
(1972) 07 CAL CK 0029
In the Calcutta High Court
Case No : A.F.O.O. No. 59 of 1971

The Jay Engineering Works Ltd.

APPELLANT

Vs

M.G. Wagh and Others

RESPONDENT

Date of Decision : 14-07-1972

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 12(1), 12(2)

Citation : AIR 1973 Cal 33 : 77 CWN 222

Hon'ble Judges : P.B. Mukharji, C.J.;B.C. Mitra, J

Bench : Division Bench

Advocate : B. Sen, M.K. Banerjee and G.C. Law, for the Appellant; S. Roy Choudhury and R.N. Pyne, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : M.G. Wagh and Others Vs. Jay Engineering Works Ltd., AIR 1987 SC 670 : (1987) 62 CompCas 658 : (1987) 2 CompLJ 34 : (1987) 11 ECC 410 : (1987) 1 JT 135 : (1966) 2 LLJ 315 : (1987) 1 SCALE 53 : (1987) 1 SCC 542 : (1987) 1 SCR 981 : (1987) 1 UJ 454

B.C. Mitra, J.—This appeal is directed against a judgment and order dated November 20, 1970, by which the Rule Nisi obtained by the appellant was discharged.

2. The appellant is a manufacturer and seller of Sewing Machines and Electric Fans, which are exported to various countries including the United Kingdom. Before April 19, 1962, goods manufacture ed by the appellant were consigned to Merchant Engineering Ltd., London, on outright sale basis. On and from April 1, 1902, these goods were despatched to Usha Sales (P) Ltd. in the United Kingdom with whom the appellant had entered into a selling agency agreement.

3. According to the appellant the price of Sewing Machines in United Kingdom had to be reduced in order to boost up sales which had declined by reason of competition from Japan, and the other European countries. By two notices both

dated November 5, 1966, u/s 19 (2) of the Foreign Exchange Regulation Act, 1947, (hereafter referred to as the Act), the Deputy Director. Enforcement, Calcutta, required the appellant and Usha Sales (P) Ltd. to furnish certain information and documents regarding the export of Sewing Machines to the United Kingdom including the reasons for reducing the prices of the machines exported after 1961-62 and also certain claims for rebate and expenses made by Usha Sales (P) Ltd. By a letter dated January 4, 1967, the appellant furnished the information required and thereafter by a further notice dated July 6, 1967, also u/s 19 (2) of the Act, the appellant was called upon to furnish information and documents regarding the non-realisation of export proceeds of 14 G. R. I. Forms, of a total value of ₹ 17,462-15s. during the period from November 1962 to December 1965. On July 27, 1967, the appellant explained that foreign exchange in respect of 4 of the G. R. I. Forms had since been received in India and the proceeds of some other G. R. I. Forms had been received by its bankers. The State Bank of India, and also that attempts were being made to realise the balance out of the sum lying to the credit of Usha Sales (P) Ltd. in a U. K. Bank,

4. Thereafter two notices were served upon the appellant by the first respondent. Both these notices are u/s 12 (2) of the Act. In the first notice, it is alleged that during the years 1962 to 1965. the appellant effected shipments of Sewing Machines to the United Kingdom, the full export value of which had not been received in India by the appellant and failure to realise the export value of the goods from the country of final destination within 6 months from the date of shipment of the goods in the prescribed manner, was a contravention of Section 12 (2) of the Act read with Central Government Notification No. 8(8)-EF. I. 1/52 dated April 22, 1952. Particulars of the shipments giving the G. R. I. Form Nos., dates and total invoice value were given in the annexure to the notice. 13 items of the total invoice value of ₹ 17,725-3s. with shipment dates between October 9, 1963, and December 14, 1965, were enclosed. The appellant and its Directors were called upon to show cause why adjudication proceedings u/s 23-D of the Act should not be held for the contravention of the statutory provisions.

5. In the second notice, it was alleged that the appellant had effected a number of shipments to the United Kingdom and it appeared that the full export value of the shipments had not been declared to the proper authorities and as such an amount of ₹ 12,395-8s. had not been received in India by the appellant in the prescribed manner and the failure to realise the export value of the goods from the country of final destination within 6 months from the date of shipment in the prescribed manner was a contravention of Section 12 (2) of the Act read with the Central Government Notification No. 6(8)-EF. I. 1/52 dated April 22, 1952. It was alleged that the appellant and its Directors had rendered themselves liable to be proceeded against u/s 23 (1) (a) of the Act, and therefore the appellant and its Directors were called upon to show cause why adjudication proceedings u/s 23-D of the Act should not be held against them. In the annexure to this notice a list of 40 items with shipment dates between June 29, 1962, and 17-12-1965 were given but instead of the invoice value the C. I. F. prices before and after April 1,

1962, were disclosed and the difference of ₹ 12,095-3s. was shown as the amount of under-invoicing,

6. By two letters dated November, 26, 1968, the appellant denied the charges made against it in the show cause notice, and in particular the charge relating to under-invoicing contained in the second notice. The appellant claimed that the value declared was the invoice or the contract price. This was followed by a letter dated July 11, 1969, by the 3rd respondent by which the appellant was informed that after considering the cause shown by it, it was decided that adjudication proceedings u/s 23-D of the Act should be started against the appellant who was required to be present through a representative for a personal hearing on July 2, 1969. Aggrieved by the said adjudication proceedings the appellant obtained a Rule Nisi and also Ad Interim Injunction restraining the adjudication proceedings.

