

(1984) 09 MAD CK 0019

In the Madras High Court

Case No : Writ Petition No. 7061 of 1984

Ranjit Export Private Ltd.

APPELLANT

Vs

Collector of Customs, Madras

RESPONDENT

Date of Decision : 06-09-1984

Acts Referred:

Customs Act, 1962 — Section 110, 113, 135(1), 17, 2(18)
Export Control Order, 1977 — Section 3(4)
Penal Code, 1860 (IPC) — Section 511

Citation : (1985) 5 ECC 150 : (1985) 5 ECR 1618 : (1985) 21 ELT 353

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : S. Banerjee, for the Appellant;

Judgement

1. The petitioner is before this Court seeking for the issue of a writ of mandamus, directing the respondent to release the 39 bales of fabrics in respect of which orders of detention have been passed u/s 110 of the Customs Act, 1962 hereinafter referred to as the Act. Let us take the facts as delineated in the counter affidavit filed on behalf of the respondent for the purpose of finding out the justification or otherwise in law for the order of detention of the goods and the demand of the petitioner for their release. The petitioner filed four shipping bills, Nos. 00799 dated 21-5-1984, 00816 dated 22-5-1984, 00896 dated 22-5-1984 and 00859 dated 23-5-1984. The four shipping bills covered 41 bales of silk fabrics of various varieties, valued at Rs. 5,48,828.80 CIF. The shipping documents were prepared and the goods were shown to the Central Silk Board authorities for certifying as to the correctness of the description in the invoices. It was certified by them on the invoices that the goods had been

inspected in accordance with the regulations prescribed and the contents were as declared in the invoices. Out of the 41 bales, only 2 bales valued at Rs. 45,333.33 CIF pertaining to shipping bill No. 00859 dated 23-5-1984 were brought inside the Customs examination area. At the time of the inspection of the goods, it was found that the goods were dupion silk fabrics as against the description in the shipping bill, viz., "Handloom natural silk fabrics made of 100% mulberry raw silk filature reeled yarn other than dupion". The petitioner had declared in the shipping bills that the shipments were in pursuance of discharge of the obligations against export production and the petitioner claimed registration of the shipping bill in anticipation of the grant of advance licence and duty exemption entitlement certificate, for which it has already applied to Joint Chief Controller of Imports and Exports, Calcutta and obtained letter of permit from him. The petitioner further declared that the material used is of the same description qualities, technical characteristics and quantities as mentioned in the application for advance licence and duty exemption entitlement certificate, which was already in its stock and has been utilised in the manufacture of the resultant products and that the exempt imported materials for which it has applied for the advance licence and duty exemption entitlement certificate will be used to replenish the same. The inspection of the consignment covered under shipping bill No. 00859 revealed that the goods were not in accordance with the declaration in the shipping bill. All the four shipping bills filed for the clearance of 4 bales were assessed by the Customs authorities. However, 39 bales covered by shipping bill Nos. 00799, 00816 and 00896 were not tendered for export and instead, the petitioner, by its letter dated 26-5-1984, requested for cancellation of these three shipping bills on the ground that it has got a telephonic message from the buyer saying that the relevant orders were cancelled because of delay in execution. The Customs authorities suspected that the contents of the remaining 39 bales covered by the three shipping bills would not be in accordance with the declaration in the shipping bills and invoices. This prompted them to search the premises of the petitioner at Madras and it is claimed that certain incrimination documents were seized from there under mahazar. It was learnt that the 39 bales covered by the three shipping bills were already sent to the Central Station, Madras, for onward despatch to Calcutta and they were called back. The 39 bales were

detained u/s 110 of the Act with the reasonable belief that the said goods are liable to confiscation. One Ghosh, Export Executive of the petitioner

admitted that the two bales covered by shipping bill No. 00859 contained dupion silk fabrics contrary to the declaration and as regards the 39

bales covered by the other three shipping bills, Ghosh admitted that 36 bales contained ""Matka Silk fabrics"" as against the declaration ""100% spun

silk fabric"" 3 bales contained ""Raw Matka silk fabrics"" as against the declaration ""100% mulberry raw silk fabric"". The premises of the petitioner at

Calcutta were also searched by the Customs authorities at Calcutta and the documents and files have been taken therefrom. Representative

samples from the 39 bales detained at the premises of the petitioner at Madras were also sent for test and they were shown to the Central Silk

Board authorities. Investigation revealed that the two samples drawn from the consignments declared as ""100% spun silk fabrics"" were only ""hand

spun silk fabric (matka fabric)"" and one sample drawn from the consignments declared as ""Silk fabric containing 100% mulberry silk yarn (other

that dupion)"" was raw silk and hand spun matka fabric. The documents recovered from the petitioner's premises both at Calcutta and at Madras

were perused and incrimination details have noticed. It appears that in the past also the petitioner exported goods by misdeclaring the goods in the

shipping documents. The case is under investigation and further inquiries are in progress. The respondent says that this is a case of misdeclaration

and the goods are liable to confiscation u/s 113(d) of the Act read with section 3(4) of the Export (Control) Order, 1977.

2. The narration of the facts taken from the counter affidavit filed on behalf of the respondent shows that on the ground that the goods are liable to

confiscation u/s 113(d) of the Act, the justification for detention of the goods and declining to release them is being put forth by the respondent.

Hence, the attack by Mr. K. Alagiriswami, learned counsel for the petitioner, is that section 113(d) cannot at all stand attracted on the facts as

narrated by the respondent himself. Section 113(d) of the Act reads as follows :-

Confiscation of goods attempted to be improperly exported, etc. - The following export goods shall be liable to confiscation.

* * * *

(d) any goods attempted to be exported or brought within the limits of any

customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force".

On facts, the goods were not brought within the limits of any customs area for the purpose of being exported. It is being only claimed that the goods were attempted to be exported. Mr. K. Alagiriswami, learned counsel for the petitioner, put forth the contention that assuming that the alleged attempt of exportation of the goods would be contrary to any prohibition imposed by or under the Act or any other law for the time being in force, yet, the matter could not come within the legal concept "attempt to export" at all to attract section 113(d). Hence, this court need not dwell upon the aspect as to whether the attempt, if in fact there was such an attempt, in law would be contrary to any prohibition imposed by or under the Act or any other law for the time being in force.

3. Before I assess the facts of the case to find out as to whether what the petitioner did could fall within the legal concept of "attempt to export", so as to attract section 113(d) of the Act, which alone is being invoked by the respondent, I feel it obligatory to advert to the legal notion of "attempt".

The case law and the authorities on the subject, while interesting, may appear to be intriguing too. But ultimately the question is really one of fact,

depending upon the circumstances of each case. It is worthwhile to recapitulate the case law and the authorities on the subject which expose how

nebulous the proposition is and how difficult it is to lay down a hard and fast rule to govern uniformly all situations. In *Queen Empress v. Ramakka*

ILR (1884) Mad. 5, where a women went to a well to commit suicide, it was held that she was not guilty under the section as she might have

changed her mind and she was caught before she did anything which might be regarded as the commencement of the offence of which she was

convicted.

4. In the matter of petition of R. Maccree ILR [(1893) All. 173], Knox, J. observed as follows :-

It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an

offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can

easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon his mind may be several in point of number, and yet the first act after preparations completed will, if criminal in itself, be beyond all doubt, equally an attempt with then inety and ninth act in the series.

Again the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed. The attempt to defraud a widow of valuable security commenced by an act of criminal intimidation committed in such attempt and towards the fraud does not cease to be an attempt because the perpetrator repents and abstains from completing the attempt.

The question whether the act is an act of preparation or an act in the attempt and towards commission is a fact to be determined upon the evidence. It is in most cases a question for the jury to distinguish between an act before attempt has begun, an act after attempt begun, and towards commission of the offence attempted, and an act independent of the attempt altogether"".

Blair, J., concurring with Knox, J., observed as follows :-

It seems to me that section uses the word "attempt" in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the

section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does may act, shall be punishable. The term "any act" excludes the notion that the final act short of actual commission is alone punishable, and the notion that any of the other acts would be without the ranges of this section is probably derived from the ruling in the English cases cited.....

* * * *

The difficulty with s. 511 might easily have been removed by saying that where in such an attempt using the word in the larger sense, any person

does any act towards the commission of an offence he shall be held to have committed an "attempt" within the meaning of this section. That I take

to be the real meaning and drift of the section, differentiating in a marked manner the definition of "attempt" in the definition of "attempt" in the

Indian Penal Code and the accepted English doctrine". - Pages 181-182-183

5. In *Queen Empress v. Luzman Narayan Joshi* (1899) 2 Bom. LR 286, Sir Lawrence Jenkins, C.J., defined "attempt" as "an intentional

preparatory action which failed in object through circumstances independent of the person who seeks its accomplishment. In *Queen Empress v.*

Vinayak Narayan Bhartye (1899) 2 Bom. LR 304, the same learned judge defined "attempt" as "when a man does an intentional act with a view to

attain a certain end, and fails in his object throughout some circumstances independent of his own will".

6. In *Emperor v. Ganesh Balwant Modak* ILR (1910) 34 Bom. 378, a Division Bench of the High Court at Bombay, consisting of Chandavarkar

and Heaton, JJ., held as follows :-

Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act,

something tangible and ostensible or which the law can take hold as an act showing progress towards the actual commission of the offence. It does

not matter that the progress was interrupted." - Page 378

7. In *Jaimal v. Emperor* (Air 1926 Lahore 147), Shadi Lal, C.J., opined as follows :-

....When a man does an intentional act with a view to attain a certain end and fails in his object through circumstances independent of his own will,

then that man has attempted to effect the object at which he aimed"". - Page 147

In Rama Mat Ali v. Emperor AIR 1927 Lah 634. Tekchand, J., relied on the dictum of the Bench of the High Court at Bombay in Ganesh

Balwant Modajk v. Emperor ILR (1910) 34 Bom. 378, and, on the facts upheld the conviction for attempt to cheat.

8. In Narayanaswamy Pillai v. Emperor (1932) MWN 545, the accused was held not to be guilty u/s 511 of the Indian Penal Code, because

though he intended to transport opium into French territory, he was frustrated before he crossed the border.

9. In Asgarali Pradhantha v. Emperor ILR (1934) Cal. 54, a Bench of the High Court at Calcutta, consisting of Lord-Williams and Mcnair, JJ.,

chose to sum up the law in India on the aspect of ""attempt"" in the following terms :-

So far as the law in India is concerned, it is beyond dispute that there are four stages in every crime, the intention to commit, the preparation to

commit, the attempt to commit and, if the third stage is successful, the commission itself. Intention alone or intention followed by preparation are

not sufficient to constitute an attempt. But intention followed by preparation followed by any "act done towards the commission of the offence" is

sufficient. "Act done towards the commission of the offence" are the vital words in this connection"". - Page 54

10. In Veerayya v. Emperor (1935) MWN 651, Burn J., held that the accused, who was found to be making some preliminary diggings, which

were necessary to remove the earth so that he would get at a stone slab fixed to a Buddhist stupa, was not guilty u/s 511, Indian Penal Code, and

the learned Judge further held that his act amounted to a preparation and not to an attempt to commit theft.

11. In Muniratnam Reddi, In re : (1955) AWR 53, a Bench of the High Court of Judicature of Andhra at Guntur, consisting of Subba Rao, C.J.,

as he then was, and Satyanarayana, J., while defining ""attempt to commit murder"" pointed out as follows :-

The crucial words in section 511, Indian Penal Code, are that the accused should have done the act, "towards the commission of the offence."

The two illustrations appended to the section bring out the intention of the Legislature.

There are decided cases which recognise the existence of three stages in the commission of crime (1) intention to commit, (2) preparation to commit, and (3) attempt to commit. If the attempt results in the actual commission of the offence, the crime is complete. But the Indian Penal Code makes the attempt also an offence, if the accused does any act towards the commission of the offence, the distinction between preparation and attempt may be clear in some cases, but in most of the cases the dividing line is very thin. Nonetheless it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but he was frustrated only by extraneous circumstances he would be guilty of an attempt to commit the offence of murder. The question is really one of fact depending upon the circumstances of each case." - Page 53

12. In *State of U.P. Vs. Ram Charan*, a Bench of the High Court at Allahabad, consisting of Takru and Sharma, JJ., after extracting the following passage occurring in Russel in his well-known Treatise on Crimes, 8th Edition, Volume 1, pages 145 and 148, held that the passage reflects the subject of the Indian law also.

