# Assistant Collector of Customs Vs India-Ferro-Alloy Industries (P.) Ltd. and Others

**Court:** Calcutta High Court

**Date of Decision:** Sept. 25, 1973

**Acts Referred:** Constitution of India, 1950 â€" Article 14, 19, 226
Customs Act, 1962 â€" Section 105, 113

**Citation:** 78 CWN 369

**Hon'ble Judges:** B.C. Mitra, J; A.K. Janah, J

**Bench:** Division Bench

**Advocate:** G.P. Kar and A.K. Banerjee, for the Appellant;R.C. Deb, Deb Burman and Indrani Chatterjee, for the Respondent

## Judgement

B.C. Mitra, J.
The first respondent carried on business inter alia in the export of chrome. From time to time various quantities of Chrome

Ore were exported under contracts entered into with Foreign buyers. The goods exported were purchased by the first respondent from various

mine owners including a firm carrying on business under the name and style of Serajuddin and Co., According to the first respondent, chrome ore

was at no time liable to payment of Expert Duty under the provisions of the Sea Customs Act 1878, (hereafter referred to as the 1878 Act) or

under the provisions of any other law. On or about November 23, 1959, the appellant made an application before the Chief Presidency Magistrate

u/s 172 of the 1878 Act for issue of Search Warrants of premises No. 19-A, British Indian Street, Calcutta, which was the registered office of the

first respondent, on the allegation that documents relating to and in connection with illegal exportation of dutiable goods were exported in

contravention of the 1878 Act and such documents were secreted in the above premises. Such was carried at the respondent''s Registered Office

and a large number of documents belonging to the first respondent were seized by the Custom authorities.

2. On March 30, 1968 the respondent''s office was searched on the authority of a Search Warrant issued u/s 105 of the Customs Act, 1962

(hereinafter referred to as the 1962 Act).

3. A Show Cause Notice dated June 17, 1963, was served on the first respondent on or about June 20, 1963. In this notice, the first respondent

was charged with contravention of sections 137, 167(3), 167(8) and Section 19 of the 1878 Act read with Sections 23A, 23B, and 12(1) of the

Foreign Exchange Regulation Act. Before furnishing any explanation to the said Show Cause Notice, the first respondent challenged the notice on

a petition under Article 226 of the Constitution and obtained a Rule nisi which was made absolute by an order dated August 13, 1969. No

judgment was delivered, but the trial Court came to the conclusion that in view of its judgment delivered in Matter No. 301/63 ((5) Serajuddin and

Company and others v. Assistant Collector of Customs, Sperintendent Preventive Service and Ors.) on June 17, 1963, the Rule ought to be made

absolute and ordered accordingly and further directed issue of appropriate writs.

4. Mr. G.P. Kar appearing for the appellants contended that the trial Court failed to apply its mind to the facts and the law involved in this case,

and further that the trial Court ought not to have made the Rule absolute, by merely following its earlier judgment in a different case, in which the

facts were different. He also argued that the trial Court should have given its reason for making the Rule absolute on the materials before it, and

should not have disposed of the matter by merely following its earlier judgment. We find that the petition in this appeal and the petition in Matter

No. 301/69 are almost identical, except for variations and modifications due to the difference in the quality of goods exported, namely, that in this

case the goods exported was chrome ore, but In Matter No. 301 of 1963 the subject matter of export was Manganese Ore. There is also a slight

difference in the allegations in the petition, arising out of different procedure in export in Manganese Ore which was subject to export duty, while

chrome ore was not liable to such duty. The allegations in the petitions are identical and the issues involved in the writ petition out of which this

appeal arises and the writ petition in Matter No. 301/ 63 are the same. I shall, however, deal with this appeal on its merits and go into the question

of the correctness of the judgment and order in Matter No. 301/63 which was followed by the trial Court in making the Rule absolute in this

matter.

