicants in these cases base their claims to relief with a story of their own perfidy, this Court will not exercise, in their favour the discretionary relief of certiorari. Reliance is placed on the well known maxim of equity *ex turpi causa non oritur actio* (out of turpitude no cause of action arises) and it is contended that while exercising the special jurisdiction, the Court is entitled to have regard to the conduct of the applicant and decline relief if he has not approached the Court with clean hands. The applicants on their own showing have violated the laws-enacted for protection of the economic and financial interests of the nation, and relief in proceedings by way of certiorari is not granted as a matter of course and cannot be had as a matter of right. But there is a danger with these pity equity maxims which has to be guarded against. They enunciate no doubt equitable rules based on certain moral principles

but, if just extended by logical process in the modern complex society they are apt to be carried far beyond the original purpose and may cease to be equitable.

44. It cannot be seriously disputed that the order for the issue of certiorari is strictly a matter of discretion, the relief being granted for the

advancement of justice and to strike down injustice. But Mr. M.K. Nambiar, Counsel for one set of applicants, contends that discretion both in the

granting and withholding of relief now runs more or less in fairly well evolved channels and that it is only certain conduct in relation to the very

proceedings in Court that would disentitle the applicants to relief. Other Counsel appearing for the applicants adopted this argument and it is stated

that the requirement in this regard is that the applicants should not make before the Court in the proceedings for certiorari any statement which is

false or conceal something from the Court which is relevant. It is stated that if the Court has reason to be satisfied that there has been deliberate

concealment of facts so as to mislead the Court, the Court will decline to consider the merits of the case and reject the application. A number of

cases were cited where the rule has been applied and relief refused to the applicants. In view of the strenuous arguments of learned Counsel that

the conduct pleaded in the present cases is not of the type contemplated for declining relief in the exercise of discretion, I propose to examine the

matter at some length. No direct case has been cited before us placing a limit on the discretionary power of the Court in the matter of withholding

relief and making its exercise mandatory wherever a Tribunal has gone wrong in law and the error is a serious one apparent on the face of the

record, however unmeritorious and undeserving the applicant may be. Learned Counsel referred us to a decision of this Court in Issardas

Somamal Lulla Vs. The Collector of Madras and Additional Custodian of Evacuee Property, Madras, , wherein Ramachandra Ayyar, J., (as he

then was), after examining several decisions observed at page 530:

Thus a writ of certiorari is issued at the discretion of the Superior Court. It cannot be held to be a writ of right or one issued as a matter of course.

But for the exercise of the discretion of the Court, there are some well accepted principles. In issuing the writ, if the Court....is moved by a party

aggrieved by the order of the inferior tribunal, the Court is bound to issue the

writ at his instance, except in cases where he had disentitled himself to the discretionary relief by reason of his own conduct like submission to jurisdiction, laches, etc.

Reference was also made to A.K. Gopalan Vs. The State of Madras, at Page 40, at page 40 where Lord Atkin's dicta at page 670 in Eshugbayi

Eleko v. Government of Nigeria (Officer Administering L.R. (1931) A.C. 662, that in accordance with British jurisprudence no member of the

Executive can interfere with the liberty or property of British subject except when he can support the legality of his act before a Court of justice,

was referred to. Counsel also relied on the dicta of Scrutton, L.J., in Rex. v. Secretary of State for Home Affairs O'Brien, Ex parte L.R. (1923) 2

K.B. 361 : at page 382:

You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous, and the

subject is entitled only to be deprived of his liberty by due process of law, although that due process if taken will probably send him to prison. A

man undoubtedly guilty of murder must yet be released, if due forms of law have not been followed in his conviction. It is quite possible even

probable, that the subject in this case is guilty of high treason; he is still entitled only to be deprived of his liberty by due process of law.

Reference was made to the passage at page 140 in Halsbury's Laws of England, volume XI, Simonds edition, wherein with respect to application

for certiorari by a party aggrieved it is observed:

Although the order is not of course it will though discretionary nevertheless be granted ex debito justitiae, to quash proceedings which the Court

has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by

an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief.

