(1979) 02 MAD CK 0044

In the Madras High Court

Case No : Appeal No''s. 413, etc. of 1975

T.R. Balasubramaniam and Others — APPELLANT

Vs

The Director of Enforcement — RESPONDENT

Date of Decision : 27-02-1979

Acts Referred:

Foreign Exchange Regulation Act, 1947 — Section 10, 12, 12(1), 12(2), 12(3)
Foreign Exchange Regulation Act, 1973 — Section 54, 81

Citation : (1980) ILR (Mad) 384

Hon'ble Judges : Sathiadev, J;Mohan, J

Bench : Division Bench

Advocate : T. Dulip Singh, S.R. Sundaram and B. Govinda Rao, for the Appellant; U.N.R. Rao, Central Government Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Mohan, J.—All these appeals can be dealt with under one common judgment, since the issues involved are one and the same. The facts leading to the appalls may be briefly stated hereunder.

2. Reliable information was received by the Enforcement Directorate that many of the textile and handicrafts exporters in Tamil Nadu were Arranging purchase of foreign exchange for heavy amounts in an unauthorised manner at Malaysia, in order to repatriate the same under the guise of export proceeds in compliance with the undertaking furnished by them on the G.R.I. form to the Reserve Bank of India as prescribed u/s 12 of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as the Act), undertaking to realise the full proceeds by exports made by them. Investigations were made to find out the exact modus operandi of these exports and the enquiry revealed the following facts; The Government of India introduced certain import incentives for export of textile goods and handicrafts under the Export promotion scheme. Under this scheme textile and handicrafts exporters were issued licences for import of raw materials on the basis of their export performance in order to stimulate and promote

export. Taking advantage of certain (sic) in the formulation and implementation of the scheme some exporters appeared to abuse and misuse these concessions. Under the scheme, import licences were issued solely on the basis of the declared value of the goods. In certain cases licences were also issued in advance of the realisation of the value of exports. Since the exporters were able to earn sizeable profits--200 to 300 by the sale of such import licences obtained under the scheme there was a sudden growth of textile exporters and benami parties acting on behalf of extablished exporters. Most of these exporters had their own branches or representatives abroad who acted as consignees of the goods exported. In order to obtain the immediate benefit of these entitlements relating to import licences, eventually to be sold at high premium, most of the textile exporters began to boost up the invoice value of their export by declaring a false value which, more often than not was 4 to 5 times the real value. The exported goods were sold abroad for a nominal price and this amount which was far from the real value was duly repatriated in most cases. However, since the value of the goads was highly inflated, the exporter had to comply with the provisions of Section 12(2) of the Act which requires the shipper to realise the full value of the shipment as declared by them in the relative G.R.I. forms. Obviously, therefore, the exporters, had to find out their own resources for the extra foreign exchange which they had to repatriate in the form of export proceeds. It appears that many parties in India came to the rescue by offering to sell foreign exchange in Malaysia against compensatory rupee payment in India. Since the exporters had already earned a fabulous profit as observed above, by the sale in import licence obtained by them under the export promotion scheme, this form of compensatory payment in India suited them ideally and thus many exporters fulfilled their obligation in part by repatriating a portion of the export value by making compensatory payments. In India and obtaining foreign exchange in Malaysia and eventually repatriating the same as part export proceeds. This unauthorised purchase of foreign exchange had perforce to submit itself to the natural economic laws of demand and supply and therefore due to the sudden spurt of demand for Malaysian dollers the rate of exchange for Indian rupees and Malaysian dollers registered an unhealthy upward trend proving uneconomical from the point of exports. In consequence, the exporters had no other alternative than to commit a default of their undertaking furnished to the Reserve Bank of India to repatriate the full export value. Some of the exporters, however, sought to get ex-enreated from their liability u/s 12(2) by creating documentary evidence to show that they have attoned or refrained from doing anything or taken or refrained from taking any action which has the effect of securing that the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade. There was no difficulty in creating self-serving documents since, as observed above, most of the exporters had their own consignees.

3. Premises of these exporters were searched and very many incriminating documents were seized. Thereupon show - cause notices were issued on 8th

June, 1965 u/s 12(2) of the Act. Adjudication took place under an order dated 24th July, 1965. It was found that the exporters had admitted their intentional over-invoicing the exports only to secure incentive by way of import licence and it would not be possible to realise any amount from the foreign consigner.

