

Union of India and Others

Vs

M/S. C. Damani & Co. and Others

Civil Appeals Nos. 1450-1463 of 1979

(V. R. Krishna, Iyer, R. S. Pathak JJ)

08.05.1980

JUDGMENT

KRISHNA IYER, J. –

1. Silver is a precious metal and policy decision that the silver resources of the nation shall be conserved may well be wise policy. But public morality is more precious than silver and gold for individual and national and to honour the plighted word of a public body is proof of this higher policy. The relevance of this observation, about the link up of law and morality is basic to the decision of this case. What then, is the morality of the law vis-a-vis Government policy on export of silver. This is the question, in its jural dimensions, which has been ably argued by counsel. Such a capsulated statement, we know, is but an over-simplification, and we will proceed to unfold in fuller detail the facts and the law, the conflict and its resolution.

2. Arguments have been heard on the substantive issue as if we were disposing them of finally and not provisionally on an interlocutory basis. This has been made clear even in the ad interim order passed by this Court while granting leave. Therefore, this decision will virtually end the writ petition pending in the Bombay High Court. This procedure has the consent of all the counsel and their parties and brings to a close a litigation whose life may otherwise lengthen into after-life.

3. We are in the province of export of silver which is governed by the Imports and Exports (Control) Act 1947 (for short the Act). Section 3 clothes the Central Government with the power to :

.... make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified clauses of cases, and subject to such exceptions, if any, as may be made by or under the order, -

(a) the import, export, carriage coastwise or shipment as ship stores of goods any specified description;

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 11 of the Customs Act, 1962, and all the provisions of that Act shall have effect accordingly.

(3) Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment aboard of any goods or class of goods imported into India.

4. Pursuant to government's broad policy, it promulgated, inter alia, the Exports (Control) Order, 1977, Clause 3 whereof reads thus :

Restrictions on export of certain goods. - (1) Save as otherwise provided in this Order, no person shall export any goods of the description specified in Schedule I, except under and in accordance with a licence granted by the central Government or by an officer specified in Schedule II.

5. The anatomy of the Order discloses two parts - Parts 'A' and 'B' to Schedule I. Items included in Part 'A' are not normally allowed to be exported while those in Part 'B' are more liberally exportable.

6. The story of silver and its export has been one of fluctuating fortunes. Until February 1974 its export had been handed. Then followed a permissive period for private exporters until August 26, 1976. Thereafter, export trade in silver was canalised through, the State Trading Corporation (we may use the acronym STC, for convenience) which is wholly government-owned but with separate statutory personality. By the Exports (Control) Fifteenth Amendment Order, 1979, silver jumped from Part 'B' to Part 'A' to Schedule I. This switch came about since February 20, 1979, and meant a virtual ban (not normally allowed to be exported) on export of silver. This embargo on export of bullion hurt the respondent (M/s. Damani & Co. or, for short, Damani) for reasons we will now state.

7. There is big money in bullion dealings, more so in the export/import business thanks to wild variations in Indian and international prices. Of course, there are also the high hazards of heavy fluctuation and sharp speculations, added to the risk of transnational adjudications implicit in international trade and private international law. Damani has been in the bullion business, and when silver export came to be canalised from August 1976, trade adjusted itself to the new realities and a flexible arrangement was evolved whereby the STC enjoyed a monopoly export business but the bullion supplies were fed into the stream by private dealers like Damani. Law is the handmaid of economics and when the economics of trade suffers a radical change law helps the process without hampering of the flow. The flexible form of the contracts which emerged on canalization of silver export is relevant for us because the bone of contention between Damani and the STC, apart from the challenge to the vires of the Export (Control) Fifteenth Amendment Order, 1979, insofar as it prohibits pre-ban commitments (or the exclusion of such contracts from its operation, by way of interpretation), is about the efficacy of an indemnity clause in the contract between the two.

8. The nation lives not for the benefit of Big Business but for conservation of its own resources, and export policy is dictated by a host of considerations ordinary imponderable for the court. Although its reasonableness is not beyond the power of this Court to examine when constitutionality is in issue, the zone is so sensitive, the subject is so strategic and the import and impact so intricate that judges do not rush in where administrators fear to tread. The reasons for the ban on silver exports brought about in to tread. The reasons for the ban on silver exports brought about in February 1979, are explained briefly by the Union of India in its affidavit :

Such a step became necessary on account of depletion of the availability of silver in the country. The Export (Control) Fifteenth Amendment Order was passed by the central Government in exercise of its power under Section 3 of the Act after a full review of the prevailing conditions in the country, in the public interest, for the conservation of national resources and to meet the internal demand in the country itself. All the relevant facts were taken into account by the Central Government before issuing the order.

The reasons are set out more convincingly in another affidavit as the need of the national economy :

Due to export of silver on large scale since 1974, its availability in the country became considerably reduced giving rise to an increase in price of silver. The impugned order and impugned notice Exs. C and D to the petition were therefore issued by the government after review of prevailing conditions in the country and in public interest the impugned action was taken by the government in the interest of National Economy and for conservation of national resources and to meet the local demand.

I submit that the policy decision of the government to ban export of silver was taken by the appropriate authority after taking in consideration all the relevant factors in exercise of powers vested in the Central Government under the law. I submit that in the very nature of things such a decision had to be taken suddenly and there can be no prior notice or intimation about the same. I submit that the impugned decision is taken in larger national interest and certain amount of alleged inconvenience or hardship to the parties in the trade cannot be helped and this is the normal incident of some risk in the trade which a trader has got to take.

9. We see no ground to discredit this policy nor demolish this prohibitions. Courts cannot deal cavalierly with administrative policy where the judicial process is functionally under a hardship - a facet not fully appreciated by the Bombay High Court in its order under appeal here. Indeed, Damani limits his attack on the vires of the ban order to its operation on contracts already completed before the ban was clamped down and all that remained was shipping the bullion, failure to do which would unjustly and unreasonably expose the innocent supplier of the STC, for no fault of his, to the unforeseeable risk of a heavy liability in a foreign jurisdiction. This contention may have to be considered here or elsewhere, but if we may anticipated our conclusion even here, this question is being skirted by us because the kismet of this case can be settled on other principles. The discipline of the judicial process forbids decisional adventures not necessary, even if desirable.

10. The canalisation programme has for its raison d'etre many purposes including policing and servicing foreign trade and, hopefully, making some profit for the benefit of the nation, apart from stabilising the country's foreign trade on a sound and credible basis, pledging the creditworthiness of the State.

11. Now we will move on to the events which escalated to a crisis resulting in these proceedings (one of many in the Bombay and Delhi High Courts). We are dealing with an interlocutory order but really we are disposing of the writ petition. Respondent 1 (Damani), as per the practice evolved between the STC and the Tread, had registered itself for export tread in silver with the STC. The press note issued by government on August 26, 1976, reads thus :

Government has decided that with immediate effect export of silver will not be allowed through private parties. Instead, export of silver will be allowed only through the State Trading Corporation of India.

12. Thereafter, silver exports were canalised through the STC, the fifth respondent, which, in turn, entered into contracts in its own name with foreign buyers. To fulfill those contracts, the STC entered into contracts with indigenous suppliers. Technically, there is no contractual relationship between the foreign buyers and the indigenous supplier like Damani. As stated earlier, the amendment to the Exports (Control) Order dated February 20, 1979, barred all silver exports, including by the STC. Of course, government had a residual power to permit exports although normally and in the absence of such special permission, silver was a banned item. Pursuant to the Prohibition, a trade notice of February 27, 1979 was published benefit of the commercial community. It is indisputable, on account of the amendment of the law on February 20, 1979, that export of silver became impossible for the STC or for that matter for anyone else.

13. We have stated earlier that government is in the best position to take a policy decision on total or conditional ban of exports of commodities the gold and silver. Of course, the Union of India has taken the extreme that there is a ban on judicial review of the administrative policy behind the ban by the Central Government. We do not agree with this proposition in the light of Article 19 of the Constitution. The sovereign power is in the Constitution, not the Administration and the Court is the sentinel.

14. The larger question of vires of the ban does not arise for our consideration. The narrow issue that we propose to examine first is as to whether Damani, the indigenous supplier, is not, entitled to insulation from the indemnity clause, in the special circumstances of the case. Counsel for Damani, Shri Anil Divan, conceded that if the liability to indemnify the STC as against any claim the foreign buyer may make is held unenforceable, his client are willing to give up the other submission.

What are these circumstances ? During the period prior to February 20, 1979 when silver was part of Part 'B' to the First Schedule as Entry 77, export was permitted through the STC, subject to some conditions with which we are concerned. The first respondent, being one of the registered suppliers of silver for export, had an agreement of October 1, 1976, with the STC. The said agreement is still extant. Pursuant to Clause 2(a) thereof Damani has furnished a bank guarantee to the STC as pre-condition to supply of silver for export as per the agreement. The integral link and intimate relationship between Damani's agreement with the STC and the STC's contracts with the foreign buyer is obvious. The most important provision with which we are concerned is clause 9(a) which runs thus :

9. (a) Any cess, duty, rate or 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 STC shall be free to invoke the Bank Guarantee and/or forfeit the cash security deposit for the same.

16. Although many contentions have been canvassed before us, the battle of legal wits has been fought on Clause 9(a) which may, therefore, be treated as decisive of the present forensic adventure.

17. The key circumstances notice before formulating or discussing the points arising in the case are (a) that the consignments of silver we are concerned with relate to contracts concluded between the STC and foreign buyers and corresponding contracts concluded between Damani and the STC before the legal ban on export of silver on February 20, 1979; and (b) that Damani had, within the

time fixed in the contract, offered delivery of the silver covered by the contract to the STC; and (c) that the STC had refused to accept, performance of the contract from Damani on account of the Order forbidding the former's export of silver and lastly (d) that the stand of the STC and the Central Government has been that the contracts between the STC and the foreign buyers (who are not parties before us) are not enforceable due to the doctrine of frustration. Pervasive under standing of the contours of the dispute debated before us is possible only if we further remember that the Central government's stance before us, in acquiescence of the view upheld by the Delhi High Court where a similar 'silver' litigation came up for adjudication involving the same triangle of the STC, foreign buyer and indigenous supplier and similar contracts concluded before February 20, 1979. The Delhi High Court held that the export contract was frustrated by the ban order and consequently the indemnity clause in the contract between the Indian supplier and the STC stood inoperative. Indeed, the scenario, as it developed before us, was quite piquant, if not pathetic. In sheer logic - and law is not hostile to logic - the functional survival of the functional survival of the clause of indemnity postulated the potential operation of the principal contract, the liability flowing from which was to be indemnified. Therefore, if the basic foreign contract failed because of frustration it followed that there was nothing to indemnify and Clause 9(a) would die a natural death. Damani and the Central Government stuck to this view which appealed to the Delhi High Court but the STC pleaded that the eventuality of a foreign tribunal holding the STC liable for breach was still on the cards and this was no theoretical possibility since a notice of demand for damages had already been received. The law in the books or in the courts of one country offered no immunity in a foreign jurisdiction; what the judgment says it is and judges do speak in diverse and so the need to keep alive the indemnity clause as against Damani was an economic necessity of legal tenability. We do not discuss further or express our view because the Delhi Judgment is now pending in appeal and we propose to bypass this issue for the nonce.

18. Nobody questioned before us the power of parliament to make a law banning or regulating export and import of essential commodities, subject, of course, to the fundamental rights of citizens. But as earlier stated, the contesting respondent challenged as unreasonable and arbitrary the application of a total ban, all of a sudden, on contracts for export which had become complete and concluded before the ban. In short, it was unreasonable and, therefore, invalid vis-a-vis pre-ban commitments otherwise ready for performance. Secondly, Shri Divan for the respondent argued that the indemnity in the auxiliary contract with the STC had become non est from the point of view of performance because the principal contract had become frustrated. He was ready to perform the contract, but the STC was not ready to receive the silver for export since the latter suffered from legal handicap imposed on February 20, 1979. Lastly, counsel submitted that even without deciding these issues, the court could still intervene in its equitable jurisdiction and relieve the indigenous suppliers from the obligation to indemnify, having regard to the fact that the stand of the Government of India was that the foreign contract was frustrated and the obligation for indemnity in the Indian contract was consequently absolved and the STC was itