Supreme Court of India
State Trading Corporation Of ... vs Union Of India (Uoi) And Ors. on 15 July, 1994
Equivalent citations: 1994 (72) ELT 797 SC, JT 1994 (4) SC 528, 1994 (3) SCALE 292, 1994 Supp (3) SCC 40, 1994 (2) UJ 493 SC
Bench: S Agrawal, R Sahai
JUDGMENT

1. These appeals are directed against the common judgment of the High Court of Delhi dated October 29, 1979 in the writ petitions assailing the amendments] introduced in the Export (Control) Order, 1977 on February 20, 1979 whereby a ban on the export of silver was imposed by the Government of India.

2. Import and export of goods is controlled by the Imports and Exports (Control) Act, 1947. Section 3 of the said Act empowers the Central Government to make a provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order the import, export, carriage coastwise or shipment as ship stores of goods of any specified description. In exercise of the said power, the Central Government has been controlling the export of goods from the country. Insofar as silver is concerned its export was completely prohibited till 1974. The said ban was lifted in February 1974. By notification dated August 26, 1976, the export of silver was canalised through the State Trading Corporation, appellant herein. The scheme for canalisation of export of silver through the appellant envisaged:

(i) a Business Associateship contract which was required to be entered into by the local supplier/dealer/exporter of silver with the appellant;

(ii) a separate contract for export of specified quantity of silver by the local supplier to be entered into between the appellant and the local supplier/dealer/exporter of silver; and

(iii) a contract to be entered into by the appellant with the foreign buyer for export of silver.

3. Under the said scheme for canalisation, the appellant was to undertake market surveys on behalf of the buyer and to negotiate and conclude export contracts for export of silver in consultation with the supplier and was entitled to a consideration of 1% of the value of invoice.

4. Under the Export (Control) Order, 1977 promulgated by the Central Government under Section 3 of the Imports and Exports (Control) Act silver bullion, silver sheets and plates which have not undergone any process of manufacture subsequent to rolling were listed at S. No. 77(i) in Part B of Schedule I to the said Order and the export of these items was allowed through the appellant only within a limited ceiling permissible subject to certain conditions specified in Column (3) of the Schedule. By Exports (Control) Fifteenth Amendment Order, 1979 issued on February 20, 1979 the said item was deleted from Part B of Schedule I and was inserted at S. No. 47 in Part A of Schedule I to the said Order and as a result these items became classified in the category of goods which are normally not allowed to be exported. On February 20, 1979 the Chief Controller of Imports and

Exports issued a Public Notice banning the export of these items with immediate effect.

5. The writ petitioners (respondents Nos. 5 and 6 in the appeals) had entered into contracts with the appellant prior to February 20, 1979 for supply of silver for the purpose of export. In view of the ban imposed on the export of silver by notifications dated February 20, 1979 they filed writ petitions in the Delhi High Court wherein it was prayed that appropriate orders or writs may be issued restraining the Union of India, the Chief Controller of Imports & Exports and the Collector of Customs from enforcing the terms of the notification dated February 20, 1979 in respect of pre-ban commitments where contracts in respect thereof had already been duly registered under Column (3) of Item 77 of Part B of Schedule I to the Exports (Control) Order, 1977. In the alternative it was prayed that the said notification dated February 20, 1979 be declared as unconstitutional being violative of Article 19(1)(g) of the Constitution. The appellant was also impleaded as a respondent in the said writ petitions. The writ petitions were dismissed by the High Court by judgment dated October 29, 1979. The High Court held that the contract between the suppliers and the appellant for supply of silver for export and the contract of sale by the appellant with the foreign buyer are part of one whole and cannot be separately dealt with even though the appellant alone is the common party in these two types of contracts and the suppliers had no privity of contract with the foreign buyer from the appellant. In this context the High Court observed:

The effect of the total ban on the export of silver imposed by the Government of India on February 20, 1979 was that both these contracts became impossible of performance. The Corporation could not export silver to the foreign buyers. Similarly the suppliers could not compel the appellant to buy silver from the suppliers nor could the appellant compel the suppliers to sell the silver to the appellant. The contract between the petitioners and the Corporation was thus frustrated and came to an end under Section 56 of the Contract Act due to impossibility of performance. This frustration is a complete defence to the enforceability of the contract between these two parties.

