SOUTH INDIA COIR MILLS POOCHAKKAL

v.

THE ADDITIONAL COLLECTOR OF CUSTOMS AND CENTRAL EXCISE AND ANOTHER

March 25, 1976

[Y. V. CHANDRACHUD, V. R. KRISHNA IYER AND N. L.UNTWALIA, JJ.]

Foreign Exchange Regulation Act (7 *of* 1947), *s.* 12(1) *as amended by Act* 40 *of* 1969—*Scope of.*

The appellant is a dealer and exporter in coir yarn. On its behalf a shipping bill for export of 150 bales of coir yarn to a port in Italy was filed, but the consignee was shown to be a firm of Yugoslavia. The invoice and the form of declaration prescribed under the Foreign Exchange Regulation Act, 1947, were drawn up by the appellant on rupee terms in accordance with the contract with the Yugoslav firm. The Collector of Customs, after issuing a show cause notice to the appellant and considering the explanation of the appellant, held that the appellant had misdeclared the material particulars regarding the prescribed manner of payment, and that there was a contravention of s. 12(1), Foreign Exchange Regulation Act read with s. 11 Customs Act, and ordered the confiscation of the goods under s. 113 and imposed a penalty of Rs. 25,000/- under s. 114, Customs Act. The High Court upheld the order.

Dismissing the appeal to this Court,

HELD : In the circumstances of the case, the quantum of penalty is reduced to Rs. 15,000/-. [912 F]

(1) By virtue of s. 23A, Foreign Exchange Regulation Act the prohibition imposed under s. 12(1) of the Act becomes a prohibition imposed under s. 11, Customs Act. Section 11, Customs Act, empowers the Central Government to prohibit the export of goods absolutely or conditionally and s. 113, Customs Act, provides for confiscation of goods exported contrary to any prohibition imposed, and the person attempting to export is liable to penalty under s. 114. [908 D, F-G]

(2) Section 12(1), Foreign Exchange Regulation Act, as amended by Act 40 of 1969, consists of 3 parts : (a) Issuance of a notification by the Central Government prohibiting the export of certain goods to any place specified in the notification. (b) The prohibition is relaxed and export is permitted when the exporter furnishes a declaration in the prescribed form which must be true in all material particulars including the amount representing the full export value of the goods or the expected exported value of the goods. (c) Apart from furnishing the declaration containing the true statements in all material particulars, the exporter is also required to affirm in the said declaration, that is, in the document or paper containing the declaration, that the full export value of the goods will, within the prescribed period be paid in the prescribed manner. This affirmation is not required to be in any prescribed form. Until and unless the exporter so affirms, he cannot, in the interests of conserving the foreign exchange, be allowed to export the goods. [910 B-D]

(3) In the present case there was no affirmation that the full export value of the goods has been or will, within the prescribed period, be paid in the prescribed manner, and, the absence of the affirmation is tantamount to failure on the part of the appellant to comply with the requirements of law engrafted in s. 12(1), Foreign Exchange Regulation Act. [912 D]

(a) The declaration of the buyer's name as the Yugoslav firm was found to be wrong, but that did not attract the provisions of s. 12(1), because, in the prescribed form, the buyer's name was not to be inserted. [910 G-H]

(b) The High Court was wrong in holding that because the mode of payment mentioned in the declaration is contrary to r. 7 of the Foreign Exchange Rules, 1952, there was a misdeclaration of material particulars. The appellant has managed to get the payment in Indian rupees through the Yugoslav firm. Therefore, even after the statement that the country of destination was Italy, the statement that the payment was to be received in India in Indian rupees was not untrue, although it was contrary to the mode prescribed in r. 7. But the absence of the affirmation is significant. [911 E-G; 912 B]

(c) Rule 7 provides that the amount representing the full value of the goods exported to the countries specified in the 2nd schedule shall be paid through an authorised dealer and unless authorised by the Reserve Bank, shall be paid in the manner specified in the schedule. The approved methods of payment in the case of Italy, which is in Group A of the schedule, are : (i) currency of any country in the sub-group; (ii) sterling from an 'External Account' as defined under the U.K. Exchange Control Regulations; and (iii) Rupees from the account of a bank in any country in the Convertible Account group. [911 G-912 A]

(d) The appellant could not have affirmed that the full export value of the goods would be paid in one of the prescribed modes. If such affirmation was made it would have been false because of the statement in the declaration that the value of the goods was to be received in India in Indian rupees. If in the affirmation the appellant had stated that for the value of the goods exported to Italy it was to receive payment in Indian rupees, then the affirmation would have violated s. 12(1) as it would not have been an affirmation stating that the export value would be paid in the prescribed manner. Hence, the decision of the High Court that the appellant had attempted to export goods in violation of s. 12(1) is correct, though it is upheld on a different basis. [912 B-E]

(4) Though it is an economic offence and relates to the law of foreign exchange since the law was not clear either to the Customs authorities or the High Court and has resulted in the recording of finding against the appellant on a wrong basis, although not affecting the substance of the view that the appellant violated s. 12(1), the quantum of penalty is reduced. [912 F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 244 of 1976.

