

(1996) 02 MAD CK 0131

In the Madras High Court

Case No : A.A.O. No"s. 803 and 804 of 1985

Union of India (UOI)

APPELLANT

Vs

S.K. Senjan Chettiar and Sons

RESPONDENT

Date of Decision : 12-02-1996

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 18(2), 54

Citation : (1996) 2 CTC 115

Hon'ble Judges : Sathasivam, J;Abdul Hadi, J

Bench : Division Bench

Advocate : S. Veeraraghavan, for the Appellant; K. Shahul Hameed, for S.A. Kareem, for the Respondent

Final Decision : Allowed

Judgement

Abdul Hadi, J.—In these appeals by the Enforcement Director u/s 54 of Foreign Exchange Regulation Act, 1973, (hereinafter referred to as the Act) only short point is involved. u/s 18(2) of the Act the contravention charged was upheld by the first authority but the same was reversed by the appellate Board. The relevant export was made on 4.7.1978. But out of the total amount of Rs. 58,983.66, a sum of Rs. 22,226.75 corresponding to US \$ 2725 has not been repatriated and that is why the first authority levied penalty of Rs. 4,000 on the respondent firm M/s. S.K. Senjan Chettiar & Sons and of a sum of Rs. 1,000 on its partner S.A. Rajamannar. (Out of these two appeals one appeal relates to the penalty levied on the firm and the other appeal relates to penalty levied on the partner).

2. These penalties were levied by the first authority on the footing that the respondent-firm allowed the importer to take delivery of the goods even though the importer did not pay fully, and there was deficiency in payment to the extent of the abovesaid US \$ 2725. The respondent has allowed the importer to do so without the importer furnishing the trust receipt. Thereafter also the importer did not pay the said sum but adjusted it with his earlier claim against the exporter

on the footing defective goods were supplied earlier by the exporter. In this regard the first authority also observes that the abovesaid partner Rajamannar, acting on behalf of the firm had visited the importer's place (Denmark, and agreed to the said set off. In such a situation the first authority by his order levied the abovesaid penalties. The appellate Board has reversed the said order of the first authority observing as follows:

"True, the firm has compromised to some extent by allowing the documents to be released but it has explained its action as relatable to the confidence and faith in the foreign buyer arising out of the magnitude of the business transactions which have successfully taken place in the past. To me there appears nothing unnatural in such confidence being reposed by the firm in the foreign buyer and if it turns out that the latter indulged in making false claims, vide their letter dated 12.7.79, it only means the firm has not taken a wise decision but that does not in any way impair the bona fides of the decision. In fact, to be fair to the AO, he was prepared to assume that the consignee's claim and statement were false and if so much is granted the conclusion is irresistible that the firm and its Managing Partner were not at fault in allowing the foreign exchange to the tune of US \$ 2725 to remain outstanding. I therefore set aside the finding of the AO that the charge against the appellants in respect of all these GRI forms is established."

3. But the learned counsel for the appellant points out that this reasoning of the Appellate Board is not at all acceptable but erroneous in law, since the respondent firm has not only allowed the foreign buyer to take delivery of the goods without furnishing trust receipt, but has also actually agreed to the abovesaid adjustment claimed by the foreign buyer on the ground of past defective supply of goods by the respondent-firm.

4. We also find the following passage from the first authority's order:-

"...After taking delivery of the goods the buyers have raised various claims on the past exports and wanted this consignment as a compensation for the past defective supply of goods. Shri. S.A. Rajamannar had visited Denmark and appeared to have agreed to the set off."

Learned counsel for the respondent has not shown anything contra against the abovesaid observation of the first authority. He is also unable to point out any ground having been taken, in the first appeal preferred by the respondent, against the abovesaid observation of the first authority.

5. That apart, it also appears that only because the respondent-firm has agreed to the abovesaid set off claimed by the importer, the respondent firm is reluctant upon to take legal action against the consignee importer. We also find that the first authority himself has found thus;

"... But I am unable to see why even after 21/2 years the exporters are reluctant to take any legal action against the consignee. They seem to have compromised

to certain extent by allowing the documents to be released without even a trust receipt."

6. Then regarding the other reasoning of the Appellate Board stating that the first authority was prepared to assume that the consigner's claim and statement were false. Here again, it is not correct to say that the first authority had proceeded on any such assumption. All that the first authority says is as follows;

"It may be true that the consignee may be making a false claim and the statements made in their letter dated 12.7.1979 are false..."

So, this statement of the first authority only says that the claim of set off made by the consignee "may be true" and the said consignee "may be" making a false claim. So, it cannot be said that the first authority has come to the conclusion that the consignee was actually making false claim or the first authority assumed that the consignee was making a false claim.

7. If really the respondent-firm has not agreed to the set off claimed by the importer then the consignee-exporter would have atleast sent a legal notice against the importer claiming the abovesaid US \$ 2725. Admittedly, no such legal notice even has been sent by the respondent-firm. Therefore, the reasoning of the Appellate Board is totally unacceptable and erroneous in law.

8. Learned counsel for the appellant also relied on two decisions of this Court, one reported in *P. Varadareddy v. The Additional Director Enforcement Directorate CFC (Mad) 269* and *India & Foreign Traders v. Special Director of Enforcement New Delhi CFC (Mad) 244*. In the former case, the appellant-company effected shipments of readymade garments to R and P in West Germany during March., June, 1978 in D/P basis. Since the appellant-company did not report the receipt of the money within the prescribed period of six months, a show cause notice was issued to them. But they changed the terms of payments without the permission of the Reserve Bank of India. In such a situation, levy of penalty was held to be valid and the relevant observation of this Court is that it was clear from the provisions of Section 18(2) of the Act, that mens rea was not at all required and that if it was proved that any act or omission had taken place, there was violation of the concerned section justifying the penalty.

9. In the other decision also penalty was levied on failure to realise sale proceeds in the export sale by the appellant therein. In the said case, the appellant got full amount from the Export Credit Guarantee Corporation but that does not absolve the appellant therein of his liability under the Act. There also it was observed that the intention of the party committing contravention need not be proved by the authorities. These two decisions also support the contention of the learned counsel for the appellant.

10. Therefore, the reasoning of the Appellate Board is totally unacceptable and erroneous in law. Accordingly, we set aside the order of the appellate Board and

confirm the order of the first authority and we allow these appeals. No costs.