The question in each case is whether the acts relied on constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short of completion by the intervention of causes outside the volition of the accused, or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind.

13. In *State Vs. Parasmal and Others*, Tyagi, J., defined "attempt" in the following terms :

.... When a person intends to commit a particular offence and then he conducts himself in such a manner which clearly indicates his desire to translate that intention into action, and in pursuance of such an intention if he does something which may help him to accomplish that desire, then it can safely be held that he committed an offence of attempt to commit a particular offence. It is not necessary that the act which falls under the definition of an attempt should in all circumstances be a penultimate act towards

the commission of that offence. That act may fall at any stage during the series of acts which go to constitute an offence u/s 511 of the Indian Penal Code." - Page 67

14. For the purpose of case law at the level of the High Court, I think, we can be content with advertence to the above pronouncements of the

various High Courts. But, we do have pronouncements emanating from the highest court in the land on the question. In *Abhayanand Mishra Vs.*

The State of Bihar, , two learned judges of Supreme Court approved the decision and the reasons therefore in the matter of the petition of R.

Maccree ILR (1893) All. 173 and the views of the Supreme Court were summarised in paragraph 26 of the Judgment as follows :

We may summarise our views about the construction of S. 511, I.P.C., thus : A person commits the offence of attempt to commit a particular

offence. When (i) he intends to commit that particular offence; and (ii) he, having made preparations and with intention to commit the offence, does

an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the

course of committing that offence". - Page 1703

15. In *Malkiat Singh Vs. The State of Punjab*, , three learned judges of the Supreme Court dealt with a case where paddy, booked by a firm in

Punjab to consignee to Delhi, was carried in a lorry driven by the first appellant and the lorry was stopped by the police at a place which was 32

miles from Delhi, that is, inside the State of Punjab (the Punjab Delhi boundary was 18 miles from Delhi), and the appellants, along with others,

were prosecuted and convicted for an offence u/s 7 of the Essential Commodities Act, and the Supreme Court, while holding that no offence has

been committed by the appellant nor was there an attempt to commit an offence analysed the question and expressed its opinion in the following

terms :

... It was merely a preparation on the part of the appellants and as a matter of law a preparation for committing an offence is different from

attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the

other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person

may be convicted of an attempt to commit a crime, he must be shown, first, to have had an intention to commit the offence, and secondly, to have

done an act which constitutes the actus reus of a criminal attempt. The sufficiency of the actus reus is a question of law which led to difficulty

because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently

proximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however, clearly

it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the

stack with the matches in his pocket, but, if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being

watched, he may be guilty of an attempt to burn it. Sir James Stephen, in his digest of Criminal Law, art. 50 defines an attempt as follows :-

An act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not

interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case. The

test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if

the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present

case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their

mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey. Section 8 of the

Essential Commodities Act states that "any person who attempts to contravene, or abets a contravention of, any order made u/s 3 shall be deemed

to have contravened that order". But there is no provision in the Act which makes a preparation to commit an offence punishable. It follows

therefore that the appellants should not have been convicted under S. 7 of the Essential Commodities Act". - Pages 666-667

16. In Sudhir Kumar Mukherjee v. State of West Bengal (1974) II SCJ 2, two learned Judges of the Supreme Court, referred to its earlier

pronouncement in Abhayanand v. State of Bihar AIR SC 1698, but however, on facts held that what the accused did in that case was a definite

step towards the commission of cheating, though it was not the penultimate step.