5. Counsel for the appellants eontended that the trial Court was in error in making the rule absolute by following the decision of the Supreme Court

in (6) Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, . He argued that in that case the only

question before the Court was whether on the facts stated in the Show Cause Notice the respondents in that appeal could be held to have

contravened Section 12(1) of the Foreign Exchange Regulations Act. In order to appreciate this contention and also because the decision in this

appeal would turn on the views of the Supreme Court in that case, it is necessary to refer briefly to the facts involved in that case. The respondents

who were exporters of Manganese Ore had exported large quantity of such ore after complying with the formalities of law, but in reality had under

invoiced various'' consignments exported by them and also had failed to repatriate the foreign exchange of the value of about Rs. 3 crores obtained

by them as the price of the Manganese Ore exported. Several Notices were issued by the Custom authorities calling upon the respondent to show

cause why action should not be taken against them for contravention of Section 12(1) of the Foreign Exchange Regulation Act and Section 19

read with Section 167(8) of the Sea Customs Act. The majority view of the Supreme Court was that the requirement of Section 12(1) of the

Foreign Exchange Regulation Act was satisfied if the stipulated declaration in the form prescribed by Rule 3 of the rules framed under the Act was

furnished and supported by evidence prescribed in Rule 5. And even if the invoice particulars mentioned in the declaration did not represent the full

export value of the goods exported, the declaration could not be considered to be invalid or nonest. It was further held that contravention

complained of in that case was really the contravention of Section 12(2) of the Act and also Rule 5. It was also held that if every declaration which

did not accurately state full export value of the goods exported was a contravention of Section 12(1) of the said Act, then all exports on

consignment basis must be held to have contravened the restrictions imposed by Section 12(1) of the Act. The conclusion of the Supreme Court

on this point was that the scheme of the Act made it clear that so far -as the Customs authorities were concerned, all that they had to see was that

no goods were exported without furnishing the declaration prescribed by Section 12(1) and once that stage was passed the rest of the matter was

left in the hands of the Reserve Bank of India and Director of Enforcement.

Referring to this decision, Mr. Kar argued that if the only charge against the respondents was violation of Section 12(1) of the Foreign Exchange

Regulation Act, it might have been contended on behalf of the respondents, that the show cause notice is bad because the declaration in fact was

filed by the first respondent and the mere fact that the declaration was incorrect or that the value of the goods exported was under Invoiced would

not entitle the Customs authorities to Issue a show cause notice for violation of Section 12(1) of the Foreign Exchange Regulation Act. He argued,

however, that apart from the charge relating to violation of Section12(1) of the Foreign Exchange Regulation Act, there were definite charges of

violation of various provisions of 1878 Act. and that such charges were severable. It was argued further that even if the show cause notice was

held to be bad having regard to the decision of the Supreme Court mentioned above, the other charges under the 1878 Act were enough to sustain

the show cause notice and justify the proceedings against the respondents. In support of this contention, reliance was placed by Mr. Kar on a

bench decision of this Court reported in ((4) S.K. Srivastava and Others Vs. Vullubhdas Kalyanji and Co. (P) Ltd., ). In that case, an exporter

was charged with misdeclaration in the relevant shipping bills in respect of the F.O.B. value with regard to an attempt to export 1000 nales of B.

Twills. The charge was that by the misdeclaration the exporter contravened Section 167 (8) of 1878 Act read with Section 23A of the Foreign

Exchange Regulation Act as well as Section 167 (37) of the 1878 Act. The goods confiscated but an option was given to the exporter to redeem

the goods on payment of a fine of Rs. 2 Lacs and a personal penalty of Rs. 35,000/- was also imposed. Upon payment of these sums under

protest, the exporter got the goods released and thereafter challenged and impugned orders by statutory appeal and revision. The revision

application being dismissed the exporter obtained a Rule Nisi in an application under Article 226 of the Constitution. The contention on behalf of

the Customs authorities in that case was that separate offences had been committed u/s 167(37) of the 1878 Act which was independent of the

offence under the Foreign Exchange Regulation Act and, therefore, even if the charge failed u/s 12(1) of the Foreign Exchange Regulation Act, the

