

The Jay Engineering Works Ltd. Vs. M.G. Wagh and ors.

The Jay Engineering Works Ltd. Vs. M.G. Wagh and ors.

SooperKanoon Citation : sooperkanoon.com/862596

Court : Kolkata

Decided On : Mar-28-1973

Reported in : AIR1973Cal413

Judge : Sankar Prasad Mitra, C.J., ;Sabyasachi Mukharji and ;Janah, JJ.

Acts : Foreign Exchange Regulation Act, 1947 - Sections 12(2), 12(3) and 23D

Appeal No. : Appeal No. 108 of 1971

Appellant : The Jay Engineering Works Ltd.

Respondent : M.G. Wagh and ors.

Advocate for Def. : Subrata Ray Choudhury, Adv.

Disposition : Appeal allowed

Judgement :

Sankar Prasad Mitra, C.J.

1. This is an appeal from a judgment of Mr. Justice K. L. Roy delivered on November 20, 1970. By this judgment the validity of a notice under Section 12 (2) of the Foreign Exchange Regulation Act, 1947 was upheld. There was another notice under Section 5 (1) of the said Act with which we are not concerned in this appeal. In the writ application before Mr. Justice Roy the notice under Section 12 (2) dated the 9th December, 1968 was challenged and appropriate writs were

prayed for.

2. The appeal first came up for hearing before my learned brother Mr. Justice Sabyasachi Mukharji and myself. It was urged on behalf of the respondents that in view of certain observations of the Supreme Court we would be invited to differ from a division bench judgment of this Court on the point involved in the appeal. It was urged further that there were also other strong reasons why the division bench of our Court should not be followed. For avoiding all controversies I constituted this bench of three Judges in order that the contentions on behalf of the respondents may be fully urged.

3. The facts are that between March 31, 1962 and April 7, 1962 Messrs. Jay Engineering Works Ltd. exported electric fans and sewing machines to Mombasa in South East Africa by five several consignments of divers invoice values. It is alleged that M/s. Jay Engineering Works Ltd. had an agency agreement in East Africa with M/s. India Machinery Importers Ltd. In June, 1962, this agreement was terminated. And in November 1962, M/s. India Machinery Importers' business was completely closed down.

4. On November 23, 1962 the appellant wrote to the Reserve Bank of India asking for permission to adjust the outstanding bills against India Machinery Importers (E. A.) Ltd. with the outstanding claims of M/s. Jay Engineering Works Ltd. and for permission to repatriate the balance due to them amounting to Sh. 4940.

5. On the 1st April 1965 certain amendments to Section 12 (2) of the Foreign Exchange Regulation Act were made, But we are not concerned with these amendments because the goods which are the subject matter of this appeal were exported long before these amendments came into force.

6. On the 25th May, 1965, The Export Credit and Guarantee Corporation Ltd., a Government of India undertaking wrote to the appellant dealing with the claims against India Machinery Importers Ltd. and offering to admit a claim to the extent of Sh. 1190-76.

7. The appellant by a letter dated November 4, 1965 requested the Export Credit and Guarantee Corporation Ltd. to accept a claim of Sh. 5660-36.

8. On November 30, 1965, the appellant wrote to the Reserve Bank of India, inter alia, enclosing a list of the outstanding bills against India Machinery Importers and referring to the offer of Export Credit and Guarantee Corporation Ltd. The appellant requested the Reserve Bank of India to allow the petitioner to accept the offer of Sh. 1150.

9. On the 7th July, 1962 the Enforcement Directorate of the Government of India passed an order under Section 19 (2) of the Foreign Exchange Regulation Act, 1947 asking for information as to whether the full value of the aforesaid exported goods had been realised.

10. The appellant gave its reply to the Assistant Director of Enforcement on the 17/20th December, 1966. In this letter all the facts already stated have more or less been set out.