Appeal by Special Leave from the Judgment and Order dated 9-10-74 of the Kerala High Court in W. A. No. 142 of 1972.

M. N. Phadke, S. K. Mehta, K. R. Nagaraja and *P. N. Puri,* for the Appellant.

G. L. Sanghi and *Girish Chandra,* for Respondent No. 1.

D. N. Misra, for Respondent No. 2.

The Judgment of the Court was delivered by

UNTWALIA, J.—In this appeal by special leave an important question of law falls for our determination. It concerns the interpretation of section 12(1) of the Foreign Exchange Regulation Act, 1947, Central Act 7 of 1947 as it stood amended at the relevant time by Act 40 of 1969.

The appellant is a firm, one of the partners or proprietors of which is Shri T. K. Seethy. It is a dealer in Coir Yarn and exports the said commodity to foreign buyers also. On March 24, 1971 a shipping bill was filed on behalf of the appellant for the export of 150 bales of Coir Yarn to Trieste a port in Italay. The consignee's name in the shipping bill was shown as M/s Ferolektro, Sarajavo, Yugoslavia. Indisputably the Central Government had published a notification in

the official gazette under section 12(1) of the Foreign Exchange Regulation Act prohibiting the export of coir yarn from India to certain places specified in the notification including Italy unless certain conditions were fulfilled. The exporter was, therefore, required to comply with the requirement of the said provision of law and file a declaration in the prescribed form. The relevant prescribed from in the Foreign Exchange Regulation Rules, 1952—hereinafter referred to as the Rules—framed under section 27 of the Act of 1947 was Form G.R.I. The Invoice and G. R. I. Form were drawn up by the appellant on rupee terms in accordance with the contract dated 1.3.1971 which it claimed to have had with M/s Ferolektro, Sarajavo, Yugoslavia. The Customs Authority found that the goods were attempted to be exported to Italy while payment, according to the form, was to be received in rupees. So the appellant was asked to explain the discrepancy in the declaration. A request was made on behalf of the appellant to amend the Invoice and G.R.I. showing payment in Sterling. It was not allowed to do so. On April 20, 1971 the premises of the appellant firm and the house of its owner were simultaneously searched and certain documents including some letters exchanged between the appellant and some foreign firms of Italy were seized. It appeared to the Assistant Collector of Customs, Customs House, Cochin that the goods in question were being bought by M/s Tobia Giacomini, Italy while the buyer shown in the shipping document was M/s Ferolektro, Sarajavo, Yugoslavia. Such a discrepancy in the bill was against the provisions of section 50 of the Customs Act, 1962—Central Act 52 of 1962. The Assistant Collector further found that in the declaration furnished by the appellant in accordance with section 12(1) of the Foreign Exchange Regulation Act the manner of payment for the goods sought to be exported was contrary to Rule 7 of the Rules. The misdeclaration or untrue declaration made by the appellant in the shipping bill and G.R.I. Form was *prima facie* not true in material particulars and violated section 12(1) of the Foreign Exchange Regulation Act. In view of the 11th section in the Customs Act, the violation attracted the confiscation of the goods under section 113(d) and imposition of penalty under section 114 of the said Act. A show-cause notice dated May 19, 1971 was issued by the Assistant Collector to the appellant. The appellant filed a long reply to the show cause notice. The Additional Collector of Customs by his order dated July 6, 1971 held :

> "By declaring the buyer's name as FEROELETRO YUGOSLAVIA and the port of discharge and country of final destination as 'Trieste' and Italy respectively in the shipping bill and the mode of payment as in rupees in the shipping bill as well as in the G. R. I. form, the exporters have misdeclared the material particulars regarding the prescribed manner of payment and have thus clearly contravened the provisions of Section 12(1) of the F.E.R.A. read with section 11 of the Customs Act. The goods are, therefore, liable for confiscation under section 113(d) and 113(i) of the Customs Act and the exporters are liable for penalty under section 114 of the Customs Act."

A He accordingly confiscated the goods, giving an option to the appellant to redeem them on payment of Rs. 5,000/- in lieu thereof. A penalty of Rs. 25,000/- was imposed under section 114 of the Customs Act.