17. In *State of Maharashtra Vs. Mohd. Yakub and Others*, , the Supreme Court dealt with a case of an attempt of evasion of duty within the

meaning of section 135(1)(a) of the Act. That was a case of an appeal by the State of Maharashtra against an order of acquittal of the respondents

by the High Court. The facts run as follows :-

At about midnight a jeep, driven by respondent 1, and a truck stopped near a bridge at a creek and while the accused started removing some

bundles from the truck and placing them aside on the ground, the customs officers, who were following them on the basis of definite information

rushed to the spot and accosted the persons present there. At the same time, the sound of the engine of a mechanised seacraft from the side of the

creek was heard by the officers. Thereafter, two residents of the area were called for and in their presence silver ingots were recovered from the

two vehicles. Some ingots were also found near the footpath leading to the creek. From the personal search of respondent 1, a pistol, a knife and

currency notes were found. On questioning he gave false name and address. It was found that the accused were not dealers in silver. The trial

court convicted the accused u/s 135(1)(a) read with section 135(2) of the Customs Act for attempting to smuggle out of India silver ingots worth

about Rs. 8 lakhs in violation of the Foreign Exchange Regulation Act, the Imports and Exports (Control) Act and the Customs Act. But the

Additional Sessions Judges acquitted them on the ground that the facts proved by the prosecution fell short of establishing that the accused had

"attempted" to export silver in contravention of the law. The High Court upheld the acquittal.

Sarkaria, J. defined as to what would constitute an "attempt" in paragraph 13 of the judgment as follows :-

Well then, what is an "attempt" ? Kenny in his *Outlines of Criminal Law* defined "attempt" to commit a crime as the "last proximate act which a

person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control". This

definition is too narrow. What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular

case. "Attempt" defies a precise and exact definition. Broadly speaking, all

crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be "criminal" need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. As pointed out in *Abhayanand Mishra Vs. The State of Bihar*, there is a distinction between "preparation" and "attempt". Attempt begins where preparation ends. In sum, a person commits the offence of "attempt to commit a particular offence" when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. Chinnappa Reddy, J., concurring with Sarkaria, J., stated the result of search and research on the question in paragraph 32 of the judgment as follows :-

"Let me now state the result of the search and research. In order to constitute "an attempt", first, there must be an intention to commit a particular offence, second some act must have been done which would, necessarily have to be done towards the commission of the offence, and third, such act must be "proximate" to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention, but, that it must be, that is, it must be indicative or suggestive of the intention. For instance, in the instant case, had the truck been stopped and searched at the very commencement of the journey or even at Shirsat Naka, the discovery of silver ingots in the truck might at the worst lead to the inference that the accused had prepared or were

preparing for the commission of the offence. It could be said that the accused were transporting or attempting to transport silver somewhere but it would not necessarily suggest or indicate that the intention was to export silver. The fact that the truck was driven up to a lonely creek from where the silver could be transferred into a sea/faring vessel was suggestive or indicative though not conclusive, that the accused wanted to export the silver. It might have been open to the accused to plead that the silver was not to be exported but only to be transported in the course of inter-coastal trade. But, the circumstance that all this was done in a clandestine fashion, at dead of night, revealed, with reasonable certainty, the intention of the accused that the silver was to be exported."". - pages

66-67

18. In Russel on Crime, 12th Edition, Volume I, the elements of liability in attempt were set out as follows :-

The courts, and the writers, have never purported to find themselves in any special difficulty to define the means *rea* of attempt. What they have found difficult is to express with precision a test whereby to decide what constitutes the physical element, the *actus reus*, of attempt.

In all crimes it is the law which defines the *actus reus*; therefore it is important to note that in the crime of attempt the question whether the accused

persons conduct did reach a point which constituted an *actus reus* is one of law for the judge.

