

(2009) 03 MAD CK 0157

In the Madras High Court

Case No : Writ Petition No"s. 4398 of 1998 and 13814 of 1999

Trimex Minerals Private Ltd. and S. Ramadoss Ex-Managing Director, Trimex Industries Limited APPELLANT

Vs

The Union of India (UOI) and State Bank of India, Overseas Branch RESPONDENT

Date of Decision : 11-03-2009

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 11(2), 11(4), 13, 2(18), 20(2)
Foreign Trade (Development and Regulation) Ordinance, 1992 — Section 4
Imports and Exports (Control) Act, 1947 — Section 4(1), 4(1)(3), 4I
Penal Code, 1860 (IPC) — Section 511

Citation : (2009) 03 MAD CK 0157

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : R. Thiagarajan, SC for M. Muthappan, for the Appellant; M. Ravindran, Addl. Solicitor General of India asstd. by K. Ravindranath, for the Respondent

Judgement

K. Chandru, J.—In W.P. No. 4398 of 1998, the petitioner is a Private Limited Company. In that writ petition, the challenge is to the order dated 27.1.1998 passed by the first respondent confirming the order of the second respondent dated 19.1.1996. The writ petition was admitted on 27.3.1998. An interim-stay for four weeks was granted on the condition that the petitioner furnishes bank guarantee to the extent of Rs. 2 lakhs in favour of the second respondent within a period of two weeks. Thereafter on the petitioner furnishing a bank guarantee, the interim-stay was made absolute on 28.8.1998.

2. In W.P. No. 13814 of 1999, the petitioner challenges the order dated 20.3.1998 passed by the second respondent as well as the Appellate Committee's order of the third respondent dated 29.12.1998. In this writ petition, notice of motion was ordered returnable by four weeks on 13.8.1999. On the application for interim stay, no orders were passed by this Court. It was

merely directed to be posted along with main writ petition. Since both sides have agreed that these matters to be dealt with together, they were posted together and a common order is being passed.

3. It is stated that the petitioner in W.P. No. 4398 of 1998 was a registered Merchant Exporter of slates, granites with chemical and allied products. By the Export and Import Policy (for short "EXIM Policy") for the year 1992-1997, exporters were issued Exim Scrips against the export of any product during June 1991 and for subsequent period. The petitioner Company availed the service of one Murali Krishna for expediting the issue of Exim Scrips. It was stated by them that they never authorised the said Murali Krishna to deal with the office of Joint Director General of Foreign Trade either at Chennai or at Puducherry or to apply for obtaining any licence for availing Exim Scrips. According to the petitioner, the said person was informally handling the cases of the petitioner for expeditious issue of Exim Scrips. It was stated by them that the said Murali Krishna had fabricated certain documents. After forging the signature of the Director of the Company, he had obtained Exim Scrips from the Deputy Director General of Foreign Trade at Puducherry.

4. Three Exim Scrips were obtained by the said Murali Krishna. It was also stated that those Scrips were neither received by the petitioner Company nor they issued any transfer letter attested by the concerned bank to anyone. These Scrips were issued in the name of the petitioner Company purchased by the brokers directly from the said Murali Krishna. It appears that the Licensing Authority had issued a show-cause notice to the petitioner dated 18.8.1994 asking them to show cause as to why action should not be taken to impose a fiscal penalty on the Company or its Directors. The adjudicating authority found that the fraud was committed by a person who was acting as a liaison agent and the petitioner Company cannot whitewash its involvement in the fraud. Accordingly, by an order dated 19.1.1996, a penalty of Rs. 2 crores was imposed on the Company.

5. Aggrieved by the said order of the Additional Director General of Foreign Trade, the petitioner filed an appeal to the appellate committee. The appellate committee gave a personal hearing on 21.1.1998. Thereafter by an order dated 27.1.1998, the imposition of penalty was confirmed and the appeal filed by the petitioner was dismissed. After the dismissal of the appeal, the Director General of Foreign Trade, New Delhi by a communication dated 18.3.1998 had called upon the petitioner to pay the penalty failing which they were threatened with Revenue Recovery Proceedings for releasing the penalty amounts. It was against these two orders, the first writ petition was filed.