The appellant filed a writ petition in the Kerala High Court to challenge the order of the Additional Collector. It had exercised its option
B of getting the goods released on payment of Rs. 5,000/-. The fine of Rs. 25,000/- was also paid. A learned single Judge of the High Court took the view that there was no violation of section 12(1) of the Foreign Exchange Regulation Act and quashed the order of the Additional Collector.

The Customs Authority took the matter in appeal before a Bench
C of the High Court. The Bench has allowed the appeal and upheld the order of the Additional Collector. Hence this appeal was filed after obtaining special leave of this Court.

Section 23A of the Foreign Exchange Regulation Act provides, *inter alia,* that the restrictions imposed by or under sub-section (1) of section 12 shall be deemed to have been imposed under section 11 of the Customs Act and all the provisions of that Act shall have the effect
D accordingly. Section 11 of the Customs Act empowers the Central Government to prohibit either absolutely or subject to such conditions as may be specified in a notification the import or export of goods of any specified description. Section 113 says:

> "The following export goods shall be liable to confiscation.—
>
E .....
>
> (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;"

F By virtue of Section 23A of the Foreign Exchange Regulation Act the prohibition imposed under section 12(1) of that Act becomes a prohibition imposed under section 11 of the Customs Act. And if the goods were attempted to be exported contrary to the said prohibition the goods became liable to confiscation under section 113(d) of the Customs Act. Consequently the person attempting to export the goods
G also became liable to pay penalty under section 114. There has been no difficulty in correct appreciation of the law so far either by the Customs Authority or the High Court. A good deal of difficulty and confusion however cropped up in the interpretation of section 12(1) of the Foreign Exchange Regulation Act. Sub-section (1) of section 12 as it stood prior to the amendment brought about by Act 40 of 1969 read as follows :

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> "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 any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be paid in the prescribed manner." A

B

In *Union of India & Ors.* v. *M/s Rai Bahadur Shree Ram Durga Prasad (P) Ltd: & Ors.*(1)., Hegde, J. speaking for himself and Bachawat, J gave a narrow interpretation to section 12(1) as it stood then. Sikri, J, as he then was, in his dissenting judgment said :

"I have to construe an Act which was enacted in the interest of the national economy. A deliberate large-scale contravention of its provisions would affect the interests of every man, woman and child in the country. Such an Act, I apprehend, should be construed so as to make it workable; it should, however, receive a fair construction, doing no violence to the language employed by the Legislature. It was said that if two constructions are possible the one that is in favour of the subject should be accepted. It is not necessary to pronounce on this proposition for I have come to the conclusion that there is one true construction of s. 12(1). But I should not be taken to be assenting to this proposition in so far as it is applicable to an enactment like the Exchange Act, for no subject has a right to sabotage the national economy." C D

Section 12(1) was, thereafter, amended by Act 40 of 1969. It then read as follows : E

"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— F

(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, G

and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of H

(1) [1969] 2 S.C.R. 727.

A export or not) has been, or will within the prescribed period be, paid in the prescribed manner."

Under the changed law the Exporter was required to furnish a declaration in the prescribed form which must be true in all material particulars including the amount representing the full export value of the goods or the expected export value of the goods. Apart from the B furnishing of the declaration containing the true statements in all material particulars the exporter under the amended section 12(1) of the Foreign Exchange Regulation Act was also required to affirm in the said declaration, i.e. in the document or the paper containing the declaration, that the full export value of the goods will within the prescribed period be paid in the prescribed manner. The affirmation under the last part of section 12(1) is not required to be in any pres- C cribed form. Therefore, in the form prescribed for the declaration no form of affirmation has been specified.

Broadly speaking section 12(1) consists of 3 parts (1) issuance of a notification by the Central Government prohibiting the export of certain goods to any place specified in the notification; (2) the prohibition is relaxed and export is permitted when the exporter furnishes D a declaration and (3) when he affirms in the said declaration that the payment will be in the prescribed manner. Until and unless the exporter affirms that the payment would be in the prescribed manner, he cannot be allowed to export the goods. This is for the purpose of conserving and preserving the foreign exchange so that by a subterfuge no person may be able to harm the national economy by exporting the goods without such affirmation.

E In the instant case on the findings of fact recorded by the Additional Collector which were accepted to be correct by the High Court, both by the single Judge and the Division Bench, the stress seems to have been laid on the alleged violation of the requirement of giving true material particulars in the declaration. And that enabled Mr. M. N. Phadke to strenously attack the decision of the High Court in appeal. Counsel submitted that whatever the appellant had stated F in the declaration was all true and nothing but true. It may well be, he submitted, that it violated certain provisions of the Customs Act or the Foreign Exchange Regulation Act. But surely the material particulars furnished by the appellant in its declaration not being untrue in any respect, there was no infraction of section 12(1) of the Foreign Exchange Regulation Act. The argument as presented had G substance and force but did not merit acceptance on close scrutiny.

