
(1988) 02 KL CK 0036
In the High Court Of Kerala
Case No : M.F.A. No. 488 of 1982

Raghavan Nair

APPELLANT

Vs

Deputy Director, Enforcement Directorate

RESPONDENT

Date of Decision : 29-02-1988

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 54

Citation : AIR 1989 Ker 129 : (1990) 67 CompCas 341 : (1988) 17 ECC 185 : (1988) 36 ELT 427

Hon'ble Judges : V. Sivaraman Nair, J;P.K. Shamsuddin, J

Bench : Division Bench

Advocate : M. Ratna Singh, for the Appellant; Addl. Central Govt. Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Sivaraman Nair, J.—We had dismissed the appeal for default as per judgment dt. 11th Jan. 1988. Counsel for the appellant filed CM.P. No. 3947 of 1988 to set aside that order and restore the appeal and hear it afresh. After hearing both sides, we allowed the petition on 18-2-1988. The appeal was heard immediately thereafter.

2. The appellant was a coir exporter. He had appointed a Commission Agent, M/s. Gover Horowitz and Blunt Ltd., London, to act as his agent abroad. During the year 1972-73, he had exported 530/bales of coir yarn valued at ? 9,895.50 to that London firm; but he realised only ? 9,568.60. During the year 1974, he exported 1165/bales of coir yarn valued at ? 31417.82 through the same agent; but he realised only ? 28,445.63.

3. The Enforcement Directorate, Madras issued two show cause notices to the appellant, the former on 29-2-1980 under Sections 10(1) and 12(2) of the Foreign Exchange Regulation Act, 1947 for short the 1947 Act for realising less than the export value of goods and by not taking action for repatriating the full

amount payable by the foreign firm. The second show cause notice dt. 29-2-1980, related to the export realisation for the period 1974 the Department alleged contravention on the part of the appellant of the provisions of Sections 16(1) and 18(2) of the Foreign Exchange Regulation Act, 1973 for short the 1973 Act. The appellant stated that the real export value as covered by the relevant provisions had been realised by him, and the higher value mentioned in the cables exchanged between him and the commission agent was inflated by him and was adopted for the purpose of enabling the commission agent to sell the goods to his advantage. The matter was adjudicated by the Deputy Director of Enforcement, Madras in his order dt. 15-4-1980, which was passed after hearing counsel for the appellant in detail. The adjudicating officer found, that the contraventions of the 1947 Act in respect of the period 1972-73 and in respect of the year 1974 were fully made out. He imposed a cash penalty of Rs. 3,000/- each on the petitioner for violation of Sections 10(1) and 12(2) of the 1947 Act, and Rs. 25,000/- each for violation of Sections 16(1) and 18(2) of the 1973 Act. The appellant filed Appeal No. 265 of 1980 before the Foreign Exchange Regulation Appellate Board. The appellant contended that the price of goods exported by the appellant was evidenced by the agreement with the foreign firm and the price indicated in the cables exchanged between the appellant and the agent prior to the agreement was an inflated figure intended to enable his agent to sell the goods to his customers to his advantage. Counsel submitted that the price advantage was not a component of the export proceeds and was not an amount payable to the appellant. It was, therefore, submitted that there was no contravention of any of the statutory provisions alleged and found against him. The Department countered this submission by stating, that if there was no price advantage in the foreign market over and above the fair price fixed by the Board and as mentioned in the agreement, there was no justification for the correspondence preceding the agreement indicating a higher price. The Appellate Board, after hearing counsel, held, that there was no convincing reason given by the appellant for incorporating a price in the agreement different from that disclosed from the correspondence. The Board also found that the explanation offered by the appellant that the correspondence anterior to the agreement was intended to help only the foreign firm in securing for them the price advantage did not appeal to it. The Board adverted to the normal norms of human conduct and the pattern of behaviour of business firms, particularly in export business, and found that the altruistic concept advanced by the appellant appeared to it to be unrealistic. The Board also referred to the decisions in Director, Enforcement Directorate, Ministry of Finance and Another Vs. K.O. Krishnaswamy, , and Collector of Customs, Madras and Others Vs. D. Bhoormall, and held, that the former decision did not apply to the facts of the case and the Department had discharged its burden in making out the contraventions as alleged against the appellant. However, the Board reduced the aggregate penalty of Rs. 56,000/- by half, viz., Rs. 28,000/-. It is against the order of the Appellate Board that the appellant has come up in further appeal to this court u/s 54 of the Foreign Exchange Regulation Act, 1973.

4. Mr. Ratna Singh appearing for the appellant emphatically urged before us, that the adjudicating and appellate authorities went wrong in finding that the export proceeds were the higher amounts fixed according to the correspondence and cables exchanged between the appellant and his commission agent in London. According to him, the real price was mentioned in the contract pursuant to which the goods were exported and which was lodged with the Reserve Bank of India. Counsel submitted, that contravention of Section 12(2) of the 1947 Act will be made out only if the Department proves that the amount received by the appellant was less than 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 of India. He submits, that the amount payable was the amount as per the contract and the higher amount disclosed by the correspondence and cables was only a fictitious amount. Such higher amount not being "payable", non-realisation of that amount or failure to take any action to secure the full amount of foreign exchange would not constitute offences u/s 12(2) or 10(1) of the 1947 Act His further submission was that there would be no offence u/s 16(1) or 18(2) of the 1973 Act for the same reasons.

