

**DIRECTOR, ENFORCEMENT DIRECTORATE,
MINISTRY OF FINANCE AND ANOTHER**

v. /

K. O. KRISHNASWAMY

October 26, 1979

[N. L. UNTWALIA, P. N. SHINGHAL AND A. D. KOSHAL, JJ.]

Foreign Exchange Regulation Act, 1947—Section 12(2)(b)—Scope of—Exporter over invoicing for the purpose of obtaining import licence—If violative of section 12(2)(b).

An exporter exporting goods outside India is required to furnish a declaration under section 12(1) of the Foreign Exchange Regulation Act, 1947 affirming that the full export value of the goods had been or would be paid in the prescribed manner. Sub-section (2) of this section provides that no person entitled to sell the said goods shall do so or refrain from doing anything which has the effect of securing that . . . (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."

An Export Promotion Scheme for textile goods and handicrafts promulgated by the Government of India envisaged the issuance of import licences to the exporters solely on the basis of the declared value of the exported goods. On receiving the import licences the exporters were able to sell them at a profit ranging from 200 to 300 per cent of their face value. This encouraged the exporters to prepare invoices showing the value far above the market or contractual price for obtaining import licences for the inflated amounts.

Against the invoice value of Rs. 21.97 lakhs, one of the appellants received only Rs. 1.01 lakhs, while against the invoice value of Rs. 17.06 lakhs in the case of goods exported by the other appellant the amount repatriated was Rs. 38,000 odd. Both the appellants pleaded guilty to the charge levelled against them.

Finding them guilty under section 12(2) of the Foreign Exchange Regulation Act, the Director imposed a penalty of Rs. 3 lakhs on each of them.

In a petition under Article 226 of the Constitution the High Court quashed the order on the view that there would be contravention of section 12(2)(b) only when the foreign buyer was under an obligation to pay a certain sum of money and there was non-payment of that amount or part thereof in consequence of something done by the exporter and that if the contractual value of the goods had been realised by the exporter, he could not be held guilty of any contravention merely by reason of fact that he had shown an inflated price in the invoice and thus received undeserved benefit in the form of import licence.

Dismissing the appeal,

HELD : The expression "full amount payable by the foreign buyer in respect of the goods" occurring in clause (b) would mean merely the total amount which is *due from the foreign buyer* in respect of the goods actually exported, and what would be due from a foreign buyer has to be merely the price which he has agreed to pay and not any fanciful, un-real or inflated price which the exporter may choose to falsely incorporate in the invoice with any ulterior motives. The foreign buyer cannot be held to be liable to pay any amount over and above the price which he has promised, to pay for the goods received by him and any difference between that price and the price given in the invoice can, therefore, not have the attribute of having become payable by him. If the price agreed upon had been paid to the exporter, clause (b) does not come into operation. [1096F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2595 and 2596 of 1969.

From the Judgment and Order dated 4-6-1969 of the Mysore High Court in Writ Petition Nos. 441 and 443/66.

M. K. Banerjee, Additional Sol. Genl, *R. B. Datar* and *Girish Chandra* for the Appellants:

Shyamala Pappu, *Vineet Kumar* and *A. K. Srivastava* for the Respondents.

The Judgment of the Court was delivered by

KOSHAL, J. By this Judgment we shall dispose of Civil Appeals Nos. 2595 and 2596 of 1969 in each one of which the Director, Enforcement Directorate, Ministry of Finance, Department of Revenue, Government of India (hereinafter referred to as the 'Director') challenges an order of the Mysore High Court dated the 4th of June, 1969, allowing two petitions preferred by the respondents for the issuance of writs under article 226 of the Constitution of India.

2. The facts giving rise to the two appeals may be briefly stated. The Government of India promulgated an Export Promotion Scheme under which exporters of textile goods and handicrafts were issued licences for import of raw materials on the basis of their export performance. The Scheme envisaged the issuance of import licences solely on the basis of the declared value of the exported goods. Since exporters were able to earn a handsome profit (ranging in some cases between 200 and 300 per cent of the face value) by sale of such import licences, the Scheme brought into existence a mushroom growth of textile exporters and parties acting *benami* on behalf of established exporters. Most of the exporters had abroad their own branches or representatives who acted as consignees of the goods exported from

