

M/S Om Prakash Bhatia vs Commissioner Of Customs, New Delhi on 7 July, 2003

Equivalent citations: AIR 2003 SUPREME COURT 3581, 2003 AIR SCW 3452, 2003 (4) SLT 389, (2003) 9 ALLINDCAS 494 (SC), 2003 (6) ACE 10, 2003 (9) ALLINDCAS 494, 2003 (5) SCALE 197, 2003 (6) SCC 161, (2003) 5 JT 279 (SC), (2003) 155 ELT 423, (2003) 109 ECR 336, (2003) 4 SUPREME 553, (2003) 7 INDLD 85, (2003) 5 SCALE 197

Bench: M.B. Shah, Arun Kumar

CASE NO.:

Appeal (civil) 4060 of 2001

PETITIONER:

M/s Om Prakash Bhatia

RESPONDENT:

Vs.

Commissioner of Customs, New Delhi

DATE OF JUDGMENT: 07/07/2003

BENCH:

M.B. SHAH & ARUN KUMAR

JUDGMENT:

J U D G M E N T Shah, J.

Questions requiring consideration in this appeal are:— (A) Whether over-invoicing of the goods for export would mean attempt to export 'prohibited goods'? and (B) Whether, while exporting the goods, exporter has to give value of the goods as provided under Section 14 of the Customs Act, 1962 (hereinafter referred to as 'the Act') or the value of goods which he expects to receive on sale of goods in the overseas market?

The facts in brief are:— It is stated that the appellant is engaged in the export of garments. Appellant received an order from an overseas buyer i.e. from Dubai, for supply of ladies' skirts, the contracted price for which was said to be approximately \$10.25 per piece. Appellant filed 4 shipping bills in 1998 for export of 28000 pieces of ladies skirts @ \$10.25 per piece (Rs.434 per piece) amounting to Rs.1,21,54,447/-. On checking, the actual quantity of the skirts was found to be 21184 pieces. On

enquiry, the market price of the skirts was ascertained to be Rs.45/- per piece, according to which total value of the goods comes to Rs.9,53,280/-. The exporters had claimed a draw back of Rs.21,87,800/- on the consignment @ Rs.78/- per piece. For shortage of goods, vide letter dated 4.2.1999, the exporters pleaded that it was an unintentional mistake which had happened on the part of the fabricators and suppliers. During the course of hearing, on 6.2.1999, for the drawback, it was admitted by the exporters that the market price of Rs.45/- per piece was acceptable to them and that their claim for drawback be not granted. The Commissioner of Customs noted that this was the second such case belonging to the same exporters and that there was an organized racket to claim fraudulent drawback by deliberately over-invoicing the readymade garments. The Commissioner of Customs imposed a redemption fine of Rs.10,00,000/- and levied a penalty of Rs.20,00,000/-. It was held that no drawback was admissible even if the party exported the goods in terms of Section 76 of the Act as the market value of the goods was less than the amount of drawback claimed.

Being aggrieved by the said order, the appellant filed appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as 'the Tribunal'). The Tribunal also dismissed the appeal and held that the over-invoicing of the goods for exportation was an offence under the Act. Hence, this appeal.

At the time of hearing of this appeal, learned senior counsel Mr. Adhyaru for the appellant submitted that the appellant is not claiming any drawback and, therefore, that question is not required to be dealt with. However, his contention is – Section 113(d) is not applicable to the facts of the present case as the goods are not prohibited goods. He further stated that exporter is not required to declare the market value of the goods which he would fetch in the market in India. He is required to declare the value of the goods which he is expected to receive from the overseas purchaser and that is the scheme of the Customs Act as well as of the allied Acts.

Learned Additional Solicitor General Mr. Raju Ramchandran, on the other hand, contended that over-invoicing is not permitted under the Act as it is in violation of statutory provisions. He further submitted that at the time of export, the exporter has to give correct value of the goods and that correct value of the goods would be the value of goods which he would fetch in market in India or which he is likely to fetch from overseas purchaser.

At the outset, we would state that the learned counsel for the appellant has not pressed for the drawback in view of specific provision of Section 76 which inter alia provides that no drawback shall be allowed "(b) in respect of any goods the market-price of which is less than the amount of drawback due thereon". Therefore, for the purpose of getting drawback, relevant consideration is the market price of the goods prevailing in the country and not the price of the goods which the exporter expects to receive from the overseas purchaser.

