India and Foreign Traders Vs. Special Director of Enforcement

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Court : Chennai

Decided On : Jul-30-1986

Reported in : 1987(11)ECC244

Judge : Sathiadev and ;Maheswaran, JJ.

Appeal No. : C.M.A. No. 620 of 1981

Appellant : India and Foreign Traders

Respondent : Special Director of Enforcement

Disposition : Appeal dismissed

Judgement :

Sathiadev, J.

1. Action was initiated by respondent against appellant and its Proprietor Mr. C.T. Rajagopal under Section 12(2) of Foreign Exchange Regulation Act, 1947 read with notification No. 6(8) EF. 11/52 dated 22-4-1952 claiming that during June and August 1972 they had effected shipments of bicycle chains, spare parts, etc., to Kualalampur and Singapore declaring the said shipment under GR I forms for a total value of 37,620.94, but did not realise the sale preceeds in the prescribed manner within the prescribed period. When the premises of appellant was searched on 20-9-1973, it resulted in certain documents being seized and a

statement was recorded from the proprietor, who disclosed how the transaction with four firms in those places were entered into and dealt with and in what manner the guarantees were secured for these transactions from Export Credit Guarantee Corporation (hereinafter referred to as E.C.G.C) and finally about entire cost of exports received from E.C.G.C, because the foreign dealers were not traceable and the cost of the goods was not recoverable. On the show cause notice dated 23-11-1974 issued a reply was sent on 10-1-1975, stating that apart from the facts given in his statement dated 20-9-1973 he could only further add by stating that the four firms were spotted out by him from the advertisement in 'Afrasian Market' and the consignments were shipped on credit on 90 days D/A terms only, because of E.C.G.C. guaranteeing their credit worthiness. As E.C.G.C. had settled all its claims by making rupee payment, no contravention had been committed. Both the authorities not being satisfied with the explanation offered held against the appellant on the following grounds:

i) That the appellants did not write to the importers at all;

ii) that they did not address the Indian High Commission for about one year;

iii) that they did not move any other trade authority or Chamber of Commerce at all;

iv) that they did not lodge any bank protest, and

v) that they did not think of filing a suit against the importers promptly on expiry of the prescribed period.

Though the proprietor was also proceeded against, the appellate authority having allowed his appeal, it is only the appellant-firm, which had filed the appeal on imposition of a penalty of Rs. 65,000 though the Original Authority had imposed a penalty of Rs. 1,00,000.

2. Mr. K.A. Panchapagesan, learned Counsel for the appellant, would submit that the substantial questions of law involved in this appeal are :

1) When E.C.G.C, a Goverment of India undertaking had stood by the guarantee given by it on being satisfied that the sale proceeds cannot be recovered from the foreign buyers thereafter there could be no contravention under the Act?

2) When none of the 5 grounds relied upon by both the authorities are correct, is not the conclusion of contravention vitiated by illegality?

3. Point No. 1: Mr. K.A. Panchapagesan, learned Counsel for the appellant, has placed before Court several letters exchanged between appellant and foreign buyers, E.C.G.C, Indian Commissioners at Kualalumpur and Singapore solicitors, etc. It is not in dispute that appellant had not obtained the entire value of the goods despatched within the prescribed time in foreign exchange to the extent of 37,620.94. Equally, it is not in dispute that its value in rupee was obtained from E.C.G.C. Therefore, as far as the appellant was concerned, it had secured the entire value of the goods, but had not obtained the foreign exchange as agreed to within the prescribed time, and which had resulted in action being taken against it under Section 12(2) of the Act. E.C.G.C. was satisfied with the facts and circumstances of the case based on its terms of guarantee. It cannot be treated as a final determinative for action that could be taken under the Act. It is a company owned by Government of India but it functions like any other company or bank in extending guarantee for export transactions. Primarily it is the obligation of the exporter under the Act to secure the foreign exchange earnings by the stipulated time. In exporting goods it takes the aid and assistance of various agencies and instead of availing of the services of institutions like nationalised or private banks, companies which are engaged in extending the trade facilities or offering guarantees, etc., appellant had availed of the services of E.C.G.C. As per the terms of guarantee between E.C.G.C. and appellant, it may choose to honour the claims of the appellant, but what it had done cannot be the determinative factor for finding out whether the contravention under Section 12(2) had been committed by appellant or not. The entire value of the goods exported it had realised and therefore -appellant was fully satisfied. No loss was suffered. But the essential condition in exporting the goods was that appellant should secure the value of goods in foreign exchange. Emphasis is laid on the E.C.G.C. having checked the credit worthiness of the buyer and when it had failed, thereafter appellant cannot