6. It was contended by the petitioner that the Exim Scrips were dated 03.7.1992 and they were issued after the Foreign Trade (Development & Regulation) Act, 1992 (for short "the Act") came into force i.e. with effect from 19.6.1992. Sections 11(2) and 13 of the Act reads as follows:

S. 11(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be made, whichever is more.

S. 13. Any penalty may be imposed or any confiscation may be adjudged under this Act by the Director General or subject to such limits as may be specified, by such other officer as the Central Government may, by notification in the Official Gazette, authorise in this behalf.

7. In the light of the above provisions, it was contended that as per the amended Act, the penalty for contravening the provisions of the Act was not exceeding Rs. 1000/- or five times the value of the goods over which any contravention has been made. The limit of penalty has to be specified by the Central Government by a notification in the gazette in terms of Section 13 of the Act. It was also contended that the petitioner had not committed any offence and it was the action of the intermediary who was not authorised by them.

8. On notice from this Court, a counter affidavit dated ""nil" (June 2008) was filed. In paragraph 4, it was averred as follows:

"Para 4.Further the petitioner has himself admitted that they had availed the services of one Shri.Murali Krishna for expediting the issue of Exim Scrip. Therefore, it cannot be assumed that the petitioners were unaware of issue of Exim Scrip on the basis of bogus documents submitted by his said liaison man to the Office of Asst.Chief Controller of Imports & Exports, Pondicherry. In this connection adjudicating authority in his order has mentioned that one of the firms to whom the Exim Scrip was transferred viz. M/s.Kalpna Corporation, Madras has confirmed that they had paid consideration for the Exim Scrip No. P/K/2439869 dated 03.7.1992 to the petitioner and thereby showing beyond reasonable doubt the involvement of the petitioner's firm. Their contention that the said Shri.Muralikrishnan was not authorised by them for collecting the documents from the Government Officer or other statutory bodies are on the face of it incorrect and misleading as the moment the said liaison man handed over the licences as well as cheques to them, they could have enquired from him as well as concerned licensing officer as to how the man was allowed to receive the documents from the licensing office. But instead of taking above action, they willingly accepted the licenses and sold those on premium to other parties. They could have also informed all the other concerned Government Department etc. not to allow the above liaison man to represent on their behalf for any such work. However, only after entire matter came to the notice of the Department, the petitioner took the plea of ignorance that the above licenses were obtained by the said liaison man without their knowledge. The petitioner said that their office does not exist at Pondicherry but this does seem to be relevant in the overall context as the liaison man was duly authorised and instructed to act on their behalf to liaise with the said office for expediting the issue of said licenses.

9. But, with reference to which Act (either old or new Act) will apply to the case, the following averments have been made in paragraph 5, which is as follows:

Para 5. In accordance with the Section 11(4) of the Foreign Trade (Development and Regulation) Act, 1992 (Earlier Section 4(1)(3) of the Imports and Exports (Control) Act, 1947), the penalty imposed under this Act, may, if it is not paid, be recovered as an arrear of land revenue and the Importer and Exporter Code number of the person concerned, may have failure to pay the penalty by him, be suspended by the Adjudicating Authority till the penalty is paid....

10. W.P. No. 13814 of 1999 is filed by the former Managing Director of M/s. Trimex Industries Limited with the very similar allegation. In this case, it was stated that the very same Murali Krishna who was the intermediary fabricated certain documents and after forging the Director's signature obtained seven replenishment licences fraudulently for import of raw materials by showing a false address at Puducherry. On coming to know about the same, a showcause notice dated 22.9.1994 was issued u/s 4(1) of the Import and Export Control Act, 1947 and after explanation, they were debarred from carrying out any import activity for the licensing period 1992-1993 to 1996-1997. It was also stated that the firm represented by him after obtaining Exim Scrips, refunded the premium by sale of Exim Scrips to the State Bank of India, Overseas Branch, Chennai. By an order dated 19.1.1996, a penalty of Rs. 1 crore was imposed on the Managing Director of the firm. Their subsequent appeal to the appellate committee dated 19.1.1996 was allowed and the matter was sent back for fresh consideration by the adjudicating authority. After the remand, the adjudicating authority found that the monetary benefit obtained by the firm was paid back, the Government took a lenient view and imposed a fiscal penalty of Rs. 10 lakhs on the firm and a further sum of Rs. 25 lakhs on the petitioner. Once again an appeal was filed before the appellate committee. The appellate committee reduced the penalty from Rs. 25 lakhs to Rs. 10 lakhs. It is this order which is under challenge in the second writ petition.