7. Mr. B. Sen, Counsel for the appellant formulated five propositions in support of this appeal and these were:

(1) Section 12 (2) of the Act is not applicable and is not attracted and cannot be invoked in the facts of this case, for the adjudication proceedings against the appellant.

(2) The show cause notices are invalid as they are not in accordance with Section 12 (2) of the Act.

(3) If it is intended to proceed against the appellant u/s 12 (2) of the Act, mens rea must be alleged and proved.

(4) Section 12 (2) of the Act does not require the exporter to repatriate the sale proceeds within 6 months.

(5) In issuing the two notices the respondents failed to apply their mind to the statutory provisions.

8. The first contention of Mr. Sen was that Section 12 (2) of the Act had no application and could not be invoked for the purpose of the proceedings against the appellant. It was argued that, in this case, the sale was complete and that it was not a case where sale had yet to take place. There is no dispute that the sale had been completed and the only question was the repatriation of the sale proceeds to India. Section 12 (2) of the Act it was submitted, was not intended to be invoked in cases where the sale had been effected, and was complete for the purpose of the Act. It was further argued that this Sub-section was intended to cover and apply to cases where export had been made on consignment basis and the sale had yet to take place.

9. The next submission of Counsel for the appellant was that Section 12 (1) and Section 12 (2) were intended to apply to different classes of goods. Sub-section (1) of Section 12 empowered the Central Government by a notification in the Gazette to prohibit the taking or sending out by land, sea or air of any goods or classes of goods specified in the notification from India to any place so specified

unless a declaration was furnished by the exporter that the full export value of the goods had been or would, within the prescribed period, be paid in the prescribed manner. Sub-section (2) on the other hand deals with cases where export had already taken place and a declaration under Sub-section (1) has been furnished. This Sub-section, it was argued, was intended to prevent payment for goods otherwise than in the prescribed manner, payment of less than the full amount, payable by the foreign buyer and lastly delay in making the payment. It was submitted that the object and purpose of Sub-section (2) was entirely different from the object and purpose of Sub-section (1) of Section 12 of the Act. It was further submitted that the show cause notices appeared to have been issued under Sub-section (1) of Section 12 as it was alleged, firstly, that the full export value of the shipments had not been received in India, secondly. that the failure to realise the export value of the goods within 6 months from the date of shipment of the goods was a contravention of Section 12 (2) of the Act read with the Central Government Notification dated April 22, 1952 and thirdly it was alleged that the appellant by its failure to realise the export value of the goods within 6 months from the date of shipment had contravened Section 12 (2) of the Act read with the Central Government Notification and had thereby rendered itself liable to be proceeded against u/s 23 (1) (a) of the Act. It was argued that it appeared from the text of the show cause notices that all the allegations therein were made in terms of Sub-section (1) of Section 12 of the Act.

10. It was next submitted that it was not Sub-section (2) of Section 12 but Subsection (1) of Section 12 of the Act that required an exporter to realise the export value of the goods from the country of final destination within the prescribed period of 6 months. Sub-section (2) did not impose any obligation upon the exporter to repatriate the sale proceeds to India within the prescribed period of 6 months. In order to appreciate this contention on behalf of the appellant it is necessary to set out Sub-sections (1) and (2) of Section 12 of the Act:

"12. Payment for exported goods.--(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 (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:

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".

11. Mr. Subraba Roy Chowdhury, Counsel for the respondents on the other hand, contended that the show cause notices had been rightly issued u/s 12 (2) of the Act. He argued that the principal charge against the appellant was that the payment of the goods exported did not represent the full amount payable by the foreign buyer in respect of the goods and secondly, that the payment for the goods was delayed beyond the prescribed period. Both these matters, it was argued, came within the ambit of Section 12 (2) (b) of the Act. In support of this contention he drew our attention to the statement annexed to the second show cause notice. In the last column of the statement the extent of under-invoicing has been specified.

12. Counsel for the respondents next argued that in both the show cause notices one of the charges was that the appellant had failed to realise the export value of the shipments from the foreign consignee within 6 months from the date of the shipment. He drew our attention to the proviso to Section 12 (2) which required that no proceedings in respect of any contravention of this sub-section should be instituted unless the prescribed period had expired and payment for the goods representing the full amount as aforesaid had not been made in the prescribed manner. The period of 6 months has been prescribed by Rule 6 of the Foreign Exchange Regulation Rules, 1952, Relying upon the charge in the show cause notice that there was failure to realise the export value within 6 months from the date of shipment, it was argued that the reference to the period of 6 months in the show cause notice clearly indicated that the charge was made u/s 12 (2) of the Act. In support of the above contentions, Mr. Roy Chowdhury relied upon a Bench Decision of the Madras High Court *R. Venkata Subbu v. The Director of Enforcement* ILR (1968) 3 Mad 18. In that case, it was held that the legal obligations of Section 12 (2) would attach themselves either to the seller or to the consignor and not necessarily only to the consignor and also that the words "no person is entitled to sell or procure the sale of" in Sub-section (2) of Section 12 of the Act were descriptive and they referred to persons in the capacity of sellers of goods or to persons entitled to procure the sale of the same after the export of the goods had been made. In coming to this conclusion, however, the Court referred to the terms of the G. R. I. Form and relied upon the procedure and practice in filling up the said form for the purpose of a licence to export the goods. We are unable to agree with the views of the Madras High Court that