Ex debito justitiae only means from what is due to justice. It is interesting to note that the cases given in the footnote with reference to the principle

that the conduct of a party may disentitle him to relief are grouped under the following heads : acquiescence in irregularity complained of; second

application on amended affidavits, undue delay in applying for the writ; acquiescence in jurisdiction of Court below; failure to object below to

constitution of Court; and waiver of the right to object on the ground of interest of the Tribunal. The argument naturally is that the conduct that

would disentitle an applicant to relief must fall under one or other of the above heads. Learned Counsel would limit the scope in the decision of this

Court in *Issardas Somamal Lulla Vs. The Collector of Madras and Additional Custodian of Evacuee Property, Madras*, to conduct ejusdem

generis with submission to jurisdiction, and laches.

45. In *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, it is observed at page 429:

That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Court do not, and should not, act as

Courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be

exercised along recognised lines and not arbitrarily, and one of the limitations imposed by the Courts on themselves is that they will not exercise

jurisdiction in this class of case unless substantial injustice has ensued or is likely to ensue.

In *A.M. Allison Vs. B.L. Sen*, it is stated at page 231:

Proceedings by way of certiorari are "not of course" (vide Halsbury's Laws of England, Hailsham edition, volume IX, paras. 1480 and 1481,

pages 877, 878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice, and in these

appeals which are directed against the orders of the High Court in applications under Article 226, we could refuse to interfere unless we are

satisfied that the justice of the case requires it.

In *Short and Mellor's Crown Practice*, second edition, at page 15 is found the following rule:

The writ of certiorari is demandable of absolute right by the Crown but is granted to the subject at the discretion of the Court or a Judge

At page 48 of the same book is found the following statement of the position:

It was formerly held that a certiorari would not be granted *ex debito justitiae* but that it was in the discretion of the Court; but in *The Queen v.*

Justices of Surrey (1870) L.R. 5 Q.B. 466, it was held that to a party aggrieved it ought to be granted *ex debito justitiae*, but that to an applicant

who only comes forward as one of the public, the Court ought to exercise its

discretion, and that the writ is not, on any grounds, a writ of course.

The Court must be satisfied that sufficient grounds exist for issuing the writ and even where the applicant is a party aggrieved, if he has by his

conduct precluded himself from taking an objection, the Court will not permit him to take it (Regina v. The South Holland Drainage Committee

Men, Ex parte Prest (1838) 8 L.J.Q.B. 64.

46. In S.A. De Smith's Judicial Review of Administrative Action it is stated at page 316:

Waiver, acquiescence and laches are not the only discretionary bars to : the award of certiorari and prohibition. The Court is entitled to have regard

generally to the conduct of the applicant and to the special circumstances of the case in deciding whether to grant him the remedy he seeks.

47. Of the three cases relied on by the learned author in the footnote for the proposition, in one case the application for prohibition was refused

because the applicant had misrepresented and suppressed the material facts in her affidavit. Another application for certiorari was refused because

of the serious misrepresentations in the counter affidavit. With reference to the third case, Ex parte Fry (1954) 2 All E.R. 118, which I shall be

referring to presently the learned author states that the ground for refusal of certiorari was the exceedingly foolish and unreasonable conduct of the

applicant. The learned Advocate-General, apart from referring to certain cases where relief has been refused in equity jurisdiction, the legal maxims

ex turpi causa non oritur actio and nullus commodum capere potest de injuria sua propria (no man can take advantage of his own wrong) and the

principle upon which equity jurisdiction is exercised, relied upon three cases in particular Ex parte Fry (1954) 2 All E.R. 118, already referred to,

Co-operative Marketing Society v. Sriramulu (1960) 1 An.W.R. 57, and Haji Abdul Shakoor Vs. The Rent Control and Eviction Officer, Kanpur

and Others, . The third case does support the proposition now put forward by the Advocate-General. Dhavan, J., in holding that the petitioner

who came into Court founding his cause of action on an illegality would not get any assistance from the Court, observed at page 452:

A petitioner who comes into Court founding his cause of action on an illegality, will not get any assistance from the Court. Ex turpi causa non oritur

actio (out of turpitude, no cause of action arises). As long ago as 1767 Wilmot,

C.J., observed in the case of Collins v. Blantern 95 E.R. 847.