11. In this case also, the very same legal contentions as were raised in the other writ petition, have been raised. On behalf of the respondents a counter affidavit dated 05.9.2008 was filed. In paragraphs 3 and 6, it was averred as follows:

Para 3. I humbly submit that M/s. Trimex Agencies Pvt. Ltd. Madras were issued a SCN dated 22.9.1994 u/s 4I of the Imports and Exports (Control) Act, 1947 as amended read with Section 20(2) of the FT (D&R) Act, 1992 for obtaining 7 REP Licence fraudulent as per the details given under for import of Raw Materials by showing their address falsely and by producing fake, forged documents and declarations:

1. P/K/3529863 dated 03.7.92 68,52,000/- 2. P/K/3529864 " 03.7.92 69,06,000/- 3. P/K/3529855 " 25.6.92 50,23,000/- 4. P/K/3529861 " 03.7.92 52,32,000/- 5. P/K/3529857 " 25.6.92 40,07,000/- 6. P/K/3529856 " 25.6.92

34,88,000/- 7. P/K/3529854 " 25.6.92 57,79,000/-

Para 6. I humbly submit that the petitioner was directly involved in the fraud in connivance with Mr. Murali Krishna as he confirmed to concerned Bank about transfer of Exim Scrips to other parties and also executed Indemnity Bond in respect of Exim Scrip, obtained fraudulently. Addl. DGFT had imposed a penalty of Rs. 1.00 Crore each on Shri.S.Ramadas (stated to be Managing Director of the M/s.Trimex Agencies) and on M/s.Trimex Agencies Pvt.Ltd. Chennai for violation of Section 4I of the Imports & Exports (Control) Act,1947 vide Order in Original No. 3/34/93-94/ECA-II/1303, dated 19.1.1996.

12. Mr. R.Thiagarajan, learned Senior Counsel appearing for the petitioner submitted that in the Foreign Trade (Development and Regulation) Act, 1992 (Central Act 22 of 1992) Sections 11 - 14 came into force w.e.f. 07.8.1992 whereas other provisions were brought into force w.e.f. 19.6.1992. It must be stated that before the Central Act 22 of 1992 was brought into force, the earlier law was occupying the field of Imports and Exports (Control) Act 1947. That was repealed by the Foreign Trade (Development and Regulation) Ordinance 1992 (Ordinance No. 11 of 1992) (hereinafter will be referred to as "the new Act") which was brought into effect from 19.6.1992. Section 4 of the Act reads as follows:

Section 4. Continuance of existing Orders

All orders made under the Import and Export (Control) Act, 1992 (3 of 1947) and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the provisions of this Act, continue to be on force and shall be deemed to have been made under this Act.

13. The learned Senior Counsel appearing for the petitioner stated by placing reliance upon Section 11(2) that the new Act has drastically reduced the penalty. u/s 19 of the Act, the power to frame rules have been prescribed and what is saved by Section 20 was any right, privilege, obligation or liability acquired, accrued or incurred under the old Act which was repealed and also any penalty, confiscation or punishment incurred in respect of any contravention of the Act so repealed. Under the rules framed under the new Act, Rule 10 deals with cancellation of licence by the Director General or licensing authority and it is listed out that such licence can be cancelled if they were obtained by fraud, suppression of facts or misrepresentation.