Section 12 (2) applied to a seller and also to a consignor because the procedure and the practice prescribed and followed, justified such a conclusion. Interpretation of statutory provisions, in our view, ought not to be made by reference to practice and procedure. Such interpretation, in our view, is neither safe nor sound and may in some instances produce misleading results. Our attention was also drawn to another Bench decision of the Madras High Court *Rai Bahadur Shriram Durga-prasad Pvt. Ltd. v. Union of India* ILR (1968) 3 Mad 421. In that case, it was held that the gist of the offences u/s 12 (1) of the Act read with Sections 19 and 167 (8) of the Sea Customs Act is an export or any attempted export which was a violation of the obligations of the intending exporter to make a declaration to furnish the documents called for to satisfy the authorities and to obtain permission to export and that where the exporter had done all this he had not violated Section 12 (1) and if he misled the authorities by false representation or failed to repatriate the foreign exchange by virtue of his obligations u/s 12 (2), these were different offences for which separate and specific penalties could be imposed. This decision of the Madras High Court went up in appeal to the Supreme Court. This decision of the Supreme Court is reported in *Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others*, 7 . In order to appreciate the effect of this decision, it is necessary to refer to the facts in that case. Large quantities of Manganese Ore had been exported after apparently complying with requirement of law. But in fact the goods were under-invoiced and the exporter had failed to repatriate the full amount of foreign exchange of the value of about Rupees three crores, obtained by the exporter as the price of the Manganese Ore exported. The Customs Authorities issued several notices to the exporter to show cause why action should not be taken against them for contravention of Section 12 (1) read with Section 23-A of the Foreign Exchange Regulation Act and Section 19 read with Section 167 (8) of the Sea Customs Act. 3300 tons of Manganese Ore were exported with a declaration that the export was made pursuant to a contract. A G. R. I. Form was attached and it was stated in the show cause notice that it appeared from a note book that a sum of \$25,298.24 was received from the consignee of the goods and this amount was credited to an account in the name of Gangadhar Narsing Das Agarwal with the Trust Company of North America of 115, Broadway, New York. It was also alleged in the show cause notice that the shippers had obtained other benefits in respect of the goods exported over and above those disclosed to the Customs" authorities. It was, in these circumstances that it was alleged that Section 12 (1) of the Act read with Notification No. 12 dated August 4, 1957. had been contravened. The exporter applied for relief on a writ petition which was dismissed by the Trial Court but was allowed by the Division Bench of the Madras High Court. The majority of the Supreme Court held that the only question for decision was whether on the facts which had to be assumed to be correct, the respondents could be held to have contravened Section 12 (1) of the Act. The question examined therefore by the Supreme Court was whether Section 12 (1) had been violated. It was found that the stipulated declaration u/s 12 (1) in the prescribed forms had been furnished,

and the evidence required was also given and therefore, prima facie, there was no contravention of Section 12 (1) of the Act. With regard to the contention on behalf of the appellant that as the invoice price mentioned in the declarations did not represent the full export value, the declarations were invalid and therefore the goods were exported without furnishing the declaration, it was held that this contention could not be accepted as the declarations satisfied the requirement of Section 12 (1) although they did not correctly furnish the information as asked for and that such declarations could not be considered as *non est*. It was further held that the requirement of Section 12 (1) of the Act was satisfied if the stipulated declaration supported by evidence was furnished and that the contravention complained of in that case was really the contravention of Section 12 (2) and Rule 5 of the Rules. In dealing with this appeal, the Supreme Court also noted that there were two facets in every export, one relating to the goods exported and the other relating to the foreign exchange earned as a result of the export, and that so far as the Customs authorities were concerned all that they had to see was that no goods were exported without furnishing the declaration prescribed u/s 12 (1) of the Act and once that stage was passed the rest of the matter was left in the hands of the Reserve Bank and the Director of Enforcement.

13. Strong reliance was placed on the Division Bench decision of the Madras High Court and also on the majority judgment of the Supreme Court by Mr. Roy Chowdhury in support of his contention that the impugned show cause notices u/s 12 (2) of the Act, in this case, were justified. I have carefully considered the implication of the judgment of the Supreme Court in the decision mentioned above. In the facts in that case it was held that Section 12 (2) of the Act was attracted. There was positive evidence in that case that the full value of the goods exported had not been repatriated to India and that a portion of it was deposited to the credit of an account in New York. This by itself, apart from others, clearly came within the ambit of the provision in Section 12 (2) (b) of the Act, namely, "payment for the goods does not represent the full amount payable by the foreign buyer in respect of the goods". It was no doubt because of the positive and concrete evidence available to the Court that both the Supreme Court and the Division Bench of the Madras High Court came to the conclusion that Section 12 (2) of the Act was attracted and not Section 12 (1). In the appeal before us, on the other hand, there is no evidence that a part of the value of the goods had been diverted to a foreign country and not repatriated to India. All that has been alleged in the show cause notices, in this case, is that the full export value of the shipments had not so far been received in India and that the failure to realise the export value of the goods within 6 months from the date of shipment was a contravention of Section 12 (2) of the Act read with the notification dated April 22, 1952. It is to be noticed that the trial Court also relied upon the decision of the Supreme Court in discharging the Rule. I cannot but observe that the trial Court failed to examine carefully the facts in *Shriram Durgaprasad's* case. In my view, therefore, the decision of the Supreme Court