Next — as the order for confiscation of goods is passed by referring to Section 113(d) of the Act, we would refer to the same. It reads as under: — "113. Confiscation of goods attempted to be improperly exported etc.— The following export goods shall be liable to confiscation:—

(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."

The aforesaid Section empowers the authority to confiscate any goods attempted to be exported contrary to any 'prohibition' imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force. Further, Section 2(33) of the Act defines "prohibited goods" as under:— "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with." From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in section 111 (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus:— "... What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111 (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

The next question is — Is there any prohibition imposed under other law which is for the time being in force? For this purpose, reliance is placed upon Section 18 of the Foreign Exchange Regulation Act, 1973, relevant part of which reads thus:—

18. Payment for exported goods.— (1)(a) 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 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 overseas market, 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.

This Section contemplates that exporter is required to furnish to the prescribed authority in prescribed form declaration of true material particulars which include:—

(a) the amount representing the full market export value of the goods; or in the alternative,

(b) if the full export value of the goods is not ascertainable, the value which the exporter expects to receive on the sale of the goods in the overseas market, and

(c) the exporter has to affirm that full export value of goods will be received.

These two clauses of Section 18 leave no doubt that exporter is not concerned with the prevailing market price in India of the goods sought to be exported, but he is required to disclose true export value of goods. That is to say, exporter has to disclose full and true sale consideration – export value of the goods. The notification issued in exercise of the power under Section 18 also inter alia provides that Central Government prohibits the export of all goods unless exporter furnishes to the prescribed authority a declaration in the prescribed form of material particulars including the full export value of the goods or in the alternative the value of the goods which he expects to receive on their sale in overseas market. Hence, importance is given to the value of goods which exporter is to receive. It also provides that the exporter shall affirm in the declaration that full export value of the goods has been or will within prescribed period be paid in the prescribed manner. Further, the learned Additional Solicitor General referred to the notification issued under the said Section, relevant part of which reads thus:— "GSR.78—In exercise of the powers conferred by sub-section (1) of Section 18 of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Economic Affairs) No.GSR 2641, dated the 14th November, 1969, the Central Government hereby prohibits the export, otherwise than by post, of all goods, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, 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 overseas market, 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."

Apart from the aforesaid provision, for finding out the true export value of the goods, Section 14 of the Act provides relevant procedure. Section 14 is to be read along with Section 2(41), which defines the word 'value'. Section 2(41) reads as under:—"S. 2 (41) — "value", in relation to any goods, means the value thereof determined in accordance with the provisions of sub- section (1) of section 14."

Thereafter, relevant part of Section 14 reads thus:—"14. Valuation of goods for purposes of assessment. — (1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be— the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and price is the sole consideration for the sale or offer for sale:

Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill or bill of export, as the case may be, is presented under section 50;

(1A) Subject to the provisions of sub-section (1), the price referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-

section (1) or sub-section (1A) if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value. (3) "

The aforesaid Section would be applicable for determining the value of goods for the purposes of assessment of tariff under the Act or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value. In the present case, on export of goods in question, no duty was payable under the Act. It was, therefore, contended that there is no scope of application of Section 14 for determining the value of goods by applying the criteria laid down in the said Section. In our view, this submission cannot be accepted. For determining the export value of the goods, we have to refer to the meaning of the word 'value' given in

Section 2(41) of the Act, which specifically provides that value in relation to any goods means the value thereof determined in accordance with the provisions of sub-section (1) of Section 14. Therefore, if the export value of the goods is to be determined, then even if no duty is leviable, the method (mode) for determining the value of the goods provided under Section 14 is required to be followed. Section 14 specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to be resorted to and applied for determining the export value of the goods as provided under sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export value is truly stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods sought to be exported. It is true that Section 50 of the Act inter alia provides that before exporting the goods the exporter shall make entry thereof by presenting to the proper officer in the case of goods to be exported, a shipping bill and a bill of export in prescribed form. The Shipping Bill & Bill of Export (Form) Regulations, 1991 inter alia prescribes the said form. After that form is amended w.e.f. 15.6.2001, it is stated that exporter shall state "Value – FOB/PMV where applicable". We are not required to deal with this aspect in this appeal as the goods were sought to be exported in the year 1998.