charge u/s 167(37) of the 1878 Act, being a separate and a severable charge could be sustained. The Court held that separate charges were made

against the exporter for violation of Section 12(1) of the Foreign Exchange Regulation Act and also u/s 167(37) of the 1878 Act for misdeclaration

of value. It was held that the order in so far as it was founded on the Foreign Exchange Regulation Act was without jurisdiction having regard to

the decision of the Supreme Court in Sri Ram"s case (supra) but it was a valid order so far as it was founded on Section 167 (37) of the 1878 Act

and also that since the order of confiscation was founded both on items (8) and (37) of Section 167 of the 1878 Act, the order of confiscation

could not be struck down even though the charge of violation of Section 12(1) of the Foreign Exchange Regulation Act failed. On this conclusion,

the penal order imposed upon the exporter was upheld.

In this case Mr. Kar argued that there was a charge of contravention of Section 137 and Section 19 of the 1878 Act read with Sections 23A,

23B, and 12(1) of the Foreign Exchange Regulation Act, the charge of infringement of Section 137 of the Act it was argued in its turn attracted the

penalty prescribed by Section 157(37) of the 1878 Act. It was further argued that the charge u/s 167(37) of the 1878 Act was also an

independent charge and could be sustained by its own force even if the charge u/s 167(8) of 1878 Act failed.

6. Relying on the decisions mentioned above, Counsel for the appellants contended that had it been the case of clients that there was contravention

of Section 12(1) of the Foreign Exchange Regulation Act only, which in its turn attracted the penal provisions of Section 167(8) of the 1878 Act,

the show cause notice could have been struck down having regard to the decision of Supreme Court in Sree Ram Durga Prasad''s case (supra).

But in this case, other charges were made in the show cause notice, namely, contravention of Section 137, Section 19 and Section 167(3) of the

1878 Act read with Section 23A, Section 23B and Section 12(1) of the Foreign Exchange Regulation Act. It was argued that since these charges

were independent and severable charges, the show cause notice could not be struck down. It seems to us that there is good deal of force in this

contention of Counsel for the appellants.

7. Our attention was drawn by Counsel, for the appellants to a Bench decision of this Court reported in (2) The Jay Engineering Works Ltd. Vs.

M.G. Wagh and Others, to which I was a party. That there was a case of violation of Section 12(2) of the Foreign Exchange Regulation Act and

the charge was based on under-invoicing in ''G.R.I.'' Form and delay in the payment of goods already sold beyond the prescribed period. It was

not a case of violation of Section 12(1) of the Act. We do not see how this decision is of any assistance to the appellants in this case. Mr. Kar next

relied upon another decision of the Supreme Court: (1) Becker Gray and Co. (1930) Ltd. and Others Vs. Union of India (UOI) and Another, .

The only importance of this case is that it affirmed the majority view in Sree Ram Durga Prasad''s case (supra), namely that under-valuation of a

declaration u/s 12(1) of the Foreign Exchange Regulation Act did not amount to contravention of the restrictions imposed by that provision.

Reliance was next placed by Mr. Kar on a Bench decision of this Court reported in ((3) Jute Investment Co. Ltd. Vs. S.K. Srivastava and Others,

). In that case, the Court held following the decision of the Supreme Court in Sree Ram Durga Prasad''s case (supra) that Section 12(1) of the

Foreign Exchange Regulation Act before its amendment in 1969 did not prescribe any particular form in which a declaration had to be furnished

and that omission to furnish the declaration in the prescribed form and giving of incorrect particulars in the declaration did not amount to

contravention of Section 12(1) of the Act and did not attract the jurisdiction of the Customs authorities u/s 113 and Section 114 of the Customs

Act, 1962.