* * * *

Many suggested definitions of the *actus reus* of attempt as are to be found in the authorities are so vague as to be useless in practice. The one

most commonly cited is contained in the judgment of Parke B. in *R. v. Eagleton* (1855) *dear* 515;

"The mere intention to commit a misdemeanour is not criminal. Some act is required and we do not think that all acts towards committing a

misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but

acts immediately connected with it are". When this portion of the judgment is carefully examined, it will be seen that Baron Parke was not setting

out a definition of attempt. He was merely laying down certain necessary characteristics of the crime;

* * * *

The position can perhaps be summed up thus. So soon as attempt emerged clearly as a specific crime at common law the courts were faced with

the task of defining it, and this was not achieved quickly. Parke B. was concerned to make one point plain and this was that there must be an actus

reus, and it must consist in some step taken to achieve the desired end. The whole series of acts from the first done after the purpose was first

conceived, along the line until the ultimate end should be achieved, was available for judicial selection. The learned Baron seems to have favoured

the last possible act before the achievement rejecting all earlier steps. Notwithstanding the numerous instances in which the judges since that time

have cited R. v. Eagleton with approval it is quite clear that they have not followed this narrow doctrine in all cases." [pages 177 to 180]

19. In cases on Criminal law by Kenny, the cases of Regina v. Cheeseman. Crown case Reserved 1862, stands embodied and therein we get the

judgment of Blackburn, J., agreeing with Erle, C.J., on the question of attempt to commit larceny, and the learned Judge observed as follows :-

.... There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But, if the actual transaction has

commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime...." - Page 87

20. In Halsbury's Laws of England Halisham Edition, Volume 9, at page 41 "attempt" has been defined in the following terms :-

Any overt act immediately connected with the commission of an offence, and forming part of a series of acts which, if not interrupted or frustrated,

would end in the commission of the actual offence (assuming the commission of that offence to be possible), is if done with a guilty intent, an

attempt to commit the offence.

21. The specific case of the respondent is that what the petitioner did would come within the mischief of section 113(d) of the Act. The question as

to whether the attempt to export, if it falls within the legal concept of "attempt" would be contrary to any prohibition imposed by or under the Act

or any other law for the time being in force, is not being adverted to by me because learned counsel for the petitioner built his argument on the

basis that assuming that there could be a contravention of any prohibition

imposed by or under the Act or any other law for the time being in force, yet, the acts imputed to the petitioner cannot fall within the legal concept of "attempt". Section 2(18) of the Act defines "export" as follows :-

"export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India;"

The constitute export, primarily there must be taking out of India. Such taking out must be to a place outside India and that could be a matter of

inferences and deductions from the facts disclosed. The essential feature of the concept of export is the taking out of India. The Act was enacted to

consolidate and amend the law relating to Customs. Chapter V relates to levy of and exemption from Customs duty. Section 17 found in Chapter

V speaks about assessment of duty and it reads as follows :

17. Assessment of duty. - (1) After an importer has entered any imported goods u/s 46 or an exporter has entered any export goods u/s 50, the

imported goods or the export goods as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and

tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in Section 85, be assessed.

(3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce

any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods,

as the case may be, can be ascertained, and to furnish any information required for such ascertainment which it is in his power to produce or

furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be

permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents

produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise

that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the

goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

Chapter VII relates to clearance of imported goods and export goods. Section 50 is found under the sub-heading ""Clearance of Export goods"" in

Chapter VII. Section 50 deals with entry of goods for exportation and it read as follows :-

50. Entry of goods for exportation. - (1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of

goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to

the truth of its contents.

Section 51 deals with clearance of goods for exportation and it stands extracted as follows :-

51. Clearance of goods for exportation. - Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the

exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an

order permitting clearance and loading of the goods for exportation.

22. The stand of the Respondent, as expressed through his learned counsel, Mr. R. Thyagarajan, Senior Central Government Standing Counsel, is

that the stage upto section 50 in respect of the goods covered by the three shipping bills, Nos. 00799, 00816 and 00896 with which alone we are

concerned in the present case, stood completed and what all remained was for the petitioner to obtain an order from the officer, permitting

clearance and loading of the goods for exportation, and then to actually load the goods for exportation. Learned counsel for the respondent has

chose to delineate in a separate sheet furnished to this Court the formalities completed up to section 50 of the Act in respect of the three shipping

bills and the said details stand extracted as follows :

I. Shipping Bill No. 896, dated 23-5-1984

(3 bales)

Shipping Bill assessed on 24-5-1984. Description of goods - 3 bales - Handloom Degummed Silk Fabrics (100% Mulberry Raw Silk) (Filature