" You shall not stipulate for inquiry. All writers upon our law agree to this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract if he has once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action, when you come into a Court of justice in this unclean manner to recover it back".

48. The principles enunciated above have been extended to the jurisdiction of this Court under Article 226 of the Constitution. A petitioner who does not come to this Court with clean hands or who come with his hands soiled with an illegal transaction made with the deliberate object of defeating the provisions of the law, disentitles himself to any relief from the Court.

49. This is certainly a case where the conduct of the applicant for which he was disentitled to relief was not in the course of the proceedings. It was

outside the proceeding and proceeded the initiation of the proceeding. The applicant prayed for quashing an order of the Rent Control and Eviction

Officer declaring a godown belonging to the petitioner has vacant for allotment. The respondents to the application were applicants before the Rent

Control and Eviction Officer for allotment of the premises to them. The premises in question had been released to the petitioner earlier for his

personal use and applications for allotment were made by others contending that he has sub-let the premises in contravention of the release order.

The petitioner ostensibly was having the business in partnership with others in the premises. The Rent Control and Eviction Officer found that the

deed of partnership was not a genuine one, but a transaction transferring possession of the godown to others for consideration and that it was an

illegal form of sub-letting and a device to evade the provisions of the rent control law. On this finding he declared the godown vacant for allotment.

It is this order that was sought to be quashed in the certiorari proceeding. The learned Judge on the writ held that there was material on record to

justify the finding. The passage quoted above comes after this finding the learned Judge ultimately observing that the petitioner would not have been

entitled to any relief under Article 226 even if he had made out a case, which he had not. Earlier the learned Judge observed that the petitioner had

not been candid with the Court in his presentation of facts in the affidavit supporting the petition. The learned Judge has relied on a Division Bench

case of the Allahabad High Court in *Azizun Nisa and Others Vs. Asst. Custodian and Others*, . In that case it was held, that where the party

applying for a writ of certiorari, was guilty of laches which was not explained and. had also submitted to the jurisdiction of the authority, whose

order was sought to be quashed, nor filed an appeal against the order though permitted under the law, the Court would not on account of the

conduct of the applicant, in its discretion, interfere with the order under Article 226. It will be seen that in the above case of *Haji Abdul Shakoor*

Vs. The Rent Control and Eviction Officer, Kanpur and Others, , the Court could grant no relief whatsoever to the petitioner under Article 226.

The right to relief was rested on an illegal transaction but it was not a case where the illegality as found did not warrant the order as passed by the

Tribunal. The Tribunal had not acted outside the law and had, on the facts, jurisdiction to declare the vacancy and direct an allotment. The

observations are, therefore, obiter.

50. In *Co-operative Marketing Society v. Sriramulu* (1960) 1 An.W.R. 57, the Division Bench of the Andhra Pradesh High Court remarks at

page 62:

Lastly, we must observe that this Court is averse to lend its helping hand to persons who want to defraud others. Even assuming that any errors of

law was committed by Tribunals, that would not be a ground for invoking the extraordinary jurisdiction of this Court under Article 226 of the

Constitution, when it is not in furtherance of justice but tends to encourage dishonesty.

If I may say so with respect, the principle enunciated is unexceptionable. Difficulty will arise when we have to determine whether it will apply to the

facts of any particular case. The case which was under consideration there was not a case where remedy was sought to quash any penalty levied

illegally or contrary to law. The validity of a reference u/s 51 of the Madras Co-operative Societies Act was challenged on the ground that as the

business carried on by the persons in management of the society was an illegal one, the business would not come within the definition of business

u/s 51 of the Act for reference of a dispute as one touching the business of the

society. While holding the validity of the reference in law as a further ground, the observations quoted above were made.