8. Mr. R.C. Deb appealing for the respondent on the other hand argued that in this case the goods had already been exported and, therefore no

order for confiscation of the goods could be made u/s 167(37) of the 1878 Act. He argued that in the case reported in S.K. Srivastava and Others

Vs. Vullubhdas Kalyanji and Co. (P) Ltd., , to which I have referred earlier the goods had not been exported and, therefore a specific charge was

made u/s 167(37) of the 1878 Act. In this case, on the other hand, he submitted, the goods had already been exported and, therefore, no order

for confiscation u/s 167(37) of the 1878 Act would possibly be made. It was next argued that whatever other charges were made in the show

cause notice, the main ground still remained a ground u/s 12(1) of the Foreign Exchange Regulation Act for mis-declaration of the value of the

goods and the other grounds were only ancillary to the main ground.

9. In our view Mr. Deb is right in his contention that the Bench decision of this Court reported in S.K. Srivastava and Others Vs. Vullubhdas

Kalyanji and Co. (P) Ltd., has no application to this case as the goods in that case were not exported and therefore an order for confiscation of

the same could be made, if necessary. But we are unable to accept Mr. Deb"s contention that the other grounds mentioned in the show cause

notice are such that the impugned notice cannot be sustained. It is true that one of the grounds mentioned in the show cause notice is contravention

of Section 12(1) of the Foreign Exchange Regulation Act and also Section 167(8) of the 1878 Act and the show cause notice so far as it is based

on the ground of violation of these statutory provisions cannot be sustained having regard to the decision of the Supreme Court in Sree Ram Durga

Prasad"s case. But it cannot be overlooked that Section 167 (3) of the Act has also been invoked and there is a specific charge for contravention

of Section 137 of the Act, which says that no goods except passengers" baggage shall be shipped for export, until the owner has delivered to the

Customs authorities a Shipping Bill in duplicate containing such particulars in addition to those specified in Section 29 of the Act as may from time

to time be prescribed by the Customs authorities. This section, therefore, requires particulars to be furnished in addition to those mentioned in

Section 29 of the Act. Section 29 of the Act requires that on exportation of any goods whether liable to duty or not, the owner of such goods shall,

in the Shipping Bill state the real value, quantity and description of such goods to the best of his knowledge and belief and shall subscribe a

declaration of the truth of such statement. It appears to us that the charge of violation of Section 137 of the 1878 Act in its turn attracts the

provisions of Section 29 of the Act which requires the exporter to state the real value, quantity and description of the goods exported. In so far as

the charge is based on an incorrect description of the goods exported on the ground that on chemical analysis the contents of the ore exported

were found to be different from what was given in the Shipping Bill and that the shipper exported the goods in performance of the contract other

than those disclosed at the time of exportation, it cannot in our view be said, that the show cause notice cannot be sustained.

10. It cannot be overlooked that at this stage the only question is firstly, whether the show cause notice is a valid and lawful notice under the

provisions of the Statute and secondly whether the appellants have jurisdiction to issue the same. Adjudication and investigation into the

correctness or otherwise of the grounds mentioned in the show cause notice have yet to take place. It will be open to the respondent to contend

before the adjudicating officer that the grounds mentioned in the show cause notice cannot be sustained and no incorrect description or value of the

goods have been furnished by it. If the respondent is aggrieved by the decision of the adjudicating officer he has the alternative remedy by way of

appeal and thereafter a revision. It is not for this Court in the Writ petition to go into the question whether the charges or grounds mentioned in the

show cause notice are justified having regard to the evidence collected by the Customs authorities. It is the legality and validity of the show cause

notice which is under challenge and if on the materials on record it appears to this Court that some at least of the grounds require further

investigation, it cannot in our view be said, that the notice is illegal and invalid and has been issued without jurisdiction,

11. The next question to be considered is whether the show cause notice can be sustained even after it is held that the ground relating to violation

of Section 12(1) of the Foreign Exchange Regulation Act is no more a valid ground for a show cause notice having regard to the decision of the

