
(1977) 09 MAD CK 0018

In the Madras High Court

Case No : W.A. No. 309 to 317 of 1974 and 358 of 1973

Union of India and another

APPELLANT

Vs

Messrs. Marcel Nevens, Madras and others

RESPONDENT

Date of Decision : 27-09-1977

Acts Referred:

Customs Act, 1962 — Section 11, 113, 113(d), 114, 50

Citation : (1977) 09 MAD CK 0018

Hon'ble Judges : P. Govindan Nair, C.J.;Varadarajan, J

Bench : Division Bench

Advocate : T. Chengalvarayan and R. Thyagarajan, for the Appellant; S. Govind Swaminathan, I. Subramanian, Udayaprakash David and Raj, for the Respondent

Judgement

P. Govindan Nair, C.J.—These writ appeals are taken respectively from the judgments in W.P. 792, 2573, 1427, 1426, 1425, 2549, 1428, 885, 1424 and 246 all of the year 1971. W.P. 792, 1427, 1426 1425, 2548, 1428 and 1424 of 1971 were taken by, what we may term, agents, which term will be clarified when we state the facts. The other writ petitions to which reference has been made were by the exporters. The short question that arose for decision before Ramaprasada Rao, J. in the writ petitions was whether there had been violation of S. 12 (1) of the Foreign Exchange Regulation Act, 1947, by the writ petitioners. We shall extract S. 12(1) as amended presently. S. 23-A of the same Act has provided that the restriction or prohibition imposed by S. 12(1) shall be deemed to have been imposed under S. 11 of the Customs Act and all the provisions of that Act shall have effect accordingly. It is by virtue of this provision in the Foreign Exchange Regulation Act that a show cause notice was issued to the writ petitioners relying on Ss. 113 (d) and (i) read with S. 50 of the Customs Act, 1962, asking them to explain why the goods, which were sought to be exported, should not be confiscated and why penalty should not be imposed on them applying Ss. 113 and 114 of the Customs Act. It is at this stage necessary to extract S.12(1) of the Foreign Exchange Regulation Act, 1947, as amended--

12 (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 materials particulars which, among others, shall include the amount representing:--

(i) the 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 in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been or within the prescribed period be paid in the prescribed manner.

Earlier, the same question arose before this court, and it was dealt with by Palaniswami, J. in the common judgment disposed of W.P. 3758 to 3761 of 1970 and certain other writ petitions. The learned Judge came to the conclusion that there was no material whatsoever before the Collector of Customs, who took action under Ss. 113 and 114 of the Customs Act, for confiscating the goods and imposing penalties on the petitioners before the learned Judge Ramaprasada Rao, J. followed the decision of Palaniswami J. and allowed the two sets of writ petitions, one by the exporters, and the other by the agents, and set aside the confiscation orders and the orders imposing the penalty by applying the principle of the decision rendered by Palaniswami, J. There is no discussion in the judgment under appeal in these cases. Reliance has been placed solely on the reasoning of Palaniswami, J. in the judgment referred to.

2. It is argued on behalf of the Union of India and the concerned Secretary, the appellants before us, that the reasoning of the Collector and the observations made by him and the inference apparently drawn by the Collector would indicate that there was some secret understanding or agreement between Messrs. Simson and McConechy Ltd. functioning in India who are admittedly the agents of Messrs. Bevingtons and Sons, Ltd., London and Bevingtons and Sons and the principals, and the agents had similar agreement with the German firm Messrs. Zentral Kommerz that the goods dispatched by the writ petitioners allegedly intended for the German firm, were not really intended for them but for Bevington and Sons, Ltd., London. The Collector of Customs heavily relied on the materials said to have been collected by the Customs authorities on the search of the premises of Messrs. Simson and McConechy, Ltd., and certain doubtful entries in the contract, and came to the conclusion that the real contract of export was between the exporter and Messrs. Bevington and Sons, Ltd., and not between the exporter and the German firm, Zentral Kommerz. The Collector of Customs also, as a consequence of his understanding, came to the conclusion

that the mode of payment for the goods exported were to be in Sterling and not to be in Indian rupee. Therefore, the Collector of Customs had no difficulty in holding that the declaration that had been made, as envisaged by S. 12(1) and the affirmation that had been made under S.50(2) were not true. Palaniswami, J. has dealt with the matter in detail in the judgment referred to by Ramaprasada Rao, J. in the judgment under appeal in these cases, and it is not necessary to state all the grounds mentioned therein. We would, however, like to emphasise certain aspects which we consider are the salient features of this type of cases.