51. The Judgment in *Ex parte Fry* (1954) 2 All E.R. 118, relied upon by the learned Advocate-General has been considered to be a case of non-interference on the ground that the applicant was exceedingly foolish and his conduct was unreasonable. The applicant in that case was a fireman who had disobeyed an order to clean his superior officer's uniform and was given a caution by the Chief Fire Officer under the Fire Services

(Discipline) Regulations. For refusing the relief it was stated at page 122:

The applicant is a member of a service which is of great public importance. For the good of that service and of those who are employed in the

service the Secretary of State has made regulations so that their position may be ascertained and there may be as few difficulties as possible. There

is "a complete code". If a man feels that he is ordered to do something which he ought not to be ordered to do, he can raise the matter in the way

that I have said, but if, instead of doing that, he deliberately sets out to disobey the order given to him by a superior officer, he is only making

difficulties for himself and for the whole of the service, and that is something which he ought to realise....In the circumstances of the present case

there was no appeal.... because the punishment inflicted was only a caution, but there are ways and means of bringing to the notice of the fire

authority in a proper case the conduct of one who has to preside over a disciplinary tribunal of this kind if it is thought right and proper that that

would be done.

With reference to this case, Wade in his *Administrative Law*, 1961, at page 162, after stating about the Court's refusal of their aid because the

remedy was discretionary remarks:

The sensible course would have been for him to obey the order and complain afterwards to the fire authority rather than disobey and take legal

action. This put the whole matter on a sounder footing...judicial control must be confined to cases where there is some complaint of real injustice.

It is a case where a caution was administered and the Court thought that there were other ways for the aggrieved fireman to establish that the

caution administered was unwarranted. The decision cannot be a sure guide if the penalty adjudged is heavy and bears no reasonable relation to

the turpitude of the applicant. In the leading case referred to in the text books and relied on in subsequent cases for the discretionary character of

certiorari jurisdiction, *The Queen v. Justices of Surrey* (1870) L.R. 5 Q.B. 466, Lord Blackburn laid down the principle thus at page 473:

Where the party grieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it as in *Regina v.*

The South-Holland Drainage Committee Men, ex parte Prest (1838) 8 L.J.Q.B. 64.

In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be

treated, like a writ of error, as *ex debito justitiae*.....

52. As the case in *Regina v. The South Holland Drainage Committee Men, ex parte Prest* (1838) 8 L.J.Q.B. 64, is generally referred to in all the

subsequent cases and relied upon by the text books as an authority for the position that even to a party aggrieved who may be entitled to certiorari

ex debito justitiae relief may be declined by the Court having regard to his conduct, it will be useful to examine the case in some detail.

53. In that case a writ of certiorari to bring up an inquisition under a local Act for being quashed on certiorari was refused at the instance of a party

who had waived the regular notice to treat and allowed the inquisition to be taken before the proper time and who had allowed the calculations to

be taken for compensation in a mode not authorised by the Act. It was made out in the affidavit in answer that the defect in the procedure was as a

result of express consent and waiver on the part of the applicant. With reference to the calculations the applicant was a party to the arrangement

under which the calculations were made. There was another objection and it is that which is relevant here, that compensation had been provided

as. if it was freehold land whereas in fact it was copyhold property and that compensation ought to have been provided for the Lords of the manor

in respect of their interest in the premises. The Lord of the manor also appeared at the hearing as his interest was involved, the assessment of the

compensation being final and conclusive upon all parties and the Jury had only to apportion the compensation among the different interests. It was

doubtful whether copyholds could be taken at all. Lord Denman, C.J., in discharging the rule observed at page 65:

It must not be supposed, because we discharge this rule, that we are setting up

this inquisition, and saying that it is good. That is not the case....With regard to this being copyhold land, I think nothing of the objection, because it does not appear that the nature of the tenure was disclosed. But, whether this inquisition be good or bad, the present party is not competent to apply to us. The first objection never could have existed, if he had not expressly waived the notice; and as to the mode of compensation, the objection is answered in the same manner.

The decision of Patterson, J., in the case is of considerable interest, as it reveals one other aspect on which discretion was refused. Patterson, J.,

observed at page 66:

We only say, that this party is not in a condition to ask us to interfere. It is said that the inquisition was unduly taken, and the witnesses may not be

indictable for perjury. Whose fault is that? The applicant has to thank himself. So also, with regard to this being copyhold land, he deceived the

committee men, and concealed from them that fact. Indeed, he has conducted himself in such a manner as not to have entitled himself to relief.