4. The Appellant in Appeal Suit No. 413 of 1975 was found guilty u/s 12(2) of the Act and it was held that:

in view of the poor realisation and the fact that he had been unlawfuly benefited to the extent of over Rs. five lakhs by way of import entitlements, I impose on him a penalty of Rs. five lakhs.

This order was taken up in appeal to the Appellate Board. The appellate Board by its proceedings dated 22nd February 1975 confirmed the order of the Director of Enforcement holding that:

it is not open to the Appellant appeal suit No. 413 of 19/5) without leading any evidence to contend that the goods had been over invoiced particularly in view of his declaration as to the value which he expected to receive in the G.R.I. form and the benefit which he obtained by way of import entitlements on the basis of his declaration.

As regards penalty, it was found the

appellant had obtained import entitlements exceeding Rs. five lakhs on the basis of a value of Rs. 6.88 lakhs shown in the G.R.I. forms. This cannot be considered to be excessive.

5. The Appellants in Appeal Suit Nos. 494 to 499 of 1975 pleaded guilty to the charges u/s 12(2) of the Act and it was held that there was contravention of Section 12(2) of the Act by the Appellants. In the matter of imposition of penalty, the Director felt bound to take note of the following facts: the total amount outstanding against each firm; the complete and total non-repatriation; and the import entitlements unlawfully obtained by each firm. On this basis, the Director levied varying amounts by way of penalty the details of which are appended as a statement of our judgment.

6. On appeal, the appellate Board confirmed the finding of the Director. Likewise in Appeal Suit No. 501 of 1975 a penalty of Rs. 50,000 was levied under similar circumstances which came to be confirmed by the appellate Court. It is against these orders of the appellate Board, the present appeals have been preferred u/s 54 of the Act.

7. Mr. Dulip Singh, the learned Counsel for the Appellant urged the following paints for our consideration. Section 12(2) of the Act will apply only to consignment sales and not to completed sales and though this Court has taken the view in R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, that it applies to both sales, that decision has been specifically (sic) from in Krishnaswamy v. Govt. of India AIR 1970 Mys. 3 and The Jay Engineering

Works Ltd. Vs. M.G. Wagh and Others, . According to the Counsel, the question arose before the Full Bench of Calcutta High Court in J.E. Works Ltd. v. M.G. Wagh''s whether the decision of the Madras High Court in R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, which was disented by a Division Bench of Calcutta High Court in The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others, , could be considered to be correct. The Full Bench upheld the view of the Division Bench of that court and therefore the learned Counsel for the Appellants would comment its acceptance by this Court. He further contended that though this question did not directly arise before the Supreme Court, there is a favourable passage occurring in Union of India v. Durgaprasad P. Ltd. (1970) 1 S.C.J. 666, and on that basis it would be possible for him to contend that the said section will not apply to consignment sale.

8. The learned Counsel would further submit that there is no contravention of Section 12(2) of the Act as the export value as evidenced by G.R.I. form cannot represent the full amount payable by the foreign buyer and the full amount payable by the foreign buyer is the real value of the goods. In this case, the mistake had been committed by the Director and the appellate authority by equating the full export value of the goods with full amount payable by the foreign buyer and there is no obligation on the part of the Appellants to pay the value as evidenced by G.R.I. form which gives the full export value of the goods. According to the Counsel, the Appellants may be guilty of abuse of privileges under the import incentive scheme, but that is not germane to hold a parson guilty u/s 12(2) and this reasoning has been adopted by the Mysore and Calcutta High Courts. Further in each one of these cases the Appellants did not specifically plead over-invoicing but the Department itself has come to under stand that way and has proceeded to hold the Appellants guilty of over-Invoicing. May be it is an accident in this case that all the Appellants had over-invoiced. The law should be the same respective of whether it is over-invoicing or under-invoicing If form G.R.I. is to be accepted for purpose of finding the Appellant guilty of over-invoicing why the same should not be accepted in the case of under - invoicing. If it is so accepted then the Appellants cannot be held guilty u/s 12(2) of the Act.