and also of the Division Bench of the Madras High Court is of no assistance to the respondents in this appeal. Counsel for the respondents also drew our attention to the judgment of Kailasam, J.. in Gangadhar Narsingdas Agarwal v. Union of India, (1967-1 Mad LJ 197) which was reversed in appeal as noted above. Our attention was also drawn to a decision of the Supreme Court, Corporation of Calcutta and Another Vs. Liberty Cinema, . Reliance was placed on this decision by Mr. Roy Chowdhury to repel the contention of Mr. Sen that the observations of the Supreme Court in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, that in the facts in that case Section 12 (2) of the Act was attracted, were not necessary for the purpose of that decision and were mere obiter which did not bind this Court Mr. Roy Chowdhury relied on the observations at p. 1118 of the Report which after referring to a contention that since the observation of the Supreme Court did not form part of the actual decision they need not be given that weight which they would have been otherwise entitled to, it was held that the acceptance of that contention would result in by passing the judgment of the Supreme Court and that was something which could not, in any case, be supported. Quite apart from the controversy as to whether the observations of the Supreme Court were obiter or were not necessary for the purpose of the decision in that case, it appears to me that those observations were made in the context of the facts in that case and they cannot be considered in isolation and to the exclusion of the facts in which they were made namely, that there was positive evidence of an agreement or arrangement by which a part of the sale proceeds of the goods exported was diverted to an account in a foreign country and was not repatriated to India, In the case now before us there is neither any charge nor any allegation of diversion of the sale proceeds. All that is alleged in the show cause notice is that the full export value had not so far been received in India and failure to realise the export value of the goods within 6 months from the date of shipment is a contravention of Section 12 (2) of the Act In these facts, as I have noticed earlier, the decision, of the Supreme Court is of no assistance to the respondents in this case.

14. Counsel for the appellant next contended that the appropriate section of the statute to be applied in a case, such as this, where goods have been ex-ported on an outright sale basis and the transaction of sale is complete is Section 10 of the Act, which says that no person who has a right to receive foreign exchange or to receive from a person resident outside India, a payment in Rupees shall except with the general or special permission of the Reserve Bank do or refrain from doing anything which has the effect of securing that the receipt by such a person of the whole or part of the foreign exchange or payment is delayed or that the foreign exchange or payment ceases in whole or in part to be receivable by him. It was argued that in this case both the export and the sale of the goods were complete and the only question was the repatriation of the sale proceeds to India. In such a case, it was further submitted that proceedings, if any, against the exporter or seller should be u/s 10 of the Act Contravention of Section 10

attracts the penal provisions in Section 23 of the Act just as they are attracted in the contravention of Section 12 (2) of the Act Although we are not called upon to decide in this case whether Section 10 of the Act applies to the facts of this case, it seems to me that there is a good deal of force in this contention of Counsel for the appellant.

15. An attempt was made by Mr. Roy Chowdhury to substantiate his contention that Section 12 (2) applied in this case by referring to the proviso to that Section. The proviso says 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 value has not been made in the manner prescribed. It was argued that since one of the charges in the show cause notices was the failure to realise the export value within 6 months from the date of shipment, the proceedings were rightly started u/s 12 (2) of the Act In other words, it was contended that the proviso to the sub-section required that no proceeding for the contravention of the sub-section was to be started until the prescribed period had expired, and in this case, the show cause notices clearly charged the appellant with, the failure to realise the export value of the goods within 6 months from the date of shipment. I am not impressed by this contention of Counsel for the respondents. The proviso merely creates a bar against commencement of proceedings be-fore a particular point of time, namely, the expiry of the prescribed period. The sub-section has to be interpreted not in the light of the proviso which is Primarily concerned with the procedural matter, namely, the point of time at which the proceedings may be commenced, but on its plain language, keeping in view the purpose and object sought to be attained. Clause (a) of the sub-section contemplates a situation where "the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade". There cannot, possibly, be any doubt that this Clause in the subsection contemplates a stage before the sale of the goods, that is to say, a stage where the sale has yet to take place. Clause (b) of the sub-section deals with the payment for the goods and provides that it has to be paid in the prescribed manner, and that it has to represent full amount payable by the buyer and that payment should not be delayed. The question of payment again may arise either before the sale or at the time when the contract for sale is made. The aim and object of Sub-section (2) is to prohibit a person entitled to sell the goods from doing anything which has the effect of payment being made otherwise than in the prescribed manner or a smaller amount being paid for the price of the goods or such payment being delayed. As I read this clause, it seems to me. that questions such as those contemplated by this clause, can arise only before or at the time of the sale of the goods but cannot arise after the sale is completed. as in this case. The manner of payment for the goods is the subject-matter of bargain between the parties at or before the sale and certainly not after the sale is completed. The same is equally true of the amount to be paid by the buyer as the price of the goods and also of the time within which payment of the price is to be made. On a careful analysis of the

requirement of Clauses (a) and (b) of Sub-section (2) of Section 12. I cannot but come to the conclusion that the stage in the process of export and sale, contemplated by Sub-section (2) is a stage after the export of the goods has been made but before the sale has taken place and completed. Any other construction of Clauses (a) and (b) of Sub-section (2) will offend the plain language used by the legislature in Clauses (a) and (b) of this sub-section.