4. The first aspect we would like to point out is that it is the violation of S.12(1) of the Foreign Exchange Regulation Act that may be penalised by applying the provisions of the Customs Act, and not the violation of any of the rules framed or any direction issued under any of the provisions of the law. We need not elaborate on this, because the point is covered by the decision of the Supreme Court reported in *Becker Gray and Co. v. Union of India* 1970-3 S.C.R. 445.

5. The second aspect which we must refer to is what has been emphasised by the Supreme Court in the decision reported in *S. 1. Goir Mills v. Addl. Collector of Customs* AIR 1976 S.C. 1527. We shall extract paragraph 8 of this judgment--

The declaration of the buyer's name even if wrong in the shipping bill and invoice did not attract the provisions of S. 12(1) of the Foreign Exchange Regulation Act. In the form prescribed under R.3 of the Rules (G.R.I. being one such form) the buyer's name was not to be inserted. It was not given in the declaration furnished by the appellant in that form. But the finding of the Additional Collector is that the destination of the goods was Triest, in Italy, and in the declaration furnished in form G.R.I. the appellant had stated that the payment was to be received in Indian rupees and this statement was untrue being against the prescribed manner.

The learned judge of the Kerala High Court, who dealt with the writ petition (which gave rise to the appeal before the Supreme Court) and dismissed it, held that S. 12(1)(ii) would not apply and the obligation of the exporter was--

(a) to furnish to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed;

(b) which declaration must be true in all material particulars and that among others shall include the amount representing the full export value of the goods; and

(c) he must affirm in the said declaration that the full export value of the goods will within the prescribed period, be paid in the prescribed manner.

The learned Judge stating that there was no case that there was no affirmation in the declaration held that S. 12(1) was not violated. The Division Bench, before which the matter went up in appeal, noticed that the declaration furnished by the appellant did not contain an affirmation as required by the last portion of the said sub-section. But, since the mode of payment mentioned in the declaration (sic)

was contrary to R.7 of the Rules, the Division Bench upheld the view of the Additional Collector that the appellant "had misdeclared the material particulars and attempted to export the goods in question in contravention of the prohibition contained in S.12(1) of the Act".

6. The Supreme Court referring to this conclusion reached by the Division Bench observed--

On the facts and in the circumstances of this case we are constrained to hold that even after the statement in Column 2 of Form G.R.I. that the country of destination of goods was Italy the statement in column 5 that the payment was to be received in India in Indian Rupee was not untrue.

However, the appeal was dismissed, and the decision of the Division Bench of the High Court was upheld on the ground that had he, the exporter, made a declaration, then, he would certainly have violated S. 12(1) of the Act by giving such a declaration, and the omission to give a declaration (there was no declaration) was also a violation of S.12(1)

7. Here, on the facts of the documents that have been filed by the exporter, there is nothing to indicate that there is any violation of S.12(1).The exporters had stated that the destination of the goods was a company in G.D.R. and the payment was to be made in rupees for which credit facilities would be provided to the agents of Messrs. Bevington and Sons, Ltd., in India. The Collector of Customs went behind the face value of these statements in the relevant documents, on the basis of the impressions formed by going through the documents obtained by a search of the agent's premises. The Collector of Customs assumed that the real sale in question was in favour of Bevington and Sons, Ltd., London, and not in favour of the German firm Zentral Kommerz, Berlin. The Collector of Customs naturally came to the further conclusion that the payment would have to be made in Sterling, since England fell under Group A in schedule I of the Foreign Exchange Regulation Act, and that, therefore, the statement that the payments are to be made in rupees was alone an untrue statement. The whole approach was made by the Collector of Customs on the basis of the initial impression formed. It is stated by the Collector of Customs in the earlier part of the order, after referring to the contentions raised on behalf of the exporters and the agents, in paragraph 17 of his order--

I am afraid that I am unable to accept the explanation furnished by them. The correspondence seized from the premises of Messrs. Simson and McConechy provide ample evidence to show that they had a good deal of hand in planning the mode of payment for the purchase made by them for and on behalf of Messrs. Bevington and Sons. This kind of elaborate planning including alteration and addition in crucial documents like contracts would not have been necessary if these export were in the nature of a straight sale by the Indian Exporters to the so-called consignees in the Eastern European countries with M/s. Bevington and Sons playing just the role of brokers as made out by their agents Messrs. Simson

and McConechy.