6. The appellant has filed these appeals only against the aforesaid observations of High Court. While the appellant does not challenge the correctness of the observations the High Court that the contract between the appellant and the foreign buyers has become impossible of performance and has become frustrated under Section 56 of the Contract it seeks to protect itself against any claim by the foreign buyers since they were not par to the writ petitions in the High Court and the appellant apprehends that if a claim preferred against it the respondent suppliers would disclaim all liability on the basis the aforesaid observations of the High Court.

7. The case of the appellant is that in the Business Associateship Contract that entered into by the local suppliers with the appellant in accordance with the scheme canalisation of export of silver, there is following provision relating to indemnity: Any cess, duty, rate to tax, whatsoever, payable in respect of any transaction covered by this contract shall be borne by the supplier. The supplier hereby indemnifies the STC and shall always keep it indemnified against all claims, including claims for sale, purchase tax, actions, losses, damages, expenses etc. arising out of or relating to or in respect of this contract and/or the export contract, and the STC shall be free to invoke the Bank Guarantee and/or forfeit the cash security deposit for the same.

8. The appellant submits that in view of the said indemnity clause the appellant entitled to claim indemnity for any loss sustained by it on account of any claim for damage made by the foreign buyers against the appellant and that the observations of the High Court should not be so construed as to preclude the appellant from claiming the protection of the indemnity clause referred to above.

9. Reference, at this stage, may be made to the decision of this Court in Union India and Ors. v. C. Damani & Co. and Ors. , which also arose from the ban imposed on export of silver under notification dated February 20, 1979. Inj the said case an interim order had been passed by the Bombay High Court in writ petitions filed by the local suppliers wherein the High Court had restrained the implementation off the decision dated February 20, 1979 insofar as the contracts/licences specified in the notification were concerned and it was directed that local suppliers be permitted to export silver pursuant to the said contracts/licences. In the said case it was contended on behalf of the local suppliers that in view of the frustration of the contract between the appellant and the foreign buyers the obligation for indemnity in the contract between the local suppliers and the appellant was consequently absolved and that was inequitable to keep the indemnity clause in the Indian contract alive. On behalf of the appellant, it was however, submitted that the indemnity clause had an independent existence and embraced all possibilities so that any manner of liability flowing from the foreign contract would bring to life the indemnity clause in the Indian contract. This Court did not, however, consider it necessary to go into these questions and the case was disposed of keeping in view the equity of the situation having regard to the direction that was contained in the order granting special leave to appeal. After considering whether in equity the court should give a direction that if the foreign buyer claims damages for breach of contract from the appellant, whether the appellant should at all be permitted to enforce indemnity given by the intending exporters and having regard to the facts of those cases this Court held that the indemnity clause in the contract shall not be enforced by the appellant even if the unlikely event of the appellant being made liable by the foreign buyer takes places. The Court expressly left open as a general proposition of law the question of automatic absolution from the indemnity clause so far as indigenous suppliers are concerned.

10. The learned Additional Solicitor General, in support of the appeals, has raised the said question and has urged that in spite of the frustration of the contract between the appellant and the foreign buyers the indemnity clause between the Indian suppliers and the appellant remain operative and in the event of the appellant being held liable for damages in a claim by the foreign buyers the appellant should be entitled to reimbursement on the basis of the indemnity clause. The learned additional Solicitor General has, in the alternative, submitted that the observations of the High Court may be clarified so as to permit the appellant to raise this question in the event of such a contingency arising in future.

11. We, however, find that the question as to the applicability of the indemnity clause in the contract between the Indian suppliers and the appellant to claims by the foreign buyers against the appellant was not specifically raised before the High Court and the High Court has not dealt with the said question. The observations of the High Court aforementioned cannot, in our opinion, the construed as a decision on this question. The question will have to be considered if and when it arises in the tight of the facts of the particular case. We, therefore, do not propose to go into the same and we

leave it to the parties to raise it in appropriate proceedings in the event of such a contingency arising on account of the appellant being found liable for damages to the foreign buyers and the appellant claiming reimbursement from the Indian suppliers for the loss sustained by it on account of such claim for damages on the basis of the indemnity clause contained in the contract between the Indian suppliers and the appellant. We make it clear that the observations of the High Court referred to above will not preclude the appellant from making such a claim in case it becomes necessary to do so in future.

12. The appeals are disposed of accordingly. No orders as to costs.