From the aforesaid provisions, mainly, Section 2(41) read with Section 14 of the Act and Section 18 of the Foreign Exchange Regulation Act, 1973, it is crystal clear that:—

- (a) Exporter has to declare full export value of the goods (sale consideration for the goods exported).
- (b) Exporter has to affirm that the full export value of the goods will be received in the prescribed manner.
- (c) If the full export value of the goods is not ascertainable, the value which the exporter expects to receive on the sale of the goods in the overseas market.
- (d) Exporter has to declare true or correct export value of the goods, that is to say, correct sale consideration of the goods. Criterion under Section 14 of the Act is the price at which such or other goods are ordinarily sold or offered for sale in the course of international trade where the seller and buyer have no interest in the business of each other and the price is the sole consideration for sale or offer for sale.

To the same effect, Rule 11 of the Foreign Trade (Development and Regulation) Rules, 1993 provides. This Rule is to be read along with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992, which inter alia provides that no export or import shall be made by any person except in accordance with the provisions of this act, the rules and the orders made thereunder and the export and import policy for the time being in force. Rule 11 reads thus:— "11. Declaration as to value and quality of imported goods.—On the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the bill of entry or the shipping bill or any other documents prescribed under the Customs Act, 1962 (52 of 1962), state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe to a declaration of the truth of such statement at the foot of such bill of entry or shipping bill or any other documents."

Hence, in cases where the export value is not correctly stated, but there is intentional over-invoicing for some other purpose, that is to say, not mentioning true sale consideration of the goods, then it would amount to violation of the conditions for import / export of the goods. The purpose may be money laundering or some other purpose, but it would certainly amount to illegal / unauthorised money transaction. In any case, over-invoicing of the export goods would result in illegal/irregular transactions in foreign currency. Learned senior counsel Mr. Dave submitted that in some cases, exporter may get much higher value of the goods than the market price prevailing in the country and, therefore, merely because higher export value is mentioned, it cannot be inferred that it is not the true sale consideration. In some cases, this hypothetical contention may be right. However this would depend upon facts and circumstances as well as evidence on record in each case. If the goods are easily available in the market, then it would be difficult to arrive at the conclusion that a foreign buyer – a prudent businessman would pay ten times more than the prevailing market price of readymade clothes, particularly, in the days where information is easily available through internet or various other sources. In any case, when margin of profit appears, on the face of it, unreasonable, it is for the exporter to establish that it was a true export value stated in the shipping bill. Section 14 itself contemplates that the price at which such or like goods are ordinarily sold or offered for sale in the course of international trade would be the value of the goods. In *Toolsidass Jewraj v. Additional Collector of Customs & Others* [(1991) 2 SCC 443], full export value of the goods was not correctly stated in the shipping bills along with G.R. I forms and it was a case of under-valuation in respect of full export value of goods. In that set of circumstances, the Court upheld the order passed by the authorities that there was violation of Section 12(1) of the Foreign Exchange Regulation Act, 1947.

In the present case, as found by the authorities, 28,000 pieces of ladies skirts at the rate of \$10.25 per piece, export value of which was mentioned as Rs.1,21,54,447/-, were sought to be exported. The market price of such skirts was ascertained to be Rs.45/- per piece and on that basis total value of the goods came to be Rs.9,53,280/-. The exporter claimed a drawback of Rs.21,87,800/- on the consignment on the basis that value of each skirt was Rs.78/- per piece. No doubt, during the enquiry exporter admitted that the market price of Rs.45/- per piece was acceptable to him and the claim for drawback was withdrawn. Thereafter, the exporter has not led any evidence that export

value mentioned in the shipping bill was the true sale consideration for the goods sought to be exported. Considering the aforesaid facts and also the fact that this was the second case belonging to the same exporter, the authorities arrived at the conclusion that it was an organized racket to claim fraudulent drawback or an act of deliberate over-invoicing the readymade garments. Hence, the authority imposed redemption fine as well as levied penalty. In our view, this finding arrived at by the authorities below cannot be said to be, in any way, unreasonable which would call for interference by this Court in this appeal. In the result, the appeal is dismissed. There shall be no order as to costs.

I.A. No.3 OF 2002 We had heard learned counsel for the intervenor on the question of law involved in this appeal. I. A. stands disposed of accordingly.