The declaration of the buyer's name even if wrong in the shipping bill and invoice did not attract the provisions of section 12(1) of the Foreign Exchange Regulation Act. In the form prescribed under Rule 3 of the Rules (G.I.R. 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 Col- H lector is that the destination of the goods was Trieste in Italy and in the declaration furnished in form G.I.R. the appellant had stated that the payment was to be received in India in Indian rupees and this statement was untrue as being against the prescribed manner.

It is to be noticed that under section 12(1) as it stood prior to the amendment by Act 40 of 1969 the declaration had to contain a statement that the amount representing the full export value of the goods will be paid in the prescribed manner. But now this is not to be a part of the declaration but has to be separately affirmed although in the declaration itself. The learned single Judge noticed in his judgment that section 12(1)(ii) will 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."

Stating that "There is no case that there is no affirmation in the declaration" the single Judge held that section 12(1) was not violated. The Division Bench, however, noted the fact that the declaration furnished by the appellant "did not contain an affirmation as required by the last portion of the said sub-section". Yet because of the mode of payment mentioned in the declaration being contrary to Rule 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 section 12(1) of the Act." 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 Rupees was not untrue. The appellant had managed or manouvered to get the payment through the firm of Yugoslavia in Indian Rupees. The statement therefore, was not untrue although it was against the mode prescribed under Rule 7 of the Rules. But here comes in the importance of the affirmation in the declaration.

Rule 7 of the Rules says :

> "The amount representing the full value of goods exported to the countries specified in the Second Schedule shall be paid through an authorised dealer and unless otherwise authorised by the Reserve Bank, shall be paid in the manner specified in the said Schedule."

In the Second Schedule Italy occurs in Group A—"Convertible Account Countries". In that case the approved methods of payment are :

> "(a) Currency of any country in this sub-group.
>
> (b) Sterling from an 'External Account', as defined under the U. K. Exchange Control Regulations.

A (c) Rupees from the account of a bank in any country in the Convertible Account group."

Yugoslavia in the Second Schedule finds place in Group B "Bilateral Account countries" where the approved method of payment is "Rupees from the account of a bank in the country of import."

In the present case the absence of affirmation had its own signi-
B ficance. It was difficult, almost impossible, for the appellant to affirm that the full export value of the goods was to be paid in one of the three modes prescribed in the Second Schedule to the Rules for the export of the goods to Italy. We are, therefore, of the opinion that although the statement in the declaration that the value of the goods mentioned in column 4 at Rs. 63,301.50 was to be received in India in Indian rupees for the export of goods to Italy was not
C untrue, the affirmation, if made, would have been either false or contrary to the requirement of the law. If in the affirmation the appellant had stated that for the value of the goods exported to Italy it was to receive the payment in Indian rupees through the Chartered Bank Ltd. Cochin as per the declaration, then the affirmation would have violated section 12(1) as it would not have been an affirmation stating that the export value would be paid in the prescribed manner. Absence
D of affirmation in the declaration furnished by the appellant is tantamount to failure on the part of the appellant to comply with the requirement of the law engrafted in section 12(1) of the Foreign Exchange Regulation Act. That being so, the decision of the Division Bench of the High Court that the appellant had attempted to export goods in violation of the restrictions imposed under section 12(1) of the Foreign Exchange Regulation Act is fit to be upheld, but
E on a different basis.

In cases of economic offences and specially in relation to the law of Foreign Exchange no leniency in the quantum of punishment is warranted. But on the facts and in the circumstances of this case we feel persuaded to reduce the amount of penalty imposed upon the appellant from Rs. 25,000/- to Rs. 15,000/-. The direction as to the payment of Rs. 5,000/- in lieu of confiscation of the goods is
F upheld. Since the law engrafted in the amended Section 12(1) of the Foreign Exchange Regulation Act was not very clear either to the Custom Authorities or to the High Court resulting in the recording of the findings against the petitioner on a wrong basis, although not affecting the substance of the view that the appellant had violated Section 12(1) of the Foreign Exchange Regulation Act, we have thought it fit to reduce the quantum of penalty by Rs. 10,000/-.
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Before we part with this case we may just mention that now the Foreign Exchange Regulation Act in force is an Act of 1973—Central Act 46 of 1973. Section 18(1)(a) is almost the same as Section 12(1) of the Act of 1947.

In the result the appeal is dismissed but subject to the modification in the quantum of penalty imposed under Section 114 of the Customs
H Act 1962. In the circumstances we shall make no order as to costs in this Court.

V.P.S. *Appeal dismissed.*