8. One aspect that is to be noted in this connection is that there was no material whatever before the Collector of Customs which would reveal any secret arrangement or agreement between Bevington and Sons, Ltd., and the German firm Zentral Kommerz. On the other hand, the material that was available before the Collector of Customs, to which reference was made by him, indicated that the German firm Zentral Kommerz had opened letters of credit for a large sum of money with the agents for the purpose of paying the exporters the value of the goods. What is noteworthy is that a contract identical to that entered into between Bevington and Sons, Ltd through their agents, Simson and McConechy in India and the exporters had also been entered into between the exporters and the German firm. We think, with great respect, the learned Judge Palaniswami, J. in giving importance to the opening of the Letters of Credit and the contract between the exporter and the German firm, proceeded on right lines, and it was on that basis that the learned Judge came to the conclusion that there was nothing to indicate that the statement made in the documents filed by the exporters were untrue. The learned Judge also observed that there was no material to indicate, assuming that the documents said to have been recovered from the agents, Messrs. Simson and McConechy, Ltd. indicated that there was some underhand dealing between Simson and McConechy and Messrs. Bevington and Sons, on which aspect the learned Judge did not reach any conclusion but only assumed that the conclusion of the Collector was correct, because the question did not arise before the learned Judge, was the writ petitions before the Judge were all by the exporters--that the exporters knew about it and had thereafter made any false declarations. It was pointed out that the same information that must be taken to have been available to the agents, Messrs Simson and McConechy could not be attributed to the exporters. The statements made by the exporters were accepted to be true. The order of the Collector of Customs was set aside, and the writ petitions were allowed by Palaniswami, J. We have no doubt whatsoever that the facts being identical, the same result should follow in the case of the applications made by the exporters which have been allowed by Ramaprasada Rao, J. under the judgment under appeal. Hence, W.A. No. 310, 316 of 1974 as well as W.A. 358 of 1973 have to be dismissed. We do so. Regarding the other appeals, which are all by the agents, Nevene, and Simson and McConechy Ltd. a further question arose in view of the conclusions reached by the Collector of Customs, whether there was any material before the Collector of Customs on which a reasonable man acting quasi judicially could reach the conclusion that was reached by the Collector of Customs. Mr. Govind Swaminathan, on behalf of the appellants in this batch of cases, we think, rightly contended that the material available was only the correspondence or documents exchanged between the agents--counsel was appearing for Messrs. Simson and McConochy Ltd. and their principals, or the pencil notings said to have been made by the said agents in the originals of these contracts, and that this by no stretch of imagination can reveal that there was any understanding or agreement

between the principals Bevington and Sons, Ltd., and the German firm Zentral Kommerz. It is not enough if there was material to make a guess that there could possibly have been a similar agreement between Messrs. Bevington and Sons Ltd., and the German firm ; but, there must be some tangible proof. Speculations certainly should be avoided, particularly when orders of confiscation and imposition of penalty are to be made. The provision is of a penal nature. The degree of proof that is required for the penalty to be imposed is that which is required in a criminal case. We would expect some material on the basis of which a reasonable conclusion is possible. In fact, the conclusion must not only be a possible conclusion but must be the only conclusion that could be reached on the material before the authorities. There was no such material at all before the Collector of Customs. In view of this, though Palaniswami, J.'s judgment did not deal with the case of agents, we think the conclusion reached by the learned Judge must apply to the agents as well, since there is nothing to indicate that the contracts were not with the German firm as stated in the contract for which payments were arranged by the German firm in rupees. We accordingly dismiss W.A. Nos. 309, 311, 312, 313, 314, 315 and 317 of 1974 as well. We direct the appellant to pay the costs of the respondents in all these appeals. Counsel's fee one set Rs. 500.