Supreme Court in Sree Earn Durga Prasad"s case (supra). If it is held that the entire show cause notice is bad because the allegation regarding

violation of Section 12(1) of the Foreign Exchange Regulation Act cannot maintain adjudication proceedings, it must be held that the show cause

notice must be struck down as it is incapable of being enforced or acted upon by the respondent. It seems to us, however, that the show cause

notice so far as it relates to contravention of the provisions in the Sea Customs Act, 1878 can stand on its own and cannot be said to be vitiated or

without jurisdiction on the ground that it cannot be sustained for violation of Section 12(1) of the Foreign Exchange Regulation Act. It ought not to

be overlooked that the Sea Customs Act is a statute of 1878 and the Foreign Exchange Regulation Act is a statute of 1947. Show cause notices

under the former Act are in no way dependent upon the charges made for contravention of the latter Act. As has been held by the Supreme Court

in Sree Ram Durga Prasad''s case (supra), there are two facts in every export one relating to the export of goods and the other relating to the

earning of foreign exchange and the former aspect is dealt with by the custom authorities and the latter either by the Reserve Bank of India or by

the Director of Enforcement. It was further pointed out by the Supreme Court that the scheme of the Act made it clear that so far as the Custom

authorities were concerned, all that they had to see was that no goods were exported without submitting a declaration u/s 12(1) of the Foreign

Exchange Regulation Act and once that stage was passed, the rest of the matter was left in the hands of the Reserve Bank and the Director of

Enforcement. These observations of the Supreme Court make it clear that the charges of contravention of the Sea Customs Act, 1878 and the

Foreign Exchange Regulation. Act, 1947 are not so mixed up or tied up that they cannot be separately looked at or dealt with. It cannot, therefore,

in my view, be said that the show cause notice so far as it relates to the contravention of the provisions in the Sea Customs Act, 1878 must be

struck down as the allegation or contravention of Section 12(1) of the Foreign Exchange Regulation Act cannot sustain the show cause notice.

12. In our view the trial Court was in error in making the Rule absolute by following its earlier judgment in Matter No. 301/63 (Serajuddin and Co.

and Ors. v. Assistant Collector of Customs Superintendent Preventive Service and Ors.). No separate judgment was delivered by the trial Court

but an order was made where by the Rule Nisi was made absolute and for issue of appropriate writs.

13. Counsel for the respondents however proceeded to argue the other points as set out under paragraph 19 of the Writ petition. Some of these

points indicated by Counsel for the respondents were as follows:

(a) In view of the enquiry or investigation and the powers of the Collector of Customs u/s 12 of the Foreign Exchange Regulation Act read with

Rule 5 of the Rules framed there under, before the export of the goods the show cause notice could not be issued and it was issued without

jurisdiction.

(b) The show cause notice is devoid of material particulars and the documentary evidence on the basis of which it had been issued was not

communicated to the respondents in consequence whereof the respondents had been deproved of opportunity of showing cause against the said

notice.

(c) As the Sea Customs Act, 1878 has been repealed by the Customs Act, 1962 and keeping in view the provisions of the Foreign Exchange

Regulation Act and the General Clauses Act, the Customs authorities had no authority or jurisdiction to initiate any proceedings against the

respondents under the provisions of the Sea Customs Act, 1878.

(d) Section 182 of the Sea Customs Act, 1878 under which the show cause notice had been issued conferred unregulated, uncanalised and

arbitrary power on the Customs authorities without laying down any principle or policy for exercise thereof and, therefore, Section 182 of the Act

infringed the fundamental rights granted to the respondents by Article 14 and 19 of the Constitution and therefore ultra vires.

(e) The notification dated April 22, 1952 was in excess of the powers conferred on the Central Government u/s 12(1) of the Foreign Exchange

Regulation Act and was ultra vires, invalid and void and of no effect and did not operate as a prohibition of export in law.

None of the points mentioned above was argued before the trial Court and we cannot, therefore, allow Counsel for the respondents to canvass

these points before us. The Trial Court did not express its views on any of these questions and in our opinion the writ petition should be remanded

to the Trial Court for determination of the other points some of which have been indicated above.

In the result, the judgment and order under appeal are set aside and the matter is remanded to the trial Court for determination of the other points

raised by the respondents in the writ petition. Each party to bear its own costs.

Janah, J.

I agree.