9. The next argument of the learned Counsel is that this being a criminal proceeding, the element of mens rea has to be proved, but the orders under appeals make casual reference as if the Appellants had admitted the guilt, but what has been admitted is only over-invoicing. The admission stops with that and cannot be extended beyond. Therefore, the failure to prove mens rea would not render the Appellants guilty.

10. Lastly it was argued that the levy of penalty is not in accordance with the guidelines prescribed under the Act. The Act now where prescribes the import entitlement as a guideline but in every case what has to be taken into consideration in the levy of penalty is the value of foreign exchange in respect of which contravention has been made. The levy of penalty is spoken to in Section 23 of the Act which says:

penalty not exceeding three times the value of foreign exchange in respect of which contravention has taken place or five thousand rupees, whichever is more....

According to the Counsel these principles have been completely ignored in levying penalty and consequently the matter atleast must be remanded for levy of penalty afresh in accordance with the provisions of the Act.

11. On the other hand Mr. U.N.R. Rao, the learned Counsel for the Department, submits that merely, because the Calcutta High Court bad taken a contrary view to that of this Court does got mean that that view has to be accepted. As a matter of fast in R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, the question whether Section 12(2) applies to both consignment sales as well as completed sales has been elaborately considered and the court has come to the correct concusion, which is binding upon this Bench. The same decision has been followed in Appeal against Order Nos. 267 to 271 of 1974 (Jayalakshmi Textiles Etc. v. Govt. of India). According to him, the Judgments of the Mysore High Court and the Calcutta High Court cannot apply to the facts of the present case because there is no material relating to overinvoicing. No doubt Section 12(1) says the full import value of the goods must be declared in the prescribed form (G.R.I. form). But it certainly can .lot mean the full amount payable by the buyer under all circumstances. Anyway in a case over-invoicing as laid down in R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, having regard to the declaration made by the exporter under, G.R.I. form he can be confronted with brown statement and the adjudication takes place on that, very statement. In the case of under-invoicing the full amount payable by the foreign buyer is not the amount as declared in the G.R.I. form. Than it is open to the Reserve Bank to adjudicate upon this and the full value of the goods can be obtained by the Reserve Bank. If there is adjudication in that behalf u/s 12(5) of the Act that will be on the full amount payable by the foreign buyer. Therefore, the law is one and the same irrespective of whether there is overinvoicing or underinvoicing.

12. Mr. U.N.R. Rao would further contend that the decision in Union of India v. Durgaprasad P. Ltd. (1970) 1 S.C.J. 666 has not conclusively decided that Section 12(2) would apply to completed sales only and not to consignment sales. In fact that question is still before the Supreme Court.

13. As regards mens rea the learned Counsel contended that this is a case in which admittedly there was overinvoicing. In fact, one of the Appellants categorically state she fell a victim to the temptation of overinvoicing and the other Appellants pleaded guilty to overinvoicing. Under these circumstances, it is not very different to presume that they knew the consequence of it. This fact has been succinctly noted in the appellate order forming the subject mutter of appeal in Appeal Suit No. 494 of 1975.

14. As regards penalty, the Counsel would state that Section 23 prescribes three

times the value foreign exchange in respect of which contravention had taken place. If the value given in the G.R.I. form is taken as the basis, the Appellants would liable for greater amount of penalty. For instance in Appeal Suit No. 413 of 1975 the quantum of export was more than Rs. 7 lakhs and three rimes of that value would be nearly Rs. 22 lakhs but what has been levied is only Rs. 5 lakhs. The quantum of penalty is based on the import entitlement and in so far as no prejudice whatever has been caused to the Appellant it is not open to him to say that the basis is wrong.

15. Based on the above arguments of both the Counsel, the points that arise for consideration in three appeals are (i) whether Section 12(2) applies to only consignment sales or does it include completed sales? (ii) Whether the full export value stated in Section 12(1) will represent the full amount payable under all circumstances? (iii) whether mens rea has been established? and (iv) whether the levy of penalty is in accordance with law?

16. Before we take up these questions, we will refer to the relevent provisions of law.

17. This enactment was made to regulate certain payments dealings in foreign exchange and securities and the import and export of currency and bullion. The preamble says:

Whereas it is expediant in the economic and financial interests of India to provide for the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion, the Act was passed.

