
(1979) 03 MAD CK 0004
In the Madras High Court

Samuel and Company		APPELLANT
	Vs	
Foreign Exchange Regulation Appellate Board and Another		RESPONDENT

Date of Decision : 05-03-1979

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 12(2), 54

Citation : (1980) 1 MLJ 186

Hon'ble Judges : G. Ramanujam, J

Bench : Division Bench

Judgement

G. Ramanujam, J.—This appeal has been filed u/s 54 of the Foreign Exchange Regulation Act, 1947, hereinafter referred to as the Act

against the decision of the Foreign Exchange Regulation Appellate Board in appeal No. 183 of 1968 on its file.

2. The appellant herein, a firm carrying on business in textiles, effected certain shipments of handlooms cotton sarongs to Singapore during the year

1961-62 for an invoice price of Rs. 1,98,230. However, it realised only a sum of Rs. 20,631.69 leaving a balance of Rs. 1,77,589.31. To a notice

issued on 19th August, 1965 by the Director of Enforcement, the firm admitted that the goods were sent to their Branch office at Singapore, that

the said branch at Singapore was sold on 1st July, 1963 to Ambika Palayakat Company at No. 44, Coral Merchant Street, Madras-1 as a going

concern for a consideration of Rs. 1,55,000, that this sale was duly intimated to the Reserve Bank of India and that the said sum of Rs. 1,55,000

has been adjusted towards certain earlier outstanding export proceeds due from its Singapore branch and that by virtue of this appropriation, it had

satisfied the provisions of Section 12(2) of the Act. On the ground that the firm has not realised part of the export sale proceeds, proceedings for

violation of Section 12(2) of the Act were intimated against the firm. Those proceedings were resisted by the firm contending that it has realised some further amounts also and the balance of its bills to the tune of Rs. 1,11,970-55 could not be collected by the Singapore branch which has been sold as a going concern. After giving an oral hearing to the firm's partners and their counsel, the Director of Enforcement found that out of the total invoice value of Rs. 1,98,230 a sum of Rs. 1,11,970-55 alone remained to be realised. He however did not accept the case put forward by the firm that the firm had written off the same as bad debt, having regard to the fact that apart from the agreement dated 1st July, 1963 between the Ambika Palayakat Company, the purchaser of the Singapore branch as a going concern, there have been the other Tamil agreements dated 29th June, 1963 and 17th June, 1963 and unless those agreements are produced it is not possible to agree with the firm's explanation that at the time of the sale of the Singapore branch the unrealised export sale proceeds were treated as bad debt and written off. He felt that the Tamil agreements which have not been produced in spite of direction to do so by the firm might have dealt with part of the outstanding bills which are realisable from third parties towards the sale of the goods exported. He also found that even if the Singapore branch had been sold as a going concern as it is likely to result in the non-repatriation of the sale proceeds permission should have been obtained from the Reserve Bank of India as contemplated by Section 12(2) of the Act. In this view he held that by non-receipt of the export proceeds the firm had contravened the provisions of Section 12(2) of the Act read with the relevant notification dated 22nd April, 1952. He therefore levied a penalty of Rs. 56,000 u/s 23(1)(a) of the Act by his order dated 30th October, 1968.

3. The firm filed an appeal to the Foreign Exchange Regulation Appellate Board. The Board, by its order dated 1st January, 1975 upheld the finding of the Director of Enforcement that even accepting the defence put forward by the firm in its entirety there has been a contravention of Section 12(2) of the Act. The Board however reduced the penalty to Rs. 25,000.

4. In this appeal filed by the firm against the decision of the Appellate Board, the non-realisation of a sum of Rs. 1,11,907.35 has not been disputed. However, it is contended that in the circumstances of the case there is

no contravention of Section 12(2) of the Act as there is no requisite mens rea and there is no intentional non-repatriation which alone will come within the scope of Section 12(2) of the Act. The question is whether on the facts and circumstances of the case Section 12(2) has been contravened.

5. Admittedly the appellant exported goods to the value of Rs. 1,98, 230 and out of the said sale proceeds Rs. 1,11,907.35 remains to be realised. The explanation given by the appellant both before the Director of Enforcement as well as before the Appellate Board is that though the goods have been sold by its branch at Singapore, that branch at Singapore has been sold as a going concern for a sum of Rs. 1,55,000 with all its assets and liabilities and therefore there was no possibility of realising any further export sale proceeds. However, the Director has in fact found that the agreement dated 1st July, 1963 for sale of the Singapore branch as a going concern does not seem to include the outstandings due to the branch from its various purchasers of the goods. It is because of this position the firm has put forward a case that the amounts due from third parties by way of sale proceeds of the goods exported have been treated as bad debts and written off. But this plea was not accepted. It is in these circumstances we have to consider the question as to whether there is a contravention of Section 12(2) of the Act.

Section 12(2) is as follows:

Where any export of goods has been made to which a notification under subsection (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 anything or take or refrain from taking any action which has the effect of securing 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...

Under the said section as it stood before 1964 it was necessary for the department to establish the existence of the necessary intent. Though the

Director of Enforcement, the original authority, has not given any specific finding as to the existence of the necessary intent, the Appellate Board

found that there was the requisite intent not to secure the full export value. According to the Appellate Board by the very sale of its branch at

Singapore the appellant made over its rights to realise the outstanding dues to the purchaser thus depriving itself of the right to collect the dues, and

that this action of the firm in transferring the business with the outstanding dues necessarily amounted to doing an act with the intent not to repatriate

the full amount payable by the foreign buyer of the goods exported, that even if business necessity compelled it to sell its branch at Singapore it

should have obtained the permission of the Reserve Bank as required u/s 12(2) and therefore, even accepting the defence, the contravention of

Section 12(2) is clearly established.

6. The sale of the firm's branch at Singapore has resulted in certain foreign exchange which it had a right to receive from the foreign buyers ceasing

to be receivable. By its conduct, it has put itself in such a position that it could not realise the foreign exchange. Section 12(2) says for doing or

refraining from doing anything which has got the effect of non-realisation of the foreign exchange the permission of the Reserve Bank has to be

obtained in the absence of which it will be an offence under that section. In this case no reason has been attempted by the firm as to why the

Reserve Bank's permission could not be obtained before the sale of its branch at Singapore to Ambika Palayakat Company which has resulted in

the. non-realisation of the foreign exchange receivable from the foreign buyers. The firm in this case by doing a positive act such as sale of its

branch has put itself in a position that it cannot realise the export sale proceeds due from the foreign buyers. Even at the time of the sale of the

branch as a going concern to Ambika Palayakat Company, the firm was aware of its obligations. To get over that obligation it should have

obtained the permission of the Reserve Bank after satisfying the Reserve Bank about its bona fides. In this case the appellant merely says that

because of business exigency it had to sell the branch and the result of the sale of the branch was that it was not in a position to realise the full

export value. The learned Counsel for the appellant says that there is no intention on the part of firm not to repatriate the amount. Even assuming

that the firm had no specific intention not to repatriate the export value, its conduct in selling the branch without getting the permission of the

Reserve Bank and thus depriving itself of the right to receive the balance value of the exported goods will amount to contravention of Section

12(2). The learned Counsel for the appellant refers to the decision in *State of Maharashtra Vs. Hans George*, 35 Com. cases 557, in support of

his contention that unless there is the necessary mens rea there cannot be any contravention of Section 12(2). In that case the Supreme Court

pointed out:

It is well-settled principle of common law that mens rea is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element,

but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in

conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. To put it

differently, there is a presumption that mens rea is an essential ingredient of a statutory offence; but this may be rebutted by express words of the

statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate

grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence...

... Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a

statute would otherwise be defeated and its execution enables those put under strict liability by their act or omission to assist the promotion of the

law. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

In *Hindustan Steel Ltd. Vs. State of Orissa*, it has been pointed out by the Supreme Court that an order imposing penalty for failure to carry out a

statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted

deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation and that penalty

will not also be imposed merely because it is lawful to do so and that whether penalty should be imposed for failure to perform a statutory

obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.

7. There cannot be any dispute that proceedings by way of penalty u/s 23 of the Act for violation of Section 12 is of a quasi-criminal nature and

therefore it is necessary to establish the requisite mens rea or positive intent to contravene Section 12(2). But in the circumstances of this case, we

are not inclined to hold that the facts disclose that the appellant being aware of the consequences of his obligation u/s 12(2) to repatriate the entire

export sale proceeds failed to do so by selling its branch at Singapore for a consideration which does not cover fully the export sale proceeds and

thus put itself in a position in which it is unable to fulfil the said obligation. It may be that its business exigencies compelled it to transfer the branch

as a going concern with all its assets and liabilities and its motive in entering into that transaction was not to contravene Section 12(2). Even

assuming that the appellant's business exigencies compelled it to part with its branch as a going concern and as a result of which given up its rights

to collect the export sale proceeds from the various purchasers, the same could have been done without contravening the provisions of Section

12(2) by getting the requisite permission from the Reserve Bank. As already stated, Section 12(2) proceeds on the basis that for doing or for

refraining from doing anything which has got the result of non-repatriation of the full export sale proceeds with the permission of the Reserve Bank

will not be a contravention of that section. In this case, though the appellant has come forward with some explanation as to why it transferred its

branch at Singapore along with all its outstandings, it has not attempted to give any explanation as to why the Reserve Bank was not approached

for its permission as contemplated in Section 12(2).

8. The learned Counsel for the appellant would however say that the non-obtaining of permission of the Reserve Bank is mere technicality and

such technical breach of the provision need not call for an imposition of penalty u/s 12(2). We are not inclined to agree with the learned Counsel

that it is only technical breach of Section 12(2). The requirement of getting permission from the Reserve Bank before doing or refraining from doing

anything as a result of which the export sale proceeds could not be repatriated is not a mere idle formality. That requirement has been introduced in

the section obviously with a view to have a check and verification of the claim made by the person seeking the permission. Once a permission of the Reserve Bank is sought for as contemplated by Section 12(2) the Reserve Bank will take up the follow-up measures to find out whether doing or refraining from doing any act by the person who seeks permission is genuine and bona fide or whether it is intended only to get over the obligations he had undertaken by giving the necessary declaration in the G.R.I. forms. But by not applying for the permission of the Reserve Bank the appellant has made it impossible for verification of facts asserted by it then and there. As earlier stated, the Director of Enforcement has observed that the appellant has not produced the two Tamil agreements entered into by the appellant and the purchaser Ambika Palayakat Company apart from the agreement dated 1st July, 1963, which has been filed and that the Tamil agreements had not been produced by the appellant even though it was directed to produce the same. The Director is of the opinion that those Tamil agreements might have provided for the realisation of the amounts due from the various purchasers of the goods exported, by the appellant. The agreement dated 1st July, 1963 relied on by the appellant though shows that all the outstandings are taken over by the transferee, the sale consideration has been adjusted only towards some prior outstandings and not the outstandings arising out of the sale of the exported goods. In these circumstances, the appellant not having approached the Reserve Bank of India for permission and no explanation having been given as to why permission could not be obtained, the appellant should be taken to have contravened Section 12(2). It has been held in a series of decisions that a person knowing full well the legal consequences of any of his acts or omissions does or refrains from doing that thing, his action or omission should be taken to be wilful unless it is shown that the act or omission is due to a mistake or inadvertence.

9. In this view of the matter, we are inclined to agree with the Appellate Board that the appellant's conduct in not obtaining the requisite permission of the Reserve Bank taken along with the factum of non repatriation will clearly amount to a contravention of Section 12(2). We cannot, therefore, interfere with the ultimate order. The appeal therefore fails and is dismissed. There will be no order as to costs.