16. Turning now to Sub-section (2) Itself, it will be seen that it provides that where any export of goods has been made, "no person entitled to sell or procure the sale of the goods shall except with the permission of the Reserve Bank do or refrain from doing etc. A person who has already sold the goods cannot be said to be a person who is entitled to sell the goods even after the sale is complete. Similarly, a person who has sold the goods cannot be said to be a person entitled to procure the sale of the goods after the sale is complete. If the legislature intended that the subsection should include within its ambit cases where the sale has been completed, the appropriate words to be used would be "no person who has sold the goods or procured the sale of". Then again it is to be noticed that the tense is the future tense, namely, that no person entitled to sell or procure the sale of the goods "shall" except with the permission of the Reserve Bank etc, A future tense cannot be used in a case where the legislature contemplated a sale which is complete. Furthermore, if a sale is complete it will be too late for the person responsible for the sale or procurement of the sale to make any stipulations relating to the manner of payment, the quantum of the price and the time of payment. All in all, it seems to me that Sub-section (2): cannot be invoked in a case where the sale is complete and stipulations regarding the manner of payment, the amount and the time, have been included in the bargain between the parties.

17. Our attention was drawn by Counsel for the appellant to a Bench Decision of the Mysore High Court, K. O. Krishnaswamy v. Director of Enforcement AIR 1970 Mys 3. In that case, a penalty was imposed upon the exporter who pleaded guilty to a charge of contravention of Section 12 (2) of the Act Two firms exported 52 shipments of Art Silk Fabrics, readymade garments etc. to Singapore and other places under a declaration made u/s 12 (1) of the Act in which the value of the goods was stated. The Director of Enforcement found that the statements in the declarations concerning the value were false and there was over-invoicing. In these facts, it was held that there was no violation of Section 12 (2) of the Act. It was also held that the relevant part of Section 12 (2) (b) on which reliance was placed by the Director, was the non-payment of the full amount payable by the foreign buyer in respect of the exported goods and therefore there would be contravention of Clause (b) only when the foreign buyer was under some obligation to pay a certain sum which represented the true market value of the exported goods purchased by him and there was non-payment of the entire sum of money in consequence of something done or omitted to be done by the exporter. It appears that the attention of the learned Judges of the Mysore High Court was not drawn to the decision of the Supreme Court in Union of India

(UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, , to which I have earlier referred, and the effect of that decision was not considered by the Division Bench of the Mysore High Court. But quite apart from this, it appears that the exporter in the case before the Mysore High Court had pleaded guilty to the charge of over-invoicing made by the Director of Enforcement and it was in this background that the decision of the Mysore High Court has to be considered. In that case, again, there was admittedly a difference between the declaration of the value u/s 12 (1) of the Act and the price paid by the foreign buyer. For these reasons, I think, the Mysore decision is not of any assistance in determining the questions with which we are concerned in this appeal.

18. I now turn to the G. R. T. form which appears at PP. 47-49 of the Paper Book, The use of the different forms has been prescribed by the Foreign Exchange Regulations Rules, 1952, which were framed by the Central Government in exercise of the powers conferred by Section 27 of the Act Rule 3 of these Rules prescribes that a declaration u/s 12 of the Act shall be in one of the forms set out in the First Schedule to the Rules as the Reserve Bank may prescribe by notification in the Official Gazette. The First Schedule to the Rules prescribes different kinds of forms. There is no dispute in this case the appropriate form is G. R. I. In this form the seller/ consignor is required to declare firstly, that he is the seller/consignor of the goods in respect of which the declaration is made and that the declaration made in the form: (a) that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer and (b) that this is a fair valuation of the goods which are unsold and is true. It is to be remembered that a declaration is required to be furnished by the exporter that the amount representing the full export value of the goods has been or will be paid within the prescribed period in the prescribed manner by Section 12 (1) of the Act. Section 12 (2) of the Act has nothing whatsoever to do with the filing of the declaration and the G. R. I. form prescribed by Rule 3 of the Rules requires a declaration in terms of Section 12 (1) of the Act. The declaration required to be made by the seller/consignor is not that the invoice value declared is the full amount payable by the foreign buyer as contemplated by Section 12 (2) (b) of the Act, but that the invoice value declared is the full export value of the goods as contemplated by Section 12 (1) of the Act.

19. Keeping in view, the terms of the declaration in the G. R. I. form and the requirement as to a declaration by Section 12 (1) of the Act and Rule 3 of the Rules, I am fortified in the view which I have taken that Section 12 (2) of the Act cannot be invoked in this case and no proceedings can be started against the appellant for contravention of that sub-section. It is to be remembered that it is Section 12 (1) of the Act which requires repatriation of the value of the goods within the prescribed period and the period of 6 months has been prescribed by Rule 6 of the Rules. The respondents accepted the G. R. I. form as the appropriate form with the declarations therein. The declaration made by the appellant in this case is that the invoice value declared is the full export value of

the goods and is the same as that contracted with the buyer and that this is a fair valuation of the goods which were unsold. There is an undertaking in the declaration that the seller will deliver to the Bank, the foreign exchange proceeds resulting from the export of the goods on or before the prescribed date. The declaration that the export value will be repatriated to India within the prescribed period is required by Section 12 (1) of the Act and the period of 6 months, prescribed by Rule 6, is also fixed by the mandate of Section 12 (1) of the Act. In these facts, there is no escape from the conclusion that the appellant cannot be charged with the contravention of Section 12 (2) of the Act.

20. I now proceed to deal with, the next contention of Counsel for the appellant that the impugned notices do not comply with the requirements of Section 12 (2) of the Act, It was argued that full particulars of the charges contemplated by Section 12 (2) had not been given in the show cause notices and therefore these notices were invalid. Counsel for the respondents, on the other hand, contended and I think rightly, that all the material particulars with regard to the charges against the appellant have been set out in the impugned notices. He submitted that the appellant was informed of the nature of the offence with all the particulars that might be required for answering the charges. In support of this contention. Counsel for the respondents relied upon a decision of the U.S. Supreme Court *Federal Trade Commission v. Gratz* (1919) 253 US 421. Dealing with the question of the contents in a complaint. It was held in that case:

"The function of the complaint is solely to advise the respondent of the charges made, so that he may have due notice and full opportunity for a hearing thereon. It does not purport to set out the elements of a crime, like an indictment or information, nor the elements of a cause of action, like a declaration at law or a bill in equity. All that is requisite in a complaint before the Commission is that there be a plain statement on the thing claimed to be wrong, so that the respondent may be put upon his defence".

