M.G. WAGH & ORS.

v.

JAY ENGINEERING WORKS LTD.

JANUARY 13, 1987

[M.P. THAKKAR AND K.N. SINGH, JJ.]

Foreign Exchange Regulation Act of 1947, sections 10 and 12 (2)—Scope and Interpretation of—Whether section 12(2) designed to prevent wholesale or partial evasion of repatriation of earnings from export of goods covers only sale proceeds of goods exported 'for sale' or to sale proceeds of goods exported 'on sale' in the context of sale completed before export—Words and phrases—Meaning of the expression 'No person entitled to self or procure the sale of the goods.'

Section 12(2) of the Foreign Exchange Regulation Act, 1947 which is designed to prevent wholesale or partial evasion of repatriation of earnings from export of goods is to the effect that '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 .....'. In *R. Venkata Subbu & Ors.* v. *The Directorate of Enforcement, Enforcement Directorate, New Delhi & Anr.*, ILR Vol 3 Mad 1968 p. 18, the Madras High Court held that section 12(2) covers not only sale proceeds of goods exported "for sale" but also "on sale" in the context of sales completed before export, while the Calcutta High Court in the judgment under appeal held that it covers sale proceeds of goods exported "for sale" only. In view of the conflict of the opinions, the present appeal is by certificate.

Allowing the appeal and remitting the matters to the Competent Authority, the Court,

HELD: 1.1 The expression 'no person entitled to sell or procure the sale of the said goods' cannot be so narrowly construed (as referable to goods which have already been exported), so as to govern the scope of section 12(2) in such a truncated manner which renders it virtually impotent in so far as transactions of 'exports on sale' are concerned. Too much is being read into too little for no more laudable a purpose than to paralyze the provision. The expression does not necessarily induce one to the conclusion that the legislature wanted to prevent abuse in the context of 'export for sale' only. The expression is mean-

A ingful, relevant, and can co-exist in the context of abuse arising from 'exports on sale' from completed transactions as well. [985H;986B]

1.2 The said expression has been employed by the Legislature merely in order to indentify the accountable persons and is merely descriptive in that sense. The said expression does not restrict the operation of the Act to the persons who have not yet sold the goods. One would have to take a quantum jump in order to conclude that persons referred to in section 12(2) are the persons who have not yet sold the goods but are entitled to sell the goods in future merely because the expression 'entitled to sell' has been employed. The persons who have exported the goods to a foreign buyer, are not sought to be excluded from the operation of section 12(2). Clause (a) in terms adverts to the sale of goods being delayed. Clause (b) of section 12(2) adverts to payment for the goods, otherwise than in the prescribed manner, and also envisions a case where the payment does not represent the full amount payable by the foreign buyer in respect of the goods. Clauses (a) and (b) are compatible both with transactions of export on sale as also to transactions of export for sale. They are compatible with all transactions pertaining to both types of sales. There is no warrant to assume that the Legislature has not made any provision in order to ensure that the full amount of the sale price is repatriated and foreign exchange earned therefrom is not lost to the Nation regardless of whether it is in respect of 'export on sale' or 'export for sale'. [986F; 987A-C]

1.3 The avowed and the evident object of section 12 is to ensure that the Nation does not lose foreign exchange which is very much essential for the economic survival of the Nation. The exporter cannot be allowed to syphon away a part of the foreign exchange or to deprive the Nation of the foreign exchange earned by the exports. Such is the philosophy of section 12. To take the view that the legitimate National interest in the sphere of preservation of foreign exchange has relevance only in the context of transactions of exports for sales and that the Legislature exhibited total unconcern for the foreign exchange earned in the context of transactions of completed sales or consignment sales, is to attribute to the Legislature irrationality. And to impute to the Legislature that it did not know its job inasmuch as it has tackled the problem only partially without any rational basis for excluding the transactions of completed sales from the purview of the legislation which would substantially erode or defeat the purpose of the legislation. When it is equally possible to take the view which would be conducive to the conclusion that there is no lacuna in the legislation, it would be unreasonable to take the view that the Legislature has left a lacuna either by

negligence or by lack of foresight or because it did not know its job. [987B-F] A