- A** India. The easy-profit motive led numerous exporters to prepare invoices showing the value of exported goods far above the market or contractual price thereof in order to obtain import licences for the inflated amounts. Getting scent of the practice the Enforcement Directorate carried out a surprise search of the premises of one of the leading textile exporters of Madras State in March, 1965. The documents seized as a result thereof and the statement of the exporter confirmed the information earlier received by the Directorate. In consequence notices were issued to almost all the textile and handicrafts exporters in the State of Madras calling upon them to explain the reasons for not realising the entire amount shown in the invoices submitted by them as the price of the goods exported to various parties outside India. Two of such exporters were M/s. K. O. Krishnaswamy (the respondent in Civil Appeal No. 2595 of 1969) and M/s. Nagaraja Overseas Traders (respondent in Civil Appeal No. 2596 of 1969) and the proceedings held against them under section 19(2) of the Foreign Exchange Regulation Act, 1947, (hereinafter referred to as the 'Act') by the Director revealed that in between them they had exported 53 consignments of textile goods and handicrafts to Singapore and other places as per details given below :

Name	Value of export as shown in the GR. 1. forms	No. of shipments	Amount repatriated	Amount outstanding
1. M/s. K. O. Krishnaswami	21,97,046.62	31	1,01,165.70	20,95,880.92
2. M/s. Nagaraja Overseas Traders	17,06,159.00	22	38,510.25	16,67,648.75

F The Director arrived at the finding :

"From the above statement, it will be clear that, as regards the first two firms, the total sum shown as outstanding (which is non-existent) and hence non-repatriable, due to deliberate over-invoicing, is Rs 37,63,529.67".

G He added that in their confessional statements dated the 7th of April, 1965 (made in reply to the show cause notices served on them) and in their pleas at the hearing, the two firms had pleaded guilty to "the charges framed against them". Finding both of them guilty under section 12(2) of the Act, the Director, by his order dated the 27th May, 1965, imposed on each of them a penalty of Rs. 3 lakhs and it was that order which each of the two convicted firms challenged as illegal in a petition under article 226 of the Constitution of India.

The Division Bench of the High Court accepted the two petitions through the impugned order holding that on the facts as found by the Director, no offence under sub-section (2) of section 12 of the Act was made out. The relevant portion of that section is reproduced below :

“12(1) 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—

- (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;

and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) 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 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—

- (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."

The argument raised on behalf of the Director before the High Court was that the two firms, by "over-invoicing" the price of the goods exported had been guilty of taking action which had the effect of securing that payment for the exported goods did not represent the full amount payable by the foreign buyer in respect thereof and that therefore they had contravened clause (b) of sub-section (2) of section 12 of the Act. The argument was repelled by the High Court after a full discussion of the findings arrived at by the Director in his order dated the 27th of May, 1965, and all the ingredients of sub-section (2) of section 12. It was of the opinion that the said clause (b) would be contravened only when the foreign buyer was under an obligation to pay a certain sum of money and there was non-payment of that sum or a part thereof in consequence of something done by the exporter and that if the contractual value of the goods had been realized by the exporter he could not be held guilty of any such contravention merely by reason of the fact that he had shown an inflated price in the invoice and thus received undeserved benefits in the form of an import licence for the invoiced amount. The High Court, therefore, while accepting both the petitions, quashed the order of the Director dated the 27th May, 1965.

3. The argument advanced on behalf of the Director before the High Court has been reiterated before us, and we are clearly of the opinion, after hearing learned counsel for both the parties, that the interpretation placed upon sub-section (2) of section 12 by the High Court is unexceptionable. The expression "the full amount payable by the foreign buyer in respect of the goods" occurring in clause (b) would mean merely the total amount which is due from the foreign buyer in respect of the goods actually exported; and what would be due from a foreign buyer has to be merely the price which he has agreed to pay and not any fanciful, unreal or inflated price which the exporter may choose to falsely incorporate in the invoice with any ulterior motives. The foreign buyer cannot, by any stretch of imagination, be held to be liable to pay any amount over and above the price which he has promised to pay for the goods received by him and any difference between that price and the price given in the invoice can

therefore not have the attribute of having become 'payable' by him. And if that be so and the price actually agreed upon has been paid to the exporter, clause (b) does not come into operation in the case of the latter. **A**

4. Sub-section (1) of section 12 no doubt makes it imperative for the exporter to specify in his declaration the full (and true) export value of the goods but then a breach of this mandate is not covered by the contraventions embraced by sub-section (2). It may be that the false declarations made by the respondent-firms in the invoices submitted by them in respect of the goods exported make them liable under some provision (other than section 12(2) of the Act) of the penal law of the country, but that is an aspect of the case with which we are not here concerned. **B**

5. In the result the appeals fail and are dismissed but with no order as to costs. **C**

P.B.R.

Appeals dismissed. **D**