11. On the 9th December, 1968, the impugned notice was issued by the Enforcement Directorate. We propose to set out the notice in full. It is as follows:

'Whereas it appears that during the year 1962 M/s. Jay Engineering Works Ltd., Calcutta effected shipments of electric fans and sewing machines of the value of 705-4-0 (as per details in the annexure) to Mombasa, East Africa.

And whereas it further appears that the full export value of these shipments amounting to 005-4-0 has not so far been received in India by the said M/s. Jay Engineering Works Ltd., in the prescribed manner.

And whereas failure to realise the export value of the goods from the country of final destination of the goods within six months from the date of shipment of the goods in the prescribed manner is a contravention of the provisions of Section 12 (2) of the Foreign Exchange Regulation Act, 1947, read with Central Government Notification No. 6 (8) -- EF. 11/52 dated 22nd April, 1952.

And whereas by failure to realise the above export value of the said shipments from the concerned foreign consignees within six months from the date of the said shipments, in the prescribed manner, the said M/s, Jay Engineering Works Ltd., appear to have contravened the provisions of Section 12 (2) of the Foreign Exchange Regulation Act, 1947 read with Central Government Notification No. 6 (8)-EF.II/52 dated 22nd April, 1952 and have thereby rendered themselves liable to be proceeded against (under) Section 23 (1) (a) of the said Act.

Now, therefore, the said M/s. Jay Engineering Works Ltd., and its directors are hereby required to show cause in writing (In Duplicate) within fourteen days of the receipt of the Memorandum why adjudication proceedings as contemplated in Section 23-D of the Foreign Exchange Regulation Act, should not be held against them for the aforesaid contravention.'

12. We have been invited in this appeal to express our views on the validity of this notice having regard to the relevant provisions of the Act and other relevant circumstances. To complete the facts this notice was followed by another notice dated the 19th December, 1968, by the Enforcement Directorate to the appellant requiring the appellant to show cause and alleging payment or adjustment in contravention of Section 5 (1) (a). We are not concerned, as we have stated, in this appeal with this notice.

13. On the 21st August, 1969, a Rule was issued by this Court with respect to both the notices specified above. On the 20th November, 1970, Mr. Justice K. L. Roy discharged the Rule with regard to the notice under Section 12 (2) but made the Rule absolute so far as the notice under Section 5 (1) (a) was concerned.

14. It is common case that the goods, in the instant appeal, had been sold before they were exported. In other words, these were not exports on consignment basis or without previous sales. We would now set out the relevant provisions of Section 12 of the Foreign Exchange Regulation Act, 1947 as it stood at the material time. These are as follows:

'Section 12. Payment for exported goods.--

(1) The Central Government may, by notification in the official Gazette, prohibit the taking or sending out by land, sea or air (hereafter 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.

(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 good shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that--

(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:

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.

(3) Where in relation to any such goods the said period has expired and the goods have not been sold and payment therefor has not been made as aforesaid, the Reserve Bank may give to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be expedient for the purpose of securing the sale of the goods and payment therefor as aforesaid, and without prejudice to the generality of the foregoing provision, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.....'

15. Now, the notice under Section 12 (2), in the instant appeal, has been challenged on behalf of the appellant on three grounds, viz., (1) Section 12 (2) applies to sales on consignment basis only and does not apply to sales already effected before export; (2) assuming that Section 12 (2) applies to exports other than sales on consignment basis the charge of failure to realise the export value of the goods from the country of final destination of the goods within six months from the date of shipment of the goods is contrary to the provisions of Section 12 (2); and (3) a notice under Section 12 (2) must state that contraventions have taken place with the intent to secure certain results. In other words, the elements or ingredients of Mens Rea must be specified in the notice itself. But in the instant case that has not been done.