Certiorari was refused in this case on two grounds, waiver and acquiescence in respect of certain procedural illegalities. In regard to a matter

which went more or less to the root of the jurisdiction, the character of the property, the applicant has misled the Tribunal whose order was

challenged. He had deceived the committee men who passed the original order and concealed from them the true nature of the property. Before

the Court in his affidavit for the first time he pleaded that the land was copyhold. He was pleading the truth no doubt. But he attempted to get over

his own falsity and deception. He had to thank himself for the result. The order in question which was sought to be quashed in that case was

brought on himself by his practising deception before the committee and he sought to get over the order pleading the truth before the Court and

properly the Court rejected relief. The Court refused to exercise its discretion in his favour. He had no right to complain having represented the

land to be freehold and obtained for himself the value of a freehold land. Applying the principle of the case to the cases on hand if the applicants

had kept back the truth from the Director of Enforcement and for the first time before this Court pleaded their inequity and fraud and asked this

Court to grant them relief, as Section 12 (2) would not apply to a case of over-

invoicing, this Court may, in my opinion, in limine reject the applications for relief. In such cases, the case for relief is founded on the plea of fraud. The basis for the prerogative relief of certiorari then would be that the applicants had deceived the Department but that on the true facts as disclosed for the first time in the affidavit before Court, there could be no contravention of Section 12 (2). In such cases even if the Department is not in a position to contradict the facts, this Court will refuse relief as the relief is directly founded on fraud. This Court is then asked to accept the dishonesty and fraud of the applicants as a fact and grant them relief on that basis--but *nemo allegans turpitudinem suam est audiendus* (no one alleging his own baseness is to be heard). It may be different if the applicant is not asking this Court to accept his plea of falsity and grant him relief on that ground. In a case, where the applicant states that the Tribunal has accepted and found the true facts and uncovered his fraud but contends that on the facts so found the Tribunal has levied a penalty which it has no jurisdiction to levy, it cannot be said to be a case where the cause of action has been founded on turpitude or the equity sued for rests on falsity and baseness. All that the applicant then contends is that on the facts found the Tribunal has acted illegally and without jurisdiction in levying the penalty. He does not challenge the facts, found. The act complained of is the act of the Tribunal or body. The Tribunal according to the applicant, has found the true facts which no doubt he had earlier concealed fraudulently. The applicant in such a case wants the Tribunal to be contained within the law and to punish him on the facts found.

54. Reference was made at the Bar to the observation in *The Public Passenger Service Limited Vs. M.A. Khader and Others*, at 492:

Counsel then relied upon the well-known maxim of equity that "he who comes into equity must come with clean hands" and contended that the Courts below should have dismissed the applications as the respondents did not come with clean hands. This contention must be rejected for several reasons. The respondents are not seeking equitable relief against forfeiture. They are asserting their legal right to the shares on the ground that the forfeiture is invalid, and they continue to be the legal owners of the shares. Secondly, the maxim does not mean that every improper conduct of the applicant disentitles him to equitable relief. The maxim may be

invoked where the conduct complained of is unfair and unjust in relation to the subject-matter of the litigation and the equity sued for.

That was a case of discretionary relief and Counsel for the applicants rely on the above observations for their contention that what they claim here

is only the application of law to the facts found. The learned Advocate-General lays emphasis on the last sentence in the above quotation.

55. To sum up, the cases cited at the Bar show that while the writ of certiorari is considered to be a discretionary relief which the Court is not

bound to grant even at the instance of the aggrieved party, the refusal of the relief in the exercise of the Court's jurisdiction is generally found when

the applicant is guilty of laches or acquiescence or waiver or where the applicant has not approached the Court in good faith. Where the applicant

lacked uberrima fides and where there was suppression of material facts the application was refused. Cases may be referred to where the

discretion is exercised in favour of an applicant when his laches or acquiescence is the result of ignorance, accident, etc. Relief has also been

denied if the claim to relief is founded on the applicant's own fraud or dishonesty. The Court looks to the conduct of the applicant when the

question is, which way the discretion has to be exercised. It is not every improper conduct of the applicant that should disentitle him to relief.