14. The learned Senior Counsel after referring to para 5 of the counter affidavit stated that the respondents are confusing the issue by relying upon both the provisions of the old Act as well as the new Act. Since 1947 Act has been repealed, any action can be taken against the petitioners only in terms of the new Act, whereas, the original show-cause notice dated 19.1.1996 was issued both under the old Act as well as under the new Act. Since the show-cause notice itself came to be issued only after coming into force of the new Act, the reference made to the old Act is not available to the respondents. The learned

Counsel in this context referred to Section 20, which is the repealing and saving provision and more particularly referred to Section 20(2)(c) and contended that in the present case it was not the case of penalty, confiscation or punishment already imposed on the petitioner. It is only in such of those cases, where a penalty, confiscation or punishment proceedings are initiated, it can be continued as if the 1947 Act has not been repealed. On the basis of this factual and legal matrix, the learned Counsel submitted that the show-cause notice issued as well as the punishment imposed in terms of the old Act were not valid. If at all the petitioner is guilty of any contravention of the illegal obtaining of Replenishment Licence or fraudulent sale of Exim Scrips, they will have to be proceeded only under the new Act wherein special procedure has been granted and penalties have also been prescribed.

15. Reliance was placed upon the judgment of the Supreme Court in *Bharat Barrel and Drum Mfg. Co. (P) Ltd. Vs. The Collector of Customs, Bombay and Another*, . This is for the proposition that if the departmental authorities impose fine on a licensee without proper investigation, whether goods imported did not comply with terms of licence, the Central Government in the exercise of revisional power should consider the case on merits and give an adequate opportunity to the licensee to prove his case.

16. The learned Senior Counsel also placed reliance upon the judgment of this Court in *Ranjit Export Private Ltd. Vs. Collector of Customs, Madras*, . Since the petitioner was accused of making an attempt to import goods, the precise meaning of the term "attempt" came to be dealt with in the said judgment of this Court as found in paragraph 24 and the same may be usefully extracted below:

Para 24. In the language of the Supreme Court, attempt defies a precise and exact definition. Section 511 of the Indian Penal Code punishes "attempt", but it does not define "attempt". All said, the question is really one of fact depending upon the peculiar features and circumstances of each case and the provisions of law, the attempted breach of which is complained of. In the context of the present case, we cannot lost sight of the definition of "export" found in Section 2(18) General Clauses A of the Act. The essential ingredient of export is the taking out of India. The acts complained of must fall in the course of movement of the goods with an intention to take them out of India. All other acts done anterior to this step, namely, movement would only partake the character of preparations. If the petitioner has done any act towards the exportation, namely, taking of the goods out of India and if the act or acts could be fitted in the course of such movement of the goods, or, in other words, the act could fall in the course of progress towards the actual physical taking of the goods out of India, the mischief of Section 113(d) would be attracted. There should be a direct physical movement towards the taking of the goods out of India after all the preparations are made and which preparations may also fall within the satisfaction of the provisions and completion of the formalities under the Act.

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

17. The learned Senior Counsel also further placed reliance upon the decision of the Supreme Court in S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others, . This is for the purpose of proving that the norms obtaining on the date of licence alone would apply. For this purpose, the following passage found in paragraph 10 may be usefully extracted below:

Para 10. We are, therefore, of the opinion that the contention that a vested right accrues to an applicant for issuance of advance licence on the basis of the norm obtaining on the date of application is unacceptable. The scheme and the context militate against the contention. The fact that the policy is statutory in nature (delegated legislation) has no relevance on the question at issue. It would be wrong to equate the filing of an application for advance licence with the filing of a suit where it is held that appeal being a substantive right, the right of appeal inhering in the party on the date of filing of the suit cannot be taken away by a subsequent change in law.

Therefore, the learned Senior Counsel contended that the impugned orders must be set aside.