Reliance was placed by Counsel for the respondent on a Bench decision of this Court. *The Collector of Customs, Calcutta and Others Vs. Biswanath Mukherjee*, . In that case. My Lord the Chief Justice, quoted with approval the above observations of the Supreme Court. In my opinion, the contention of Counsel for the appellant that the show cause notices were invalid as they do not comply with the requirements of Section 12 (2) of the Act cannot be accepted.

21. The other three points formulated by Counsel for the appellant which have been noticed by me earlier in this judgment, were not pressed before us, though they were not given up, and it is therefore not necessary for me to deal with them.

22. Before concluding I should refer to one other matter which was raised by Counsel for appellant before us. It was argued that although the trial Court took note of the argument on behalf of the appellant that in the facts, in this case. Section 12 (2) of the Act could not be said to have been contravened and

adjudication proceedings could not be commenced against the appellant for violation of Section 12 (2), the learned Judge failed to give his opinion on this question or to express his views on the same or to deal with the argument advanced on behalf of the appellant in the trial Court. It seems to me that there is good deal of force in this contention. I have carefully considered the judgment of the trial Court and in my opinion the above criticism of Counsel for the appellant is justified.

23. For the reasons mentioned above, this appeal is allowed. The judgment and order of trial Court are set aside. The Rule is made absolute. Let a writ in the nature of mandamus issue upon the respondents commanding them. to forbear from giving any further effect to the show cause notices dated November 8, 1968 and the notice dated July 11, 1969, and from commencing any proceedings pursuant thereto. Let a writ in the nature of prohibition issue prohibiting the respondents and each of them from giving any effect to the two show cause notices dated November 8, 1968, and the notice dated July 11, 1969. Each party to pay its own costs.

24. This order will not prevent or fetter the respondents from taking any other or fresh steps against the appellants in accordance with law.

P.B. Mukharji, C.J.

25. I agree.

The question raised in this appeal is basically one of interpretation of Foreign Exchange Regulation Act, 1947.

It is on this question of interpretation that I wish to add my own views. Facts of this appeal are fully set out in my learned brother's judgment and I adopt them.

26. Two sections which are relevant for the purposes of this appeal are Sections 10 and 12 of the Foreign Exchange Regulation Act, 1947. Section 10 deals with the "duty of persons entitled to receive foreign exchange". Section 12 deals with the "payment for exported goods". There is incidentally another section which is Section 23 of the Act dealing with "penalty and procedure".

27. There are certain rules with which the appeal is concerned. These rules are made u/s 27 of the Act and are known as the Foreign Exchange Regulation Rules, 1952. The rules which are relevant are Rule 3, Rule 5 and Rule 6. To complete the autology of the Act and Rules I may mention here the Adjudication Proceedings and the Appeal Rules framed u/s 27 of the Act which provide for the procedure for the adjudication of an enquiry u/s 23-D of the Act.

28. Mr. B. Sen, learned Counsel for the appellant based his argument mainly on the difference in the subject-matters in Section 12 (1) and Section 12 (2) of the Act. According to him, they deal with entirely different state of affairs and different state of facts. Section 12 (1) deals with the stage anterior to the export of goods. Section 12 (2) of the Act deals with the stage where the export has

already taken place,

29. Pursuing this difference in the two sub-sections of Section 12, Mr. Sen makes further analysis of these two subsections.

30. Section 12 (2) of the Act prevents a person from doing or refraining from doing any act with four things in view:-- (a) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade; or (ii) payment for the goods is made otherwise than in the prescribed manner, or (iii) payment for the goods 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 of India; or (iv) payment for the goods is delayed to such an 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 has not been made in the prescribed manner. This follows from an analysis of Section 12 (2) of the Act.

31. Mr. Sen therefore emphasised the importance of the actual words used in contradistinction to Section 12 (1) of the Act. Section 12 (1) of the Act uses the words "full export value". The significant words in Section 12 (2) of the Act however are "full amount payable by the foreign buyer". The two expressions have different meanings and have been used for two different purposes. That is the gist of Mr. Sen's argument. Section 12 (2) suggests the "payability", that is, the liability of the foreign buyer has to be considered in the application of the Sub-section. The expression "payable by" indicates liability that is the actual obligation of the foreign buyer to pay. This obligation is the amount payable by him under the contract after working out the contract according to law and its terms. In resolving the contract the agreed price is always subject to proportionate reduction e. g., if there is any breach of warranty as to quality, there will be a proportionate diminution of price in law. Judging from this point of view "full amount payable by the foreign buyers" is the price arrived at as a result of working the contract. It may be less than the export value or the invoice of value of the goods.