be held responsible for non-realisation of value of goods in foreign exchange. This line of contention is born of a misconception. Appellant contends that, once services of a Government-owned company are availed, whatever action it takes cannot but be treated as correct and decisions arrived at by it would be binding on other agencies of the Government. Mr. Panchapagesan, strenuously pleads that one wing of the Government, having taken a decision that the amounts cannot be realised from the foreign buyers then authorities under the Foreign Exchange Regulation Act cannot hold differently. It is needless to refer to decisions on this aspect. E.C.G.C. being a company owned wholly by the Government of India, in its commercial transactions, it functions as any other company. Its decisions are not binding upon public authorities. If they contravene any of the provision of any Act, then E.C.G.C. could be proceeded against. It has to function within the ambit of law, and is bound by the provisions of Section 52 of Act, 1973. Depending upon the terms of the guarantee extended by it (a copy of it is not placed before Court) it might have honoured its commitment. It had paid in terms of rupees. As the surety it would have the right to proceed against the foreign buyers. It being not a party to this appeal, it is not clear as to what further action it had taken. The nature of transaction entered into by it is no different from what any private company engaged in extending guarantee would do. If it is to realise any portion of the amount or the entirety of it, as against the foreign buyers it would be 'deriving income in foreign exchange. Nothing precludes the appellant from taking a guarantee from a firm, which would pay in foreign exchange, under the guarantee given by it. There is always scope for an error of decision by E.C.G.C. It may be misguided or for any other extraneous reason it may pay the amount though not liable to do so. If the contention of the appellant that a decision arrived at by E.C.G.C. would be binding upon enforcement authorities is accepted, then in all transactions wherein E.C.G.C. steps in, its decision would become final and nullify the enforcement of the provisions of the Act wherever contravention had occasioned, in spite of its own negligence or carelessness or misjudgment and the like. Hence, this Court considers that any decision taken by E.C.G.C. would not bind the Enforcement Authorities under the Act in taking action against exporters, who do not recover the sale proceeds in the manner directed and within the prescribed time. Hence the first point is held as against the appellant.

4. On the second point, it is pleaded that the letters placed before the Appellate Authority clearly show that every attempt had been made to contact foreign buyers. The proprietor has gone to Singapore and Kualalumpur in September, 1972. He would state that he did not ask for the remittance of the amount because the time for payment was still available. When he had gone to those places, he ought to have ascertained the credit worthiness of the party. Yet, after default 2 consignments were sent. Therefore this is not a case wherein he had solely depended on E.C.G.C. He had also taken action to contact the foreign buyers and book further orders. Thereafter, when there was a failure of performance by foreign buyers, he had not energetically and persistently made attempts to contact them and realise the proceeds. He had simply chosen to depend upon E.C.G.C. Hence, the first ground relied upon that he did not write to the importers at all cannot be held as incorrect.

5. The next point out against appellant was that, it did not address the Indian High Commissioner for about one year, and only after the Enforcement Directorate had initiated action, it had addressed the High Commissioner. This claim cannot be correct because on 10-10-1972 itself, appellant had addressed the First Secretary of the High Commission at Kualalumpur stating that the cable sent by it had been returned stating that 'shop closed. Addressee not found' and therefore, investigation may be made of the actual position. Further letters on 30-10-1972, 10-11-1972, 22-11-1972, 19-12-1972 and 22-11-1972 have been addressed. The search took place only on 20-9-1973, and by that time,, all these letters having been addressed, it would not be correct to state that necessary steps through the High Commissioner had not been initiated within a reasonable time. But when the Commissioner had informed the appellant on 20-9-1973 calling upon it to submit the form sent by him to the Official Assignee, Singapore after duly signing and filling up particulars so that the amount could be recovered the appellant significantly failed to comply with stich a direction. It may result in either the entirely or a substantial part of it or at least a portion of the amount being realised. Appellant knew by then that E.C.G.C. would pay the entire amount and hence was not interested in getting it in foreign exchange. On 24-12-1973 E.C.G.C. finally admitted the claim. Evidently the appellant did net further pursue the matter as directed by the High Commission. This is a second omission on its part, and it had

been rightly taken note of by both the authorities.