16. On behalf of the respondents it has been argued before us that Section 12 (2) applies to all exports whether they are consignment sales or export of goods the sale whereof has already taken place. In other words, it is co-extensive with Section 12 (1) of the Act. Secondly, the period of six months prescribed by the relevant rules made under this Act is in conformity with the provisions of Sub-section (2) of Section 12 and thirdly, sufficient indication of the nature of the offence committed by the appellant has been given in the notice.

17. We would now discuss the first two arguments advanced on behalf of the parties. There is no dispute that Section 12 (1) covers all kinds of exports whether they were exports on consignment basis or exports of goods already sold. The question is whether Section 12 (2) can be said to be co-extensive with Section 12 (1). A Division Bench of our Court in the case of the Jay Engineering Works Ltd. v. M. G. Wagh, : AIR1973 Cal33 has held that Sub-section (2) of Section 12 is attracted only at a stage after the export of the goods has been made but before the sale has been completed. At page 39 in paragraph 15, Mr. Justice B. C. Mitra, observes:

'On a careful analysis of the requirements of Clauses (a) and (b) of Sub-section (2) of Section 12, I cannot but come to the conclusion that the stage in the process of export and sale, contemplated by Sub-section (2) is a stage after the export of the goods has been made but before the sale has taken place and completed. Any

other construction of Clauses (a) and (b) of Sub-section (2) will offend the plain language used by the 'legislature in clauses (a) and (b) of this subsection.'

Chief Justice P. B. Mukharji, who concurred with the judgment of Mr. Justice B. C. Mitra observed at pages 44 to 45 in paragraph 46:

'Section 12 (2) of the Foreign Exchange Regulation Act, 1947 provides for the case where export of goods has been made and lays down 'no person entitled to sell or procure the sale of the goods' shall except with the permission of the Reserve Bank do or refrain from doing certain acts. A person who has already sold the goods is not a person 'entitled to sell' the goods even after the sale is complete. So a person who has sold the goods cannot be said to be a person 'entitled to procure the sale of the goods' after the sale is complete. Therefore, my conclusion is that the Legislature intended by this Sub-section to exclude the goods within its ambit where the sale has been completed.'

18. As against this judgment of our Division Bench, Mr. Subrata Roy Chowdhury, learned counsel for the respondents drew our attention to some decisions of the Madras High Court and certain observations of the Supreme Court. In Gangadhar Narssingdas Agarwal v. Union of India, reported in (1967) 1 Mad LJ 197 at p. 203 Mr. Justice Kailasan has observed that a reading of Sub-section (2) of Section 12 of the Foreign Exchange Regulation Act, 1947 would show that the Sub-section is applicable only to goods where the sale has not been completed. It is applicable to consignors of goods, that is persons entitled to sell or procure the sale of the goods, that is to a stage before the actual sale.

19. Mr. Roy Chowdhury submits that this view of the Madras High Court was overruled by a Division Bench of the Madras High Court in Rai Bahadur Durga Prasad Pvt, Ltd. v. Union of India, reported in ILR1968 (3) Mad 421. The Division Bench was of the view that what Section 12 (1) did was to enjoin, or to make mandatory, the filing of the declaration by the exporter, and thereby the exporters obtained a permission to export; any export which avoided the filing of the declaration was prohibited. The Division Bench observed further that Section 12 (2), on the contrary, was primarily intended to enforce the obligation of the exporter to repatriate the full amount of foreign exchange earned by the goods in

the foreign market.