2.1 Section 10 has no application in respect of foreign exchange earnings related to export of goods. Section 10 is designed primarily to impose an obligation on persons who have a right to receive any foreign exchange from a person resident outside India. This section has nothing to do with the foreign exchange earned by export of goods. The entire B matter pertaining to payments for exported goods and the foreign exchange earnings arising therefrom has been dealt with in section 12 which is a complete Code in itself. Section 12 has been very carefully designed. Every possible situation has been conceived of and appropriate prophylactic measures to ensure the preservation of foreign exchange and prevention of syphoning off the foreign exchange, which is very much essential to the economic life of the Nation have been embedded therein. The entire subject of foreign exchange earnings relatable to export of goods has been specifically and specially dealt with in section 12. It would therefore be futile to search for an alibi in section 10 merely in order to support the plea that section 12 does not take within its fold the foreign exchange earnings relatable to transactions of completed D sales. [988A-E]

2.2 On a plain reading of section 10, the matter pertaining to the foreign exchange earned by exports in the context of completed sales will not directly fall within the ambit of it. It will have to be strained beyond the point of endurance in order to accommodate this aspect. E Section 10 is akin to a complementary provision which deals with preservation of foreign exchange which does not fall within a specific provision like section 12. What is more, if completed transactions are excluded from section 12, the purpose of the legislation will not be served, because sub-section (6) of section 12 which has been designed to ensure compliance with the provisions made in section 12(1) to section 12 (5) F cannot be availed of. In that event, in regard to the persons who syphon off foreign exchange earned out of the transactions in the context of a completed sale or export on sale they cannot be dealt with under section 12(6) and no sanction to ensure compliance will be available. The Act will be thus rendered toothless to ensure compliance with evasion in the context of a completed sale. There is accordingly no compulsions of law, G logic, or philosophy to adopt such a view. [988F; 989A-B]

R. Venkata Subba & Ors. v. *The Director of Enforcement, Enforcement Directorate, New Delhi & Anr.*, ILR Vol. 3 Mad. 1968 P. 18, approved.

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A CIVIL APPELLATE JURISDICTION: Civil Appeal No 797 of 1976.

From the Judgment and Order dated 14.7.1972 of the Calcutta High Court in Appeal No. 59 of 1971

B V.C. Mahajan, Mrs. Subhadra and C.V. Subba Rao for the Appellants.

Harish N. Salve, Ravinder Narain, P.K. Ram, D.N. Mishra and K. Sukumaran for the Respondent.

C The Judgment of the Court was delivered by

THAKKAR, J. Whether Section 12(2)[1] of Foreign Exchange Regulation Act of 1947 (Act) designed to prevent wholesale or partial evasion of repatriation of earnings from export of goods covers only sale proceeds of goods exported "for sale" as held by the High Court D of Calcutta by the judgment under appeal, or to sale proceeds of goods exported "on sale" in the context of sales completed before export also, as held by the Madras High Court[2] and as contended by the appellants is the problem.

E

1. "12(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—

F (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.

G 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."

2. *R. Venkatasubbu and Ors.* v. *The Director of Enforcement, Enforcement Directorate, New Delhi and Anr.*, ILR Vol. 3MAD 1968 p. 18.

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The learned Single Judge of the Calcutta High Court dismissed a Writ Petition instituted by the Respondent-Company and refused to quash two show cause notices dated November 5, 1966 issued under Section 12 (2) of the Act as it stood at the material time on taking the view canvassed by the appellants in this appeal. A Division Bench of the High Court however allowed the appeal preferred by the Respondent-Company, reversed the order of the learned Single Judge dismissing the Writ Petition, and issued a Writ of Mandamus commanding the competent authorities under the Act (appellants herein) to forbear from giving effect to the said notices and from commencing any proceedings pursuant thereto. The competent authorities under the Act have approached this Court by way of the present appeal by a certificate under Article 133 (1)(a) of the Constitution of India. The hub of the argument addressed by the respondent company, which found favour with the Calcutta High Court, but failed to impress the Madras High Court, is the expression "no person entitled to sell or procure the sale of the said good" employed by the legislature in the opening part of Section 12(2) of the Act, which to the material extent deserves to be quoted:-

> "12(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 ...."

The argument runs thus:

> Section 12 (2) of the Foreign Exchange Regulations Act 1942, on its plain terms, applies only to "persons" who are "*entitled to sell or procure the sale* of the said goods." The word "entitled" governs the word "sell" as well as the expression "procure the sale of". Further, both these expressions are used with respect to the *"said goods"*—which means the goods which have already been exported. It is in these premises submitted that Section 12(2) applies only to such persons who are entitled to sell or procure the sale of goods which have already been exported.