6. As for the third ground that it did not move any other trade authority, no materials are placed to show that the services of any such agency had been availed of.

7. As for the fourth point that no bank protest had been lodged, attempt is made to show certain correspondence with the bank of appellant, but all of them relate to realisation of the costs of goods through E.C.G.C. and not pertaining to what ought to have been done, when documents were cleared by its bankers. Having chosen to send the goods by D/A terms, it is the appellant, which had taken the risk. Nothing precluded it to direct its banker to hand over the documents only after the cost of the goods is fully remitted. For this the answer is that, when E.C.G.C. has given the guarantee, it was considered to be most sound than resorting to opening letter of credit. This explanation is least convincing. But for the manner in which appellant had exported the goods, the present situation would not have arisen at all. E.C.G.C. could have insisted for the safer procedure to be followed. By its failure to insist on fool-proof method to be followed, appellant cannot avoid its liability under the Act.

8. On the last point, appellant had contacted solicitors in Singapore in June, 1973, and they replied on 8-6-1973 stating that as the claim exceeds $ 5,000, the matter is one within the jurisdiction of the High Court. Yet appellant being a foreign claimant, the normal cost would be in the region of $ 2,500, but as prior approval of Reserve Bank will have to be obtained it was agreeable to take further action, if a sum of $ 1,000 is remitted to them. In spite of it, it was the appellant, which had taken the decision not to pursue legal action. The only explanation forthcoming is that litigation in a foreign country will be expensive, but when it is a question of export transaction, contingencies of this nature occasion. The amount claimed initially was handly Rs. 4,000. When appellant had legal right to collect the amount, and having foregone it at its volition, for the only reason that it is expensive, it cannot be heard to plead that it had not committed contravention of Section 12(2) of the Act.

9. As pointed out by Appellate Board, if only it had taken certain actions through its solicitors, the foreign buyers might have come to terms with the appellant. Hence, appellant having chosen not to avail of remedies which are known and available in law, it cannot contend that the authorities were in error in taking this fact, as one of the grounds to hold against it.

10. Appellant would then contend that unless an intention to do or refrain from doing any action as provided under Section 12(2) is made out no contravention occasions. Prior to Central Act 55 of 1964, which came into force on 1-4-1965, Section 12(2) contained the following expression :.except with the permission of the Reserve Bank do or refrain from doing any Act with intent to secure....

It was by the amending Act, the word 'intent' was omitted. In support of this plea, reliance is placed on a decision of this Court in W.P. Nos. 186 of 1966, etc., dated 9-10-1969 by a learned single Judge of this Court holding that.Similarly after the amendment, before the authority can find a person guilty of contravention of Section 12(2) of the Act, it must record a finding with reference to the materials placed before it or available to it that the inaction was for the purpose of ensuring any one of the four consequences flowing from Clauses (a) and (b) of Section 12(2) of the Act....

This conclusion was arrived at on taking note of the word 'secure' forming part of the section. None of the Counsel appearing before him were able to enlighten on the object behind the amendment, which had resulted in deletion of the word 'intent'. Though the objects and reasons for amending Act nowhere touch upon Section 12(2), the word 'intent' in the context in which it had been used earlier, but later on omitted, would go to show that it would not be necessary for the authorities to bring out the intention of the parties in committing contravention. The expression ' secure ' had remained alongside 'intent', prior to the amendment. Hence, it is not as if for the first time by replacing the expression 'intent' the word secure had found its place in the section. Hence, the emphasis laid on the meaning of the word 'secure' as if it had found its place for the first time by the amendment Act; and reading it as if it carries within itself the word 'intent' does notarise. The words 'effect of securiug' is a resultant effect of doing or refraining

from doing something in the export of goods. Once it is made out, the intention in doing it need not be proved by authorities. In spite of such an amendment effected, it would not be proper to hold that it is obligatory on the part of the enforcing authorities to give a finding that what was done was with the intention of contravening the provisions of the Act. Therefore, the view so taken in the above decision not being correct, there was no need to render a finding as to whether the appellant did it with an intention to contravene the Act or not.

11. Hence, for the reasons stated above the appeal is dismissed with costs.

12. Learned Counsel for the appellant mentions that leave to appeal to the Supreme Court may be granted, but leave is refused as the matter does not involve any substantial question of law of general importance deserving consideration by the Supreme Court.