20. The same Division Bench of the Madras High Court also heard the case of R. Venkata Subbu v. The Director of Enforcement, Enforcement Directorate, New Delhi, reported in ILR 1968 (3) Mad 18. Chief Justice Anantanarayanan has observed that the words 'no person entitled to sell,' or 'procure the sale of the said goods' in Section 12 (2) of the Act are clearly descriptive; they refer to the person entitled to procure the sale of the same, after the export of the goods has been made. But this does not necessarily imply that the export must only be to a nominee of the consignor at the other end. Any person in this situation has two legal obligations. He must see that the sale of the goods is not delayed to an unreasonable extent. He must further see that payment for the goods is made in the prescribed manner, representing the full amount payable by the foreign buyer in respect of the goods, and also that such payment is not unduly delayed. Mr. Justice Natesan who concurred with the learned Chief Justice has said that Section 12 (2) applies to cases both of export on sale and export for sale. The person referred to as 'the person entitled to sell or procure the sale of in the first part of Section 12 (2) is only description and can include a case where a person has actually sold or procured the sale of the goods. According to the learned Judge this Sub-section ex facie applies to the case of consignment for sale, that is, an export by a consignor of goods to a consignee for sale, but clearly takes in also cases where there are firm contracts of sale.

21. Mr. Roy Chowdhury then submitted that the view of the Madras High Court's Division Bench was supported by the Supreme Court in the case of Union of India v. Rai Bahadur Shreeram Durga Prasad, reported in : [1969]2SCR727 . In this case, the respondents were exporters of manganese ore. They had exported large quantities of manganese ore after ostensibly complying with the formalities of law, But in reality they had under-invoiced the various consignments sent by them and had failed to repatriate foreign exchange of the value of about 3 crores of rupees obtained by them as price of the exported manganese ore. The customs authorities issued several notices to the respondents to show cause why action should not be taken against them for contravening Section 12 (1) read with Section 23-A of the Foreign Exchange Regulation Act and Section 19 read with

Section 167 (8) of the Sea Customs Act. The respondents applied under Article 226 of the Constitution for quashing the notices and prohibiting further action on those notices. The Appeal Bench of the Madras High Court (ILR 1968 (3) Mad 421) reversing the decision of the Single Judge (1967 (1) Mad LJ 197) allowed the petition. The Supreme Court by a majority judgment dismissed the appeal and held that the notices issued to the respondents were invalid as the offences alleged did not fall within Section 23-A of the Act. It appears from the majority judgment of Mr. Justice Hegde at page 1609 in paragraph 31 that it was not disputed before the Supreme Court that the petitioners were liable to be dealt with under Section 23 and were punishable under Section 23 (1) (b). In view of this concession Mr. Justice Hegde in paragraph 34 at page 1611 has been pleased to observe:

'The contravention complained of in this case is really the contravention of Section 12 (2) and Rule 5. The former is punishable under Section 23 and the latter under Section 23 read with Section 22'.

22. Mr. Subrata Roy Chowdhury places strong reliance on these observations of Mr. Justice Hegde and invites us to differ from the decision of our Division Bench in : AIR1973 Cal33 and to hold that Section 12 (2) applies not only to consignment sales but also to exports where sales have already taken place.

23. We are of opinion that the observation of Mr. Justice Hegde quoted above cannot be treated as a decision by the Supreme Court that Section 12 (2) applies to both the types of transactions we have referred to. The reason is that in paragraph 30 at page 1608 Mr. Justice Hegde has said:

'The only question that arises for decision in these appeals is whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of these proceedings, the respondents can be held to have contravened Section 12 (1)'

24. The case, therefore, which the Supreme Court was invited to consider was a case under Section 12 (1) and any observation made on Section 12 (2) cannot be treated as a point decided by the Supreme Court. In this connection it may be

useful to refer to two decisions of the Supreme Court. In the case of *Ranchhoddas Atmaram v. Union of India*, reported in : 1961 CriLJ31 their Lordships have observed that the fact is that the question was never required to be decided could not have been or be treated as decided by the Supreme Court. Then again in the case of *Madhav Rao Jivaji Rao Scindia v. Union of India*, reported in : [1971]3SCR9 their Lordships have said that it is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.

24-A. It is clear that in the Supreme Court's decision in : [1969]2SCR727 the question of application of Section 12 (2) to the facts of that case did not fall to be answered, and as such, any observation made on Section 12 (2) cannot be taken by us as a proposition of law laid down by the Supreme Court.