Reeled) Yarn used in warp and weft other than Dupion). Value - Rs. 62,630.20

Documents presented for assessment -

- (a) Shipping Bill in terms of Section 50(1) of Customs Act, 1962.
- (b) Declaration in terms of Section 50(2) of Custom Act, 1962 (Pasted on the Shipping Bill).
- (c) Declaration for claiming under Duty Exemption Entitlement Certificate Scheme.
- (d) Invoice No. MSS/263, dated 21-5-1984 for US Dollars 5793.29 C.I.F.
- (e) Packing List.
- (f) G.R. Form No. G.A. 071942.
- (g) Cotton Textile Export Promotion Council's Endorsement on the Shipping Bill.
- (h) Certificate dated 22-5-1984, on the Invoice by Central Silk Board.

II. Shipping Bill No. 816 dated 22-5-1984.

Shipping Bill assessed on 22-5-1984. Description of goods - 18 bales - Indian Handloom Degummed Silk Fabrics (100% Spun Silk Fibres).

Documents presented for assessment -

- (a) Shipping Bill in terms of Section 50(1) of Customs Act, 1962.
- (b) Declaration in terms of Section 50(2) of Customs Act, 1962 (Pasted on the Shipping Bill).
- (c) Declaration for claiming under Duty Exemption Entitlement Certificate Scheme.
- (d) Invoice No. MSS/261, dated 18-5-1984 for US Dollars 22,503.06.
- (e) Packing List.
- (f) G.R. Form No. G.A. 071944.
- (g) Cotton Textile Export Promotion Council's Endorsement on the Shipping Bill.
- (h) Certificate dated 19-5-1984 on the Invoice by the Central Silk Board.

III. Shipping Bill No. 799, dated 21-5-1984.

Shipping Bill assessed on 22-5-1984. Description of Goods - 18 bales - Handloom Degummed Silk Fabrics (100% Spun Silk Fabrics) Value -

Rs. 1,97,570.30.

Documents presented for assessment -

- (a) Shipping Bill in terms of Section 50(1) of Customs Act, 1962.

(b) Declaration in terms of Section 50(2) of Customs Act, 1962 (Pasted on the Shipping Bill).

(c) Declaration for claiming under Duty Exemption Entitlement Certificate Scheme.

(d) Invoice No. MSS/260, dated 17-5-1984 for US Dollars 18,275.25 C.I.F.

(e) Packing List.

(f) G.R. Form No. G.A. 071945.

(g) Cotton Textile Export Promotion Council's Endorsement on the Shipping Bill.

(h) Certificate dated 22-5-1984 on the Invoice by Central Silk Board.

23. The satisfaction of the concerned provisions of the Act and the completion of the formalities therefore do have a place under the Act. Even

after the satisfaction on the said provisions and the completion of the formalities under the Act, the goods may not be taken out of India or even

attempted to be taken out of India. If once we understand the essential ingredient of export as denoting and connoting the taking out of India, and

attempt to export must also impinge upon this essential ingredient of taking out of India.

Movement need not necessarily be at a place outside the territory of India. The movement could as well be within the territory of India. But, there

should be movement of the goods. Otherwise, the very concept of taking out will have no meaning. I asked Mr. R. Thyagarajan, learned counsel

for the respondent, as to whether he would subscribe to a view that only by satisfying the formalities and going through the provisions under the

Act there could be an exportation of the goods. Learned counsel rightly gave the answer in the negative. Obviously, there could be export, in the

sense taking of the goods outside India, even without going through the formalities and satisfying the provisions of the Act and still, and attempt in

such taking out of the goods would come within the mischief of contravention and prohibitions imposed by or under the Act or any other law for

the time being in force and section 113(d) would be attracted. Hence, it is not possible to test as to whether what happened and what a party did

in a particular case would constitute an attempt to export within the mischief of section 113(d) of the Act by adverting only to the satisfaction of the

formalities under the Act. There could be an attempt to export even without going through the formalities under the Act and satisfying the

provisions thereof. Section 113(d) has got two limbs. The first limb speaks about goods attempted to be exported and the second limb speaks

about goods being brought within the limits of any customs area for the purpose of being exported. As stated above, the second limb has not come

into play because, admittedly, the goods were not brought within the limits of the Customs area for the purpose of being exported, contrary to the

prohibitions. If the goods have come with such an intention within the limits of the Customs area, then, the second limb could definitely be attracted.

But, the first limb covers a larger area. Even without being brought within the limits of the Customs area, there could be an attempt to export the

goods in contravention of the prohibitions. In my view, to attract the first limb of section 113(d), the process of movement of the goods for the

purpose of taking them out of India must have begun. There is no need for me to advert to the question as to whether in the completion of the

formalities or the satisfying with the other provisions of the Act, any violations thereof could be detected and penalised. I am testing the case only

on the specific case expressed by the respondent that section 113(d) of the Act alone is attracted, in that the petitioner attempted to export the

goods. While the satisfaction of the provisions and the completion of the formalities under the Act have got a place, they, by themselves, without

there being any overt act towards the movement of the goods for the purpose of taking them out of India, would not amount to attempt to export

the goods.

24. In the language of the Supreme Court, attempt defies a precise and exact definition. Section 511 of the Indian Penal Code punishes "attempt",

but it does not define "attempt". All said, the question is really one of fact depending upon the peculiar features and circumstances of each case and

the provisions of law, the attempted breach of which is complained of. In the context of the present case, we cannot lose sight of the definition of

"export" found in section 2(18) of the Act. The essential ingredient of export is the taking out of India. The acts complained of must fall in the

course of movement of the goods with an intention to take them out of India. All other acts done anterior to this step, namely, movement would

only partake the character of preparations. If the petitioner has done any act towards the exportation, namely, taking of the goods out of India and

if the act or acts could be fitted in the course of such movement of the goods, or, in other words, the act could fall in the course of progress towards the actual physical taking of the goods out of India, the mischief of section 113(d) would be attracted. There should be a direct physical movement towards the taking of the goods out of India after all the preparations are made and which preparations may also fall within the satisfaction of the provisions and completion of the formalities under the Act. There must be an act or acts done towards the actual physical movement of the goods with an intention to take them out of India. That alone, in my view, would constitute an attempt to export the goods, that too depending on the facts and circumstances of the case. As stated above, I am not expressing any opinion with reference to the violation of any of the provisions of the Act which would involve penal consequences, since such a stand is not expressed before me by the respondent. The essential feature to be taken note of for assessing this question is as to whether the act of the person did reach a point which constituted an actus reus. This question is one of law depending upon the facts and circumstances of the case to be decided by the Court. If there is no taking of the goods out of India, there is no exportation. Hence, "attempt" must also have relevance to the taking of the goods out of India. We are not concerned with the actual completion of the exportation. We are concerned only with the attempt. But, if no feature which would constitute actus reus or physical element towards taking of the goods out of India is made out on the facts and circumstances of the case, it will be far fetched to invoke the first limb of section 113(d) of the Act. That is the point on facts in the present case. The definition of "Export" as found in section 2(18) and the concept of "attempt" as I could evolve with reference to the export, as defined in the Act, being what they are, I am of the view that the respondent is not in order to detain the goods on the ground that section 113(d) of the Act is attracted and the goods are liable to confiscation on that ground.

25. In this connection, I must also take note of the fact that the petitioner stopped of its own volition with the completion of the formalities up to and inclusive of section 50 of the Act. Thereafter the petitioner wrote a letter on 26-5-1984 requesting for cancellation of the cancellation of the

concerned three shipping bills. It is true, if the factual features have made out that what the petitioner did could fall within the legal concept of

attempt to export", there will be difficulty in accepting this letter of withdrawal or abstention as watering down the implications of attempt as such.

But, I have found that what the petitioner did could not fall within the legal concept of "attempt to export" and the satisfaction of the provisions and

the completion of the formalities up to and inclusive of section 50 of the Act, have got a place under the Act and they could only partake the

character of preparations with regard to "attempt to export", which could be defined only taking note of the definition of "export" found in section

2(18) of the Act. The discussion which has preceded obliges me to countenance the case of the petitioner and accordingly, the writ petition is

allowed. I make no orders as to costs.