18. Per contra, Mr. M.Ravindran, learned Additional Solicitor General submitted that whether under the old Act or under the new Act, the petitioners have committed fraudulent transactions and obtained undue pecuniary benefit. Their theory of some intermediary agent had independently committed such acts is not born out by records. In any event, both the adjudicating authority and the

appellate committee have dealt with the issue and such finding of fact cannot be interfered with by this Court. He also submitted that the fraud committed by the petitioner was referred to the CBI for an investigation during October 2003. Having committed criminal acts of forgery and fraudulent transaction, the petitioner cannot escape the penal consequences.

19. The learned Additional Solicitor General of India also referred to Section 6 of the General Clauses Act, 1897 and submitted that the old Act viz., 1947 Act being repealed by the new Act, viz., 1992 Act, it will not affect the previous operation of any enactment so repealed and therefore the impugned adjudication proceedings merely referring to the old Act will not invalidate the same. In this context, he placed reliance upon the judgment of the Supreme Court in *Jayantilal Amrathlal Vs. The Union of India (UOI)*, . The following passage found in paragraph 8 is relevant, which reads as follows:

Para 8. The above contention is untenable. There are no provisions in the Gold (Control) Act, 1968 which are inconsistent with Rule 126(I)(10) of the "Rules". That being so, action taken under that rule must be deemed to be continuing in view of Section 6 of the General Clauses Act, 1897. It is true that Gold (Control) Act, 1968 does not purport to incorporate into that Act the provisions of Section 6 of the General Clauses Act. But the provisions therein are not inconsistent with the provisions in Section 6 of the General Clauses Act. Hence the provisions of Section 6 of the General Clauses Act are attracted in view of the repeal of the Gold (Control) Ordinance, 1968. As the Gold (Control) Act does not exhibit a different or contrary intention, proceedings initiated under the repealed law must be held to continue. We must also remember that by Gold (Control) Ordinance, the "Rules" were deemed as an act of Parliament. Hence on the repeal of the "Rules" and the Gold (Control) Ordinance, 1968 the consequences mentioned in Section 6 of the General Clauses Act, follow. For ascertaining whether there is a contrary intention, one has to look to the provisions of the Gold (Control) Act, 1968. In order to see whether the rights and liabilities under the repealed law have been put an end to by the new enactment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question - see *State of Punjab v. Mohar Singh* AIR 1955 SC 84 and *T.S. Baliah Vs. T.S. Rengachari*, .

20. Basing reliance upon the above extracted passage, the learned Additional Solicitor General submitted that it is not a case of the rights and liabilities under the repealed law have been put an end to by the new enactment and that the new Act kept alive the rights and liabilities under the repealed law.

21. There can be no quarrel over the proposition of law laid down in the *Jayantilal Amrathlal*'s case (cited supra) relied on by the learned Additional Solicitor General of India. What is contended before this Court by the learned

Senior Counsel for the petitioner is that under the new Act, the procedure in dealing with the alleged offence committed by the petitioner is entirely different. Even if the petitioners were found guilty, they are liable to pay the penalty in terms of the new Act. He also submitted that even assuming without admitting that the petitioner has committed offences punishable under the Foreign Trade Act in so far as the actions have been initiated only under the new enactment, the penalty also has to be in terms of the new enactment. For this purpose, the learned Counsel referred to Section 20 providing for repeal and saving clause. A further submission was also made that since no statutory proceedings were initiated before new Act and what is saved was only the penalty, confiscation, punishment in respect of any contravention under the old Act. It is not the case of the respondents that there were any proceedings pending before the new Act came into force.

22. This argument of the petitioner merits acceptance. Since the respondents have imposed penalties as per the old Act, the impugned order of the third respondent appellate committee is hereby set aside. The matter is remitted back to the Secretary, Ministry of Commerce, Union of India, New Delhi for fresh disposal in accordance with the provisions of the Central Act 22 of 1992. This exercise shall be done by the Union of India within a period of three months from the date of receipt of a copy of this order after due notice to the petitioner.

23. However, the bank guarantee created by the petitioner pursuant to the order passed by this Court dated 27.3.1998 shall be kept alive pending the outcome of the orders to be passed on the appeals filed by the petitioner.

24. The writ petitions are allowed to the extent indicated above. There will be no order as to costs.