25. In fact this judgment of the Supreme Court was also placed before our Division Bench in : AIR1973 Cal33 Chief Justice P.B. Mukharji has considered this judgment and has reached the same conclusion as we have reached as to its binding character.

26. Mr. Subrata Roy Chowdhury has advanced before us an additional argument. This argument is based primarily on the dictionary meaning of the word 'entitle' and how that word has been construed in different judgments by English Courts. His proposition is that in the Compact Edition of the Oxford English Dictionary (1971 reprint 1972) Vol. 1, pages 877, 219 of the letter 'E' col. 2 (bottom): the meaning of 'entitle' has been stated as 'appl.a.; that has a title or qualification, qualified.' In different English cases also this word has been interpreted in the same sense in construing different statutes. Mr. Roy Chowdhury contends that the expression 'no person entitled to sell' in Section 12 (2) means 'no person qualified to sell'. Mr. Roy Chowdhury then raises the question who is the person qualified to sell under Section 12? His answer is that a person who signs a declaration under Section 12 (1) is a person qualified to sell. And since every person who exports goods acquires the qualification irrespective of whether it was a case of consignment sale or goods already sold by signing the declaration the present

case can be covered by Sub-section (2) of Section 12. According to learned Counsel in a regulatory Act of this nature the extended meaning suggested by him should be accepted by us to give effect to the object or purpose of the Act viz. to secure repatriation of foreign exchange. Mr. Roy Chowdhury urges that Section 12 (2) is attracted on the basis of this extended meaning to a completed sale when there has been a failure to repatriate the foreign exchange declared under Sub-section (1).

27. Our difficulty in accepting this argument of Mr. Roy Chowdhury is that we cannot take the expression 'entitled to sell' disjunctively with the expression 'procure the sale of.' They have to be taken together and once they are taken together they cannot but mean sales which are to take place in future and not sales which have already taken place. Secondly, this extended meaning given by Mr. Roy Chowdhury would also go against the dictionary provided by the statute itself. We have already quoted above Sub-section (3) of Section 12. In that Sub-section the same expressions viz. 'entitled to sell' or 'procure the sale of' have been used. But these expressions have been used in relation to goods which have not been sold and payment whereof has not been made. That shows that these expressions have been used in the instant statute to refer to future and not past transactions. In Maxwell on the Interpretation of Statute, 12th Edition at pages 278 and 282 it is observed that when precision is required, no safer rule can be followed than always to call the same thing by the same name. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act and from the general presumption that the same expression is presumed to be used in the same sense throughout an Act, or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning. In the instant case, the same expressions have been introduced, both in the Section 12 (2) and in Section 12 (3) and if it is clear from Section 12 (3) that these expressions refer to future transactions, it is safe to presume that they refer to future transactions in Section 12 (2) as well. Thirdly, if we say that the expression 'no person entitled to sell' includes a person who has already sold we shall be traveling beyond the plain meaning of the words. This plain meaning can, inter alia, be derived from the association of words in this sub-section, namely, 'entitled to sell or procure the sale of.' Fourthly, if two

meanings are equally possible in a penal statute, it is well known that, the Court leans in favour of the subject. In *Francis Hart Dyke, Esq. v. Henry William Elliot and the owners of the Steam-tug or Vessel 'Gauntlet'*, reported in (1872) LR 4 PC 184 at p. 191 Lord Justice James observed :

'No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit then a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not to be found or made in the same language in any other instrument.'