We are not impressed by this submission that the aforesaid expression can be so narrowly construed so as to govern the scope of Section 12 (2) in such a truncated manner which renders it virtually

impotent in so far as transactions of "exports on sale" are concerned. Too much is being read into too little for no more laudable a purpose than to paralyze the provision. It appears to us that this expression does not necessarily induce one to the conclusion that the legislature wanted to prevent abuse in the context of 'exports for sale' only. The expression is meaningful, relevant, and can co-exist in the context of abuse arising from 'exports on sale' from completed transactions as well. The expression "no person entitled to sell, or procure the sale of the said goods" is merely descriptive of the person who is accountable under the said provisions as has been held by the Madras High Court in *R. Venkata Subbu's case*, I.L.R. Vol. 3 Madras 1968 Page 18, which has made a correct meaningful, and purposeful approach with which we unhesitatingly agree. The whole purpose is to 'identify' the accountable persons to prevent malpractises and ensure compliance. It is conceivable that the exports might be made in the name of or through the agency of a person other than the 'owner of goods' or the person entitled to sell the goods arising out of an 'export on sale'. In our view, Anantaraman, CJ, who spoke for the Madras High Court in ***Venkatasubbu's*** case (supra) was right in taking the view that the words "no person entitled to sell or procure the sale of the goods" are descriptive words which refer to the person in the capacity of the seller of the goods or the person entitled to procure the sale of the goods after the export of the goods has been made and that this expression does not necessarily imply that the export must be to a nominee of the consignor at the other end in pursuance to a contemplated transaction of sale. We are therefore unable to accede to the submission urged on behalf of the Respondent Company (original Writ Petitioner) that Section 12 (2) can apply only to such persons who are entitled to sell or procure the sale of goods which have already been exported for sale and not to the exports made in pursuance to sales which have already been effected to a foreign buyer before the exports. In our opinion, the said expression has been employed by the Legislature merely in order to identify the accountable persons and is merely descriptive in that sense. The said expression does not restrict the operation of the Act to the persons who have not yet sold the goods. One would have to take a quantum jump in order to conclude that persons referred to in Section 12 (2) are the persons who have not yet sold the goods but are entitled to sell the goods in future merely because the expression 'entitled to sell' has been employed. The persons who have exported the goods to a foreign buyer, in our view, are not sought to be excluded from the operation of section 12 (2). This conclusion is reinforced if clauses (a) and (b) of Section 12(2) are taken into account. Clause (a) in terms adverts to the sale of goods being delayed. Clause (b) of Section 12(2) adverts to payment for the goods, otherwise than in the

prescribed manner, and also envisions a case where the payment does not represent the full amount payable by the foreign buyer in respect of the goods. Clauses (a) and (b) are compatible both with transactions of export on sale as also to transactions of export for sale. They are compatible with all transactions pertaining to both types of sales. There is no warrant to assume that the Legislature has not made any provision in order to ensure that the full amount of the sale price is repatriated and foreign exchange earned therefrom is not lost to the Nation regardless of whether it is in respect of 'export on sale' or 'export for sale'. The avowed and the evident object of Section 12 is to ensure that that the Nation does not lose foreign exchange which is very much essential for the economic survival of the Nation. The exporter cannot be allowed to syphon away a part of the foreign exchange or to deprive the Nation of the foreign exchange earned by the exports. Such is the philosophy of Sec. 12. To take the view that the legitimate National interest in the sphere of preservation of foreign exchange has relevance only in the context of transactions of exports for sales and that the Legislature exhibited total unconcern for the foreign exchange earned in the context of transactions of completed sales or consignment sales, is to attribute to the Legislature irrationality. And to impute to the Legislature that it did not know its job inasmuch as it has tackled the problem only partially without any rational basis for excluding the transactions of completed sales from the purview of the legislation which would substantially erode or defeat the purpose of the legislation. When it is equally possible to take the view which would be conducive to the conclusion that there is no lacuna in the legislation, it would be unreasonable to take the view that the Legislature has left a lacuna either by negligence or by lack of foresight or because it did not know its job. In order to escape from the clutches of this answerless argument learned counsel for the Respondent Company contended that in so far as completed sales are concerned, they would be governed by Section 10[1] and that the lacuna argument would

1. "10. Duty of persons entitled to receive foreign exchange etc.—(1) No person who has a right to receive any 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 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.

(2) Where a person has failed to comply with the requirements of sub-section(1) in relation to any foreign exchange or payment in rupees, the Reserve Bank may give to him such directions as appear to be expedient for the purpose of securing the receipt of the foreign exchange or payment as the case may be."