So the object of the Act to protect the economic and financial interests, of the country by regulating the payments and dealings in foreign exchange. The importance of foreign exchange in the growing economy of the world doe: not require to be underscored. Section 12 reads:

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 (hereinafter in this Section referred to as export) of all goods or of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed or so specified and true in all material particulars which, among others, shall include the amount representing:

(i) full export value of the goods; or

(ii) if the full export value of the goods is not ascertainable at the time of export the value which the exporter having regard to the prevailing market conditions, expects to receive on the sale of the goods in the course of international trade, and affirms the said declaration that the full export value of the goods (Whether ascertainable at the time of export or not) 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:

(a) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade,

(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 contraventation 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.

(5) Where in relation to any such goods the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents, to retain possession thereof until such time as the exported of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods.

The prescription u/s 12(1) is the G.R.I. form which is extracted below:

EXCHANGE CONTROL

(Declaration to be furnished by exporters before shipping commodities from India to territories outside India other than Pakistan, Afganistan, Nepal, Tibet, Bhutan and Portugueses territories in India,):

Name of Steamer/Aircraft No.

Shipping Bill No.

Rupee Value.

1. Exporters name:

2. Country of destination of goods:

3. Short description and quantity of goods:

4. Invoice value of goods (stating currency)

(shipping charge, insurance, etc. if not included in price.

Total....

5. Method by which payment is to be received in India:

(a) foreign currency

(b) In--rupees

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

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

(b) ...I/my principals undertake that I/they will deliver to the bank mentioned below the foreign exchange/rupee proceeds resulting from the export of these goods on or before....

Section 23 reads as follows:

23. Penalty and procedure: (1) If any person contravences the provisions of Section 4, Section 5, Section 9, Section 10, Sub-section (2) of Section 12, Section 17, Section 18-A or Section 18-B or of any rule, direction or of order made thereunder, he shall--

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner hereinafter provide, or

(b) upon conviction by a court, be punishable with imprisonment for a term which may extend to two years, or with fine or with both.

There is adjudication by the Director u/s 23-D and thereafter further appeal to the Foreign Exchange Regulation appellate Board u/s 23-E. u/s 23-EE an appeal shall lie to the High Court only on the question of law from any decision or order of the appellate Board under Sub-section (3) or Sub-section (4) of Section 23-E. The Foreign Exchange Regulation Act, 1947 was replaced by the Foreign Exchange Regulation Act, 1973 (hereinafter called the new Act) and Section 81 of the New Act provides for repeal and saving. The preamble to the New Act reads as under:

An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities transactions indirectly affecting foreign exchange and the import and export of currency and bullion, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country.

The present appeals have been preferred u/s 54 of the new Act.

18. We may now take up the questions for consideration in seriatum. The first

question is whether Section 12(2) of the Act applies to consignment sales as well as completed sales, or only to completed transactions. We are relieved of our difficulty to a great extent, because the matter is conculded by the judgment of this Court in R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, . The learned Judges held therein (at page 303):

I find no difficulty in holding that Section 12(2) applies to cases both of export on sale and export for sale, that is, consignment sale as referred at the Bar, though there was considerable discussion on this Section 12 must be read in its entirely and Sub-Section 12(2) interpreted in the context. The language no doubt is rather unhappy, but the legislative intent is clear. The person referred to as the person entitled to sell or procure the sale of in the first part of Section 12(2) is only descriptive and can include a case where the person has actually sold or procured the sale of the goods. In the Indian Sales of Goods Act, the words ''Buyer and Seller'' subject to the context may mean both a person, who buys or agrees to buy and a person, who sells or agrees to sell as the case may be. In the context of the provisions under consideration it appears to me that it can, without violence to the language and bearing in mind the scope and object of the Act, include a person, who sells or has sold, or a consigner for sale, who offers for sale the goods exported. There is nothing incongruous or incompatible in applying Section 12(3)(a) or (b) to the case of an export on sale, that is to a case where there is a contract of sale with a foreign buyer. Even where there is a firm contract of sale with a specified buyer, the completion of the sale may be delayed for various reasons and property may not pass immediately on the goods being placed on board the ship. ? The Sub-section of course, exfacie applies to the case of consignment for sale, that is an export by a consigner of goods to a consignee for sale, but it clearly takes in also cases where there are firm contract of sale.