28. The principles enunciated by Lord Justice James have received the approval over and over again of the Supreme Court. For instance, in : [1969]2SCR727 in paragraph 37 the Supreme Court quotes the observation of Lord Macmillan in *London and North Eastern Rly. Co. v. Berriman*, reported in 1946 AC 278 at pp. 286, 295. Lord Macmillan has said that where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language. Fifthly and lastly, the introduction of the extended meaning suggested by Mr. Roy Chowdhury will have the effect of substituting the word 'exporter' for the expression 'person entitled to sell or procure the sale of in Sub-section (2) of Section 12. In fact, our attention has been drawn to a proposed Bill drafted for being placed before the Parliament. In this Bill in Clause 17 (2) we find that the substitution we have hinted at has in fact been made. This Bill, we are told, has not yet been passed. But it indicates that the authorities have now realised that unless the wording of Section 12 (2) is appropriately altered, it would not be possible to make Sub-section (2) of

Section 12 co-extensive with Sub-section (1).

29. For all these reasons, we are of opinion that the transactions in this appeal are not hit by the provisions of Sub-section (2) of Section 12 of the Foreign Exchange Regulation Act, 1947 and, as such, the notice issued to the appellant on the basis of this subsection must be struck down.

30. There is another reason why the notice is bad. We have seen that in the notice it has been alleged that the appellant has failed 'to realise the export value of the goods from the country of final destination of the goods within six months from the date of shipment of the goods'. On behalf of the appellant it has been urged before us that the period of six months specified in this notice is contrary to the provisions of Sub-section (2) of Section 12. Sub-section (2) of Section 12 speaks of four several contingencies. These contingencies are as follows:

(1) The sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade.

(2) Payment for the goods is made otherwise than in the prescribed manner.

(3) Payment for the goods does not represent the full amount payable by the foreign buyer in respect of the goods, subject to deductions, if any, as may be allowed by the Reserve Bank, and

(4) Payment for the goods is delayed to such an extent as aforesaid that is to an extent which is unreasonable having regard to the ordinary course of trade.

31. No doubt, in the proviso (a) a 'prescribed period' has been referred to and Mr. Roy Chowdhury tells us that under the relevant rules framed under the Act the prescribed period is six months subject to such extensions as may be granted by the Reserve Bank and there is no conflict between the section and its proviso or between the section and the prescribed rules. It is well known that a proviso cannot affect the main provisions in the section itself. When the section says 'to an extent which is unreasonable having regard to the ordinary course of trade' a specific or definite period for all types of cases cannot be fixed for purposes of enforcing this Section by a rule made under the Act. It is obvious that this period of

six months cannot apply at least to contingencies Nos. 1 and 4 referred to above. Mr. Roy Chowdhury's contention is that, in any event, this can apply to contingency No. 3 and the present case gives rise to that contingency. But this is not a case where payment for the goods does not represent the ' full amount payable by the foreign buyer in respect of the goods. On the contrary, the case is that nothing whatever has been repatriated by the seller. In these circumstances, contingency No. 3 is not attracted to the facts of this case at all. Assuming therefore, that there can be a prescribed period for contingency No. 3 the period mentioned in the impugned notice is bad and the notice has to be struck down on this ground as well.

32. The next argument before us was based on the expression 'any act with intent to secure that' used in Sub-section (2) of Section 12. It is urged that the notice under challenge does not say that the appellant did anything with intent to secure any of the results envisaged by the sub-section. In other words, the Sub-section requires the existence of mens rea but the ingredients of mens rea have not been stated in the notice. Mr. Roy Chowdhury on the other hand contends that all that is required is to state what the nature of the offence was and since the Sub-section itself has been referred to in the notice the required provisions have been satisfied. As we are of opinion that the notice is bad (a) on the ground that Sub-section (2) of Section 12 does not touch cases of completed sates and (b) on the ground that the period of six months specified in the notice is contrary to the provisions of the sub-section, we are not inclined to decide the issue of mens rea raised before us.

33. In the result, this appeal is allowed. The notice dated 9th December, 1968 is quashed and set aside and the respondents are restrained from taking proceedings under the said notice.

34. Let appropriate writ in the nature of mandamus and certiorari issue accordingly.

35. There will be no order as to costs.

Sabyasachi Mukharji, J.

36. I agree.

Janah, J.

37. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com