5. It is beyond dispute, that if an exporter receives less than the export proceed, or fails to take adequate steps to realise the full amount of foreign exchange involved in the export transaction, that may amount to contravention of Sections 12(2) and 10(1) of the 1947 Act, corresponding to Sections 16(1) and 18(2)-of the 1973 Act. Non-repatriation of the full amount payable by the foreign firm does disclose contravention of Section 12(2) of the 1947 Act. In *Ajantha Cashew Company Vs. Assistant Director of Enforcement*, a Bench of this Court consisting of one of us had occasion to consider the question of violation of Section 12(2) of the 1947 Act in an almost identical situation. It was held, that over invoicing and non-repatriation of the full amount payable by the foreign buyer would justify a charge of violation of Section 12(2) of the 1947 Act.

6. In the present case, the effect of the explanation of the appellant was that" the higher price mentioned in the correspondence and cables was a fictitious amount and the real export proceeds were those mentioned in the contract pursuant to which the exports were effected.

7. There was, of course, a choice of two alternatives, before the original and the appellate authorities. If the explanation offered by the appellant was sufficiently satisfactory, the original or appellate authority could have agreed with the explanation of the appellant, that the amount mentioned in the contract represented 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 of India. It was equally competent for them to hold-that the explanation offered by the appellant was not satisfactory or convincing and then determine that the full amount payable by the foreign buyer was that disclosed by the correspondence and the cables, which preceded the agreement.

8. Shri Balachandran, counsel appearing for the revenue, submitted that the

appeal is not competent u/s 54 of the Foreign Exchange Regulation Act, because a Second Appeal from the decision of the Appellate Board can be entertained only on a question of law arising from a decision or order of the Appellate Board under Sub-section (3) or Sub-section (4) of Section 52 of the 1973 Act. Counsel submits, that the concurrent findings of the original and appellate authorities on the price payable by the foreign buyer does not disclose any question of law. It is, therefore submitted that the appeal is incompetent and cannot be maintained.

9. Counsel for the appellant was at pains to point out, that the question as to what is the amount payable by the foreign buyer in an export transaction is a question of law and has been so considered by the Supreme Court in the decision reported in *Director, Enforcement Directorate, Ministry of Finance and Another Vs. K.O. Krishnaswamy*, .

10. We have indicated, that the original and appellate authorities chose one of the two possible alternatives about the full amount payable by the foreign buyer. Both the alternatives had materials to support them. The original and appellate authorities concurrently chose one out of the two. That unfortunately happened to be the one against the appellant. The question for our consideration is whether the choice of one of the two possible alternatives by the authorities concerned will disclose a question of law, which alone can be the subject matter of appeal u/s 54 of the 1973 Act.

11. We are of the opinion that a finding on what was the amount payable by the foreign buyer in respect of the goods is necessarily a question of fact. It is true, that if there was no evidence to support even a finding of fact, the sustainability of that finding may throw out a question of law. But, if there are some materials which would sustain either of the two possible conclusions on a point of fact, the choice of one rather than the other may not involve a question of law at all. It is significant, that in the present case, the original and appellate authorities came to the conclusions on this question of fact largely on the basis of the correspondence which emanated from the appellant himself and the explanation which the appellant had offered. Reference is also made by the adjudicating officer to the statement of the appellant and his manager on 4-6-1976 and 26-11-1979 respectively in relation to the transactions which are involved in the charges levelled against the appellant. We are of the opinion that no question of law is involved which requires appellate scrutiny by this court u/s 54 of the 1973 Act. We are, therefore, inclined to uphold the preliminary objection raised by the revenue.

12. Even on merits, we are inclined to agree with the concurrent findings entered by the original and appellate authorities against the appellant. Undoubtedly, there were lower and higher prices in respect of each one of the export transactions. The appellant had stated, that he had appointed M/s. GoverHorowitz and Blunt Ltd, London, as his commission agent, and his exports were exclusively through that firm. If the London firm was the commission agent, his sale of goods to customers would be those of the appellant. The price

advantages would, therefore, be due to the appellant. The commission agent will collect only the higher commission at the prescribed rate. The finding entered by the original and appellate authorities, that the explanation of the appellant that he realised only the lesser price, which was the price payable by the foreign buyer and that higher price was collected so as to enable him to obtain price advantage from his customers seems to us to have been rightly rejected. We are not persuaded to hold, that the appellate-board went wrong in its conclusion on this crucial aspect of the case. We did not hear counsel for the appellant to argue that if that finding of the appellate board was correct, the appellate board would not have sustained the penalty imposed against him.

13. We should also remember, that in dealing with economic offences, the court shall be concerned as much, if not more, of the purpose of the Foreign Exchange Regulation Act to conserve our foreign exchange resources and to provide an effective over-sight of transactions even indirectly affecting such resources. The Supreme Court observed in *Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others*, -

"I have to construe an Act which was enacted in the interest of the national economy. A deliberate large-scale contravention of its provisions would affect the interests of every man, woman and child in the country. Such an Act, I apprehend, should be construed so as to make it workable; it should, however, receive a fair construction, doing no violence to the language employed by the legislature. It was said that if two constructions are possible the one that is in favour of the subject should be accepted. It is not necessary to pronounce on this proposition for I have come to the conclusion that there is one true construction of Section 12(1). But I should not be taken to be assenting to this proposition in so far as it is applicable to an enactment like the Exchange Act, for no subject has a right to sabotage the national economy."

We are bound by the above observations. We feel that we are duty bound to accept that interpretation, which will subserve the conservation of foreign exchange resources.

We have, therefore, no hesitation in finding that on the merits as well the appeal deserves to be dismissed. We dismiss this appeal with costs.