This decision was followed by another Bench of this Court in Appeal Against Order Nos. 267 and 271 of 1974. As against this Krisnaswamys Case AIR 1970 Mys. 3 was cited before us wherein it was held that it would not apply to consignment sales. Both these decisions came up for consideration The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others, and the Division Bench held that it would not apply to consignment sales. It may be noted that the decision of the Calcutta High Court proceeded on the basis of the decision in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, . In that decision this question did not directly arise for consideration. However, a Full Bench of the Calcutta High Court in The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others, upheld the decision of the Calcutta High Court in The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others, dissenting from the judgment of this Court in R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, . We are unable to persuade ourselves to hold that the decisions of our High Court referred to above require reconsideration. Therefore, applying the same, we conclude that Section 12(2) applies to both consignment as well as concluded sales.

19. The next question to be considered is whether the full export value stated in Section 12(1) will represent the full amount payable under all circumstances. It is this which an exporter is obliged to state in G.R.I. form and that is what the respective columns in G.R.I. form extracted above shows. It is also relevant to note that the exporter is obliged to declare as ''the particulars given are true and that the Invoice Value declared is the Full Export value of the goods and is the same as that contracted with the buyer'', (emphasis by us). The question under these circumstances would be whether the full export value of the goods as spoken to under the section would represent the full amount payable by the foreign buyer in respect of the goods as stated u/s 12(2)(b). In our considered view, the Parliament has avowedly chosen to use different pharaseology and there is absolutely no reason to think that the export value must under all circumstances represent full amount payable by the foreign buyer. The full amount payable by the foreign buyer may be the market value subject to fluctuation relating to foreign exchange. But in a case like one we have on hand, is it not open to the Department to rely on the very statement made by the exporter and confront him with that statement. We should answer it in the affirmative. In fact, this Court in R. Venkata Subbu and Others Vs. The Director of Enforcement and Another, has held:

The cruse of the present argument by the learned Counsel for the writ Petitioners really arises from the terminology employed by the Director, both in the charges themselves and in his final proceedings. The Director respeatedly states that the concerned parties failed to repatriate the foreign exchange representing the full export value of the goods. That is the charge to which the plea of guilty have been made. Learned Counsel for the writ Petitioners have rightly emphasisted that, though the full export value of the goods may very frequently be equivalent to the full amount payable by the foreign buyer in respect of the goods, the words accurring in Section 12(2)(b), the two may conceivably vary owing to a variety of circumstances, not all of them within the control of the seller. For instance the rates of foreign exchange themselves may be adversely affected between the dates when the contracts were made with the foreign buyer, and the date with reference to which the foreign buyer incurs the obligation to pay the value, interpreting this in terms of Indian currency, Again, Section 12(5) that we have earlier extracted, shows that the Reserve Bank has the power to require the person holding the shipping documents to retain possession of them until the exporter makes arrangements, for the Reserve Bank to receive or procure, an amount which Respondents in the opinion of the Reserve Bank the full export value of the goods; in other words, this is a check on what is known as underinvoicing. It is therefore strenuously contended that the Director did not at all address himself to the true question, whether these parties really failed to repatriate the exchange value of the full amount payable by the foreign buyer. On the very facts of overinvoicing found by the Director it is argued that there were no such amounts at all; the amounts payable were only with regard to goods actually sold, and they represented only a fraction of the originally declared full export value. They were repatriated, atleast in some cases, and hence the orders have to be set aside.