A accordingly lose significance. It is our firm opinion that Sec. 10 has no application in respect of foreign exchange earnings related to export of goods. Section 10 is designed primarily to impose an obligation on persons who have a right to receive any foreign exchange from a person resident outside India. This section has nothing to do with the B foreign exchange earned by export of goods. The entire matter pertaining to payments for exported goods and the foreign exchange earnings arising therefrom in our considred opinion, has been dealt with in Section 12 which is a complete Code in itself. It would be an irrational approach to make to hold that while Section 12 deals with payments for exported goods and foreign exchange earnings arising therefrom in all situations, it excludes from its purview one particular situation C namely that arising in the context of failure to repatriate the sale proceeds of goods exported pursuant to a completed transaction of sale. Evidently Section 12 has been very carefully designed. Every possible situation has been conceived of and appropriate prophylactic measures to ensure the preservation of foreign exchange and prevention of syphoning off the foreign exchange, which is very much essential to the economic life of the Nation, have been embeded therein. The entire subject of foreign exchange earnings relatable to export of goods has been specifically and specially dealt with in Section 12. It would therefore be futile to search for an alibi in Section 10 merely in order to support the plea that Section 12 does not take within its fold E the foreign exchange earnings relatable to transactions of completed sales. Pray what is the reason or the purpose for doing so? Why take care to deal with 'all' matters pertaining to export of goods and foreign exchange earnings therefrom in Section 12, but even so exclude foreign exchange earnings arising out of completed transaction of sale from its scope and ambit? When there is a specific provision which can F reasonably be interpreted to cover this aspect of foreign exchange earnings also, be embodied in Section 12, which appears to us to be a complete Code in itself, why leave this important vital matter of no less importance to be dealt with by section 10 which essentially deals with foreign exchange receivable from individuals and has nothing to do with export of goods? On a plain reading of Section 10, the matter G pertaining to the foreign exchange earned by exports in the context of completed sales will not directly fall within the ambit of it. It will have to be strained beyond the point of endurance in order to accommodate this aspect. Section 10 is akin to a complementary provision which deals with preservation of foreign exchange which does not fall within a specific provision like Section 12. What is more, if completed trans- H actions are excluded from Section 12, the purpose of the legislation

will not be served, because sub-section (6) of Section 12[1] which has been designed to ensure compliance with the provisions made in Section 12 (1) to Section 12(5) cannot be availed of. In that event, in regard to the persons who syphon off foreign exchange earned out of the transactions in the context of a completed sale or export on sale they cannot be dealt with under Section 12 (6) and no sanction to ensure compliance will be available. The Act will be thus rendered toothless to ensure compliance with evasion in the context of a completed sale. There is accordingly no compulsion of law, logic, or philosophy, to adopt such a view.

We accordingly allow this appeal and set aside the order of the High Court quashing the show cause notices impugned in the Writ Petition by the original Writ Petitioner. The matter will now go back to the competent authority for proceeding in accordance with law. The competent authority will extend the time for showing cause to the Respondent-Company and after affording a reasonable opportunity of hearing, proceed to pass appropriate orders in accordance with law as may be called for by the relevant records and the material and such materials as may have been produced, before him in the light of the cause shown by the Respondent-Company on merits in response to the show cause notice. It will be open to the competent authority to pass appropriate order uninhibited by any observations which may have been made by the High Court touching the facts or merits of the case or in regard to the incidental matters. We issue this direction having regard to the fact that it was in the first instance for the competent authority to form an opinion on merits on the basis of the relevant material in so far as the factual aspect was concerned. Since the High Court was quashing the notice on a jurisdictional issue there was no occasion for making any observation touching the facts of the case or the merits of the other contentions incidental thereto. We also wish to make it clear that the question regarding the validity or otherwise of the views expressed by the High Court in regard to points other than the aforesaid point regarding the applicability of Section 12(2) have been kept open for decision in future as and when an occasion arises.

12(6) "For the purpose of ensuring compliance with the provisions of this section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods has been, or will within the prescribed period be, paid in the prescribed manner."

A We should not be understood as having pronounced on these matters one way or the other.

We, therefore, allow this appeal, set aside the order passed by the High Court and dismiss the Writ Petition instituted by the Respondents, with liberty to the parties to raise all contentions on facts and
B law barring the contention that Section 12(2) of the Act is not attracted. No order as to costs.

S.R.

Appeal allowed.