32. Mr. Sen's next submission is that both in Clauses (a) and (b) of Section 12 (2) of the Act, the delay which is said to be in contravention of its provisions is the delay which is unreasonable having regard to the ordinary course of trade. In Form G. R. I prescribed under the rules, the exporter is required to give an undertaking that the foreign exchange proceeds resulting from the export of the goods would be delivered to the bank mentioned therein on or before the expiry of a certain date which must be within six months from the date of the export. Mr. Sen argued from that fact that it was inconsistent with the provisions of Section 12 (2) and accordingly the provision requiring the exporter to deliver the foreign exchange proceeds of the export within six months from the date of the shipment in the form prescribed under the Rules was in excess of the powers conferred by Section 27 of the Act. Logically he argued that where there is an

inconsistency between the provisions of the Act and the Rules, the provisions of the Act must prevail.

33. Prior to its amendment in 1964, Section 12 (2) penalised certain acts which were made "with intent to secure" the ends. Of the list of 14 items given in the second impugned notice dated the 8th November, 1968, some occurred before and some after the amendment. It was Mr Sen's contention that so far the acts alleged to have been committed before the amendment the intention, that is the mens rea must be established. It was for the Department to have been satisfied that there was an intention to avoid representation of the value of the goods while in respect of the items exported after the amendments, no such intention need be proved. It being a quasi criminal matter, the intention to avoid payment must be established. The charge should have included an allegation that it was "with intent to secure". But it did not.

34. The first impugned notice is dated also the 8th November, 1968. It alleged contravention of Section 12 (2) of the Act. But Section 12 (2) does not apply to Appellant in the facts of this case. Mr. Sen criticised the same on the following lines. Section 12 (1) provides for a declaration of "the full export value of the goods" at the time of shipment while Section 12 (2) penalises, inter alia, the receipt of a sum which does not represent "the full amount payable by the foreign buyer" in respect of the goods. Now the notice mentions the failure to realise the export value of the goods and not the failure to realise the full amount payable by the foreign buyer and so the notice is not in conformity with Section 12 (2) and is bad. His argument suggests that in requiring to show cause for failure to repatriate the full export value of the goods in the impugned notice, confusion has been made by the authorities between the "full export value" and the "full amount payable by the foreign buyer" and as such, the notice is bad.

35. Mr. Subrata Roy Chowdhury, Learned Counsel, for the respondent, on the other hand, contends that the expressions in both the Sub-sections mean the same thing. It was the basis of his argument that (1) "full export value" in Section 12 (1), (2) "full amount payable by the foreign buyer" in Section 12 (2) and (3) the "total invoice value" in form G. R. I. must be given the same meaning for the purposes of Section 12. He draws analogy from Section 12 (5) which authorises the Reserve Bank of India to stop further negotiation of the shipping documents if it thinks that the value stated in the invoice is less than the full export value of the goods and argues that that Sub-section also equates the invoice value with the full export value. In substance, Mr. Roy Chowdhury's argument is that a charge of under-invoicing would come u/s 12 (2) and the contention of the appellant that the respondent had no jurisdiction or authority u/s 12 (2) must be rejected.

36. The learned Judge says that he was impressed at first by the argument put forward by the appellant that the allegation of under-invoicing in the second impugned notice was based merely on the difference in the C. I F. price of the exported goods before and after April, 1962 as is evident from the annexure to

the notice itself. On its face the notice does not disclose any reason for the respondent's belief that there has been a failure to declare the full value of the shipment. But the learned Judge says that when it is realised that before issuing the impugned notice the petitioner was required to furnish all the necessary information with regard to the export of sewing machines to the U. K., both in regard to the non-realisation of the price of the machines already exported and for declaring lower prices in the invoices after April 1962, and that detailed information in regard to such requisition was furnished by the appellant, and that it was only after consideration of the cause shown by the petitioner u/s 19 (2) of the Act. that the impugned notices were issued, they would show that the respondents had considered the reasons given by the petitioner and found such reasons to be unsatisfactory.

37. The provisions of Section 10 of the Foreign Exchange Regulation Act, 1947 clearly defines the duty of persons entitled to receive foreign exchange. It says that no person who has a right to receive any foreign exchange except with the general or special 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 (a) that the receipt by him of the whole or part of that foreign exchange or payment is delayed or (b) that the foreign exchange or payment ceases in whole or in part to be receivable by him, Clearly the appellant in this case is a person or a company who has "a right to receive any foreign exchange" within the meaning of Section 10 of the Foreign Exchange Regulation Act. Secondly, the amount represented "full export value of the goods". When an exporter is making a declaration u/s 12 (1) of the Act, it cannot be said to come under the expression "the full amount payable by the foreign buyer" in Section 12 (2) (b) of the Act. They represent the different stages and cannot be confused.

38. The reason for this confusion is perhaps the juxtaposition of Sections 12 (1) and 12 (2) of the Act in the same section of the Foreign Exchange Regulation Act, 1947. In the British Act it is clearly separated as Section 23 and Section 25 of the English Exchange Control Act, 1947. Section 23 of the English Exchange Control Act, 1947 refers to the "payment for exports" and Section 25 of the English Exchange Control Act, 1947 clearly limits to "duty not to delay sale". "The duty to collect certain debts" is clearly enjoined in Section 24 of the English Exchange Control Act, 1947 comparable to our Section 10 of the Foreign Exchange Regulation Act, 1947. As a matter of curious coincidence I need only say that both our Foreign Exchange Regulation Act. 1947 and the English Exchange Control Act, 1947 were passed on the same date, the 11th March. 1947. The two Acts have basically similar ideas. Section 12 (2) of our Act applies where any export of goods has already been made u/s 12 (1) and to which notification u/s 12 (1) has applied, thus indicating clearly the different stages in which the respective Sub-section of this Section 12 is applicable.