This I think confuses two distinct arguments. On a question of interpretation, it seems clear that in the light of the certificate furnished in the G.R.I. form, the full export value would certainly, be the full amount payable by the foreign buyer, except indeed where other circumstances, such as an adverse rate of exchange have affected the liabilities of the foreign buyer. If such circumstances were germane to the present issues, it must certainly be held that the Director has failed to address himself to the proper question, or to the establishment of the proper ingredients. But, in all these cases, solemn certificates were furnished by these parties, not merely to the effect that a particular amount was the full export value but also specifically that this represented the bargain or contract with the foreign buyer. The argument now is not that the two have varied, owing to other supervening causes. I he argument based upon underinvoicing relevant to Section 12(5) again seems to be a quite distinct matter, and such a power of control may be vested with the Reserve Bank. But that does not affect the legal obligations of the party in the position of the consigner or seller, with regard to Section 12(2)(a) or Section 12(2)(b). Where this party fails to repatriate the foreign exchange, which would ordinarily be the export value, it may certainly be considered whether the full amount payable by the foreign buyer is a different sum owing to some circumstances for which the party is not responsible, and the party has, therefore to be exonerated; or atleast, to be dealt with only with regard to the later sum. But where it has been declared that there is a foreign buyer liable to pay this sum, the question is not this, but whether the Director will not be justified in holding the party to his word or assurance and in requiring him to repatriate the full amount payable by the foreign buyer, which is the same as the full export value of the goods. On a matter of interpretation, there can be no possible difficulty. The two descriptive terms are not precisely equivalent and they may vary. But the mere fact that the Director uses the wrong terminology, certainly cannot cloud or affect the main issue. That is, whether, on the facts, these parties did not fail to repatriate foreign exchange representing the full amount payable by the foreign buyer. They declared this to be a particular amount, and they failed, in most cases, to a repatriate the foreign exchange, even to a fraction of this amount; can they be permitted to plead their own fraudulent contravances in overinvoicing as a justification for this, court, and as an answer to the charge?

In this case, the Appellants had clearly admitted overinvoicing. Under these circumstances, to hold that they cannot be charged on the value as given in G.R.I. form is something understandable. Therefore, we reject the contention that there is no contravention of Section 12(2). Further, the word payable occurring in Section 12(2)(b) cannot be equated with the word due. In fact, payable is, as seen from the invoice, and cannot relate, to the understanding between the parties. At the risk of repetition, we say it is not necessary under all circumstance that one should be guided by G.R.I. form Section 12(2) is depended upon Section 12(1) to the limited extent of prescription of the form but it is an independent Section by itself. Krishnaswamy''s Case AIR 1970 Mys. 3 itself makes note of this distinction in the judgment as follows at page 6:

What was over-looked by the Director was the contrariety between the language of Sub-section (1) and that of Clause (b) of Sub-section (2). While Sub-section (1) speaks of the full export value of the goods, Clause (b) of Sub-section (2) refers to the ''fall amount payable by the foreign'' buyer.

20. The next point to be considered is men rea. In this case, overinvoicing has been clearly admitted by the consignors. They knew the consequences or the results of overinvoicing. They knew at the time of overinvoicing that the full value as stated in G.R.I. form;was not the amount to be repatriated. In fact, the order forming the subject-matter in Appeal No. 494 of 1975 refers to this and in paragraph 22 of the order it is stated:

It has been clearly stated in the order of the Director that it has also been admitted that no sum is really due as export sale proceeds, in respect of any of the shipments and that In fact none of the parties had even applied for extension of time to the Reserve Bank of India for the repatriation of the export sale, proceeds as all the parties knew, even at the time of the export, that no amount would be due, or realisable, in respect of any of the exports.

21. We are in entire-agreement with this finding and we hold that mens rea has been proved.

22. The last question is with regard to penalty. According to Section 23, as already seen, penalty is leviable three times the value of foreign exchange in respect of which contravention has taken place or 5,000 rupees which even is more. From this it is clear that the value of foreign exchange involved is the criteria and in fact in each of the cases before us the foreign exchange involved is more than the penalty levied. If the quantum of export is multiplied by three the penalty will be much more.

Perhaps taking a more liberal attitude the Department had levied penalty basing on import entitlement. Normally that may not be strictly correct. Nevertheless, in so far as no prejudice has been caused in that the penalty levied is not even equivalent to the value of foreign exchange lost, we are not inclined to interfere even on the question of penalty. In passing, we may also refer to the order of the Director wherein he has taken into consideration the total amount standing against each firm, the total non-repatriation and the import entitlement unlawfully obtained by each firm. If under law, the Appellants could be confronted with the statements made in G.R.I. forms which amounts represent the amount payable by the foreign buyer, the imposition of penalty is perfectly in accordance with law. Under such circumstances, we reject the contention of the Appellants as regards penalty.

23. In view of the foregoing, we hold that these appeals carry no merits and we

hereby dismiss the appeals with costs.