Depravity of conduct on the part of the applicant or falsity or dishonesty on his part that would preclude him from claiming relief, apart from special

circumstances of a particular case must in my view ordinarily be so related to the relief claimed that recognition of the dishonesty or falsity or

depravity of conduct by the Court is first called for before relief is granted. Ordinarily to deny the applicant the justice he is found entitled to, the

relief must rest on the prayer to the Court to accept his depraved conduct as the truth. But that is not to say that conduct of the applicant when not

made the basis for relief should in no case disentitle the applicant to certiorari, judicial discretion can never be circumscribed that way. If we hold in

the present cases that the applicants want this Court to find the fraud and falsity of their declaration, may be it is not controverted, and thereon in

law hold that Section 12 (2) of the Act will not apply, they would be cases where relief would rest on our finding the turpitude pleaded. Even in

such cases if the penalty besides being beyond the jurisdiction of the Tribunal

shocks the conscience of the Court or the application of the law is outrageously perverse *ex debito justitiae* the Court would properly interfere. If there is no adequate alternative remedy I would say it should interfere : *Arthur v. Commissioners of Sewers in Yorkshire* 88 E.R. 237. To my mind it seems that if the Director of Enforcement has accepted the confessional statements as representing the true state of facts, as this Court is not called upon for the first time to adjudicate on the facts and act upon the baseness set out in the affidavit, the applicants would only be claiming that the Tribunal should be told to apply the law to the facts found.

The Tribunal has to act according to law on the facts which it finds, and the question will be whether the applicants in law deserve the penalty which has been levied upon them. The question thus put in issue has nothing to do with their conduct. Dishonesty and falsity are closed chapters; certain facts are found as true by the Tribunal and it has to act thereon. To my mind if the law does not permit a penalty on the facts found, that would be a plain case of usurpation of jurisdiction which the superior Court will not allow.

56. But that is not all. Other circumstances may still weigh with the Court to stay its hands and not exercise this special jurisdiction in favour of such applicants. In the cases before us, if in any particular case there is ambiguity in the order and it is not clear that the confession has been accepted in full it would be a case of the applicant asking this Court on the materials before this Court, taking into consideration the counter affidavit of the department to accept the truth of his confession. This, we are not bound to do in the special jurisdiction. As I have said earlier, the Tribunal could have refused to go behind the declarations and held the applicants on to their declaration. In fact it is beyond my comprehension how such a huge fraud had been committed without detection. Lakhs and lakhs worth of handicraft goods are stated to have been exported on export permits and it is stated now that the goods were of no value and were worthless goods which had no market even at the time of export. Section 12 (6) of the Act authorises the authority to call for evidence to show that the full amount payable by the foreign buyer in respect of the goods will be paid in the prescribed manner. It is astonishing that despite the wide powers the authorities have, the nature of the goods exported has escaped detection

before shipping. These exports were made after incentive had been offered by import licences and import licences were granted in advance before

receipt of the proceeds of export. One would expect, in such circumstances, grater scrutiny and vigilance on the part of those who look after these

exports and imports. Is it supine indifference to what was passing under their very nose, lack of diligence or gross dereliction of duty, or what?

Naturally, Mr. K. Srinivasan, Counsel for one set of applicants submits to us, that over-invoicing has been the trade practice and the Department

themselves have winked at over-invoicing as the State stood to gain by the anticipated foreign exchange. Learned Counsel contends that

unbecoming conduct, in such circumstances, cannot be levelled, on the exporter only, and that is offset by laches on the part of the Department. I

am not prepared to countenance this wild suggestion and even otherwise two wrongs cannot make a right. The contravention of the exchange

Rules by the applicants is deliberate and a grave one. It is a violation of laws made in national interest and in public good for the protection of the

country's foreign trade and exchange position and local economy. We do not know whether there has been full probe into the truth of the dealings

and there is acceptance of the confession after full scrutiny and examination of the matter. If the confession itself is false, that is not improbable it

will be apparent that the exporters would be keeping out large amounts of foreign exchange having succeeded in their defence here.

57. Having regard to these aspects of the matter, I think this Court will be justified, if not on other grounds on the one ground that there is a

remedy by way of appeal against the order of the Director of Enforcement to decline relief in these proceedings. Section 23-E provides for an

appeal to the Foreign Exchange Regulation Appellate Board from orders of the Director of Enforcement made u/s 23. There is a further appeal

from the order of the Appellate Board to the High Court on questions of law u/s 23-EE. No doubt before an appeal is heard by the Appellate

Board, the appellant would have to deposit the sum imposed by way of penalty. Learned Counsel for the appellants would contend that having

regard to this circumstance they have no effective alternative remedy. It is submitted that the provision as to the deposit of the penalty amount, in

effect deprives the applicants of the remedy by way of appeal. Our attention was drawn in this connection to the decision of the Supreme Court in

M.G. Abrol Vs. Shantilal Chhotalal and Co., , where it is observed at page 202:

Lastly it was argued that the High Court should not have exercised its jurisdiction under Article 226 of the Constitution, as the respondents had an

effective remedy by way of appeal to higher Customs Authorities. But the High Court rightly pointed out that the respondents had no effective

remedy, for they could not file an appeal without depositing as a condition precedent the large amount of penalty imposed on them. That apart, the

existence of an effective remedy does not oust the jurisdiction of the High Court, but it is only one of the circumstances that the Court should take

into consideration in exercising its discretionary jurisdiction under Article 226 of the Constitution. In this case, the High Court thought fit to exercise

its jurisdiction under Article 226 of the Constitution and we do not see any exceptional circumstances to interfere with the discretion.

58. I fail to see how these observations can help the applicants in these cases The existence of an alternative remedy of course does not bar this

Court from interfering under Article 226 when interference is necessary. But this Court has discretion in the matter and it will have to consider

whether in a particular case the other remedy is futile. In Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta, , their Lordships

observed at page 144:

We are of the opinion that the High Court should have declined to entertain the petition. No exceptional circumstances exist in this case to warrant

the exercise of the extraordinary jurisdiction under Article 226. It was not the object of Article 226 to convert High Courts into original or

appellate assessing authorities whenever an assessee chose to attack an assessment order on the ground that a sale was made in the course of

import and, therefore, exempt from tax. It was urged on behalf of the assessee that they would have had to deposit sales tax, while filing an appeal.

Even if this is so, does this mean that in every case in which the assessee has to deposit sales tax, he can bypass the remedies provided by the

Sales Tax Act? Surely not. There must be something more in a case to warrant the entertainment of a petition under Article 226, something going

to the root of the jurisdiction of the Sales Tax Officer, something to show that it would be a case of palpable injustice to the assessee to force him

to adopt the remedies provided by the Act.

The cases before us have got complicated on the merits by reason of the confessions and the resultant rather involved orders of the Director. An examination would be required in each case whether the confession has been accepted as true or not. If it is only a question of quantum of penalty, that is not normally a matter for consideration by this Court in writ jurisdiction. If in any particular case we are convinced that if the applicant should be compelled to follow the remedy by way of appeal, palpable injustice may be done to him, the case may call for interference here. Where the error or illegality is so patent and obtrusive as to touch the conscience of this Court, interference would be called for here and now, notwithstanding the availability of remedy by way of appeal. If the penalty levied, in any case, is so heavy and it is clear that the penalty would break the applicant and that he would not be able to deposit the penalty amount and prosecute the appeal, the case may, if other circumstances warrant and certiorari would be appropriate, call for exercise of discretion in favour of the applicant. The applicants here ex facie, on their own showing, have violated the law and they are seeking to escape from the penalty imposed. Their call for justice from midstream should be heeded if otherwise they will sink. But, if they are not weighed down by the penalty and if we feel that they can safely cross the stream and reach the prescribed forum where relief may be had, we would hesitate to pollute the pure fountain of justice by going out of the way.

59. I have indicated in broad outline the general principles on which the cases before us will have to be considered and discretion exercised. For

the exercise of discretionary jurisdiction it is neither feasible nor desirable to rigidly lay down in advance rules that should govern the discretion.

Then it will cease to be discretionary. One safe and permanent rule is to be perpetually aware that the discretion has to be exercised judicially,

judiciously and with reason. I have dealt only with two of the important questions which arise for consideration in these cases. While I am in

agreement on both the aspects with the ultimate conclusion arrived at by my Lord the Chief Justice, I might have in my reasoning followed a more

zigzag path. My Lord the Chief Justice has dealt in extenso with certain other features common to all the cases and as regards these matters I am in

entire agreement. All the cases will now have to be considered individually in the light of the preliminary judgments.