39. To accept Mr. Roy Chowdhury's argument for the respondents will mean virtually to delete and repeal Section 12 (2) of the Act for according to Mr. Roy

Chowdhury "full export value of the goods" in Section 12 (1) of the Act is to be equated with "the full amount payable by the foreign buyer" in Section 12 (2) (b). When the same statute in the same section although in different Sub-sections, use different expressions, according to settled principles of construction, the Legislature must have intended to impute a different meaning and not the same meaning, in spite of the difference in language.

40. Regarding the question of punishment, for "false statement". Section 22 of the Foreign Exchange Regulation Act, 1947 makes the provisions, "No person shall, when complying with any order or direction u/s 19 or with any requirement u/s 19-H or when making any application or declaration to any authority or person for any purpose under this 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". If he does he commits an offence. If what is contended on behalf of the respondent is true, then the appellant should have been hauled up for false statement u/s 22 of the Act for he made a false statement under Form G. R. I. and made a false declaration. He cannot do it by saying that Section 12 (1) and Section 12 (2) are the same. Penal provisions must be strictly construed. The penalty and the procedure are provided in Section 23 of the Foreign Exchange Regulation Act. 1947. Section 4, Section 5. Section 9, Section 10, Section 12 (2), Section 18, Section 18-A or Section 18-B or any rule or order made thereunder is punishable. Besides, Section 23 (1-A) provides that "if any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a court, be punishable with the imprisonment for a term which may extend to two years, or with fine, or with both." Therefore, penalty is provided for breach of Section 10 as also of any section including Section 12 (1) of the Act. I am of the opinion that the whole proceeding in this case is against the tenor, substance and the clear language of Foreign Exchange Regulation Act, 1947.

41. In a statutory offence unless the statute excludes the mens rea. I would insist on mens rea to be established, for that is the very quintessence of an offence or a crime. Nothing of the kind has been established in this case. The intention under the amendment, has got to be clearly established. Here there is sufficient explanation offered in subsequent letters and correspondence and the circumstances leading to the present situation. The circumstances amongst others are the acute competition in foreign markets. The contracts were entered into in May, 1962 and the notice was not given until the 8th November, 1968. a period of four years after the incident, and long after 6 months from the date of shipment There was no iota of evidence to establish under-invoicing. The letter from the appellant dated the 4th January, 1967 in answer to the impugned notice makes it quite clear that prices in 1962-63 were reduced mainly to meet the prevailing competition in the market due to the removal of restriction on import of sewing machines in U. K. from Japan and further that the appellant received constant complaints regarding the quality and the finish of the sewing machines

and its accessories. Annexure B to that letter will show that the agent's re-sale prices were also lower in the later period. In the circumstances, the argument about under-invoicing is based purely on suspicion and has got no substance,

42. It is really a case of first impression on the interpretation. The case of Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, has been utilised by Mr. Roy Chowdhury for the respondent to advance his arguments. But it was a case u/s 12 (1) of the Foreign Exchange Regulation Act, 1947. In the instant appeal before us the whole proceeding has been instituted u/s 12 (2) of the Act. The majority judgment of the Supreme Court at page 1608, paragraph 30 begins by saying ; "The only question that arises for decision in this appeal is whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of these proceedings, the respondents can be held to have contravened Section 12 (1) which reads: "The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereinafter 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 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."

43. Therefore, it was clearly a case on Section 12 (1) of the Act. It is true that there is reference to Section 12 (2) but that is because there was a secret arrangement which makes Section 12 (2) germane. Therefore the majority judgment at page 1610 in paragraph, 32 says 3

"Hence it is open to the Director of Enforcement to levy on such of the respondents as have contravened Section 12 (2) penalty not exceeding three times the value of the foreign exchange not repatriated which in the present case can be about nine crores of rupees. They may also be punished u/s 23(1) (b). This position is conceded by the Counsel appearing for the appellants." It was really ex concessis this point.

44. It is further clear from the majority judgment at page 1611 in para-graph 34 where it is said, : "The contravention complained of in this case is really the contravention of Section 12 (2) and Rule 5. The former is punishable u/s 23 and the latter u/s 23 read with Section 22." But in the instant Appeal before us this is not really a case u/s 12 (2) of the Act. In the circumstances, I cannot accept Mr. Roy Chowdhury's argument that Section 12 (1) and Section 12 (2) of the Act mean the same thing. As indicated above "full export value of the goods" in Section 12 (1) do not mean the same thing as "full amount payable by the foreign buyer" in Section 12 (2) of the Act.

45. In a recent case AIR 1970 Mys 3, it has been held that the foreign buyer repatriating only the true value of the goods commits no contravention of the

provisions and it was therefore held that the petitions could not be penalised, -- a view which we have taken. That was a case which was more appropriate to the instant appeal before us. A comment was made that the Mysore decision did not notice the Supreme Court decision in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, . In the facts and circumstances of this case stated I do not think it makes any change in the legal position.

46. Section 12 (2) of the Foreign Exchange Regulation Act, 1947 provides for the case where an export of goods has been made and lays down "no persons entitled to sell or procure the sale of the goods" shall except with the permission of the Reserve Bank, do or refrain from doing certain acts. A person who had already sold the goods is not a person "entitled to sell the goods" even after the sale is complete. So a person who has sold the goods cannot be said to be a person "entitled to procure the sale of the goods" after the sale is complete. Therefore my conclusion is that the Legislature intended by this sub-section to include (exclude?) a case within its ambit where the sale has been completed.

47. The appeal must, therefore, be allowed, I agree with the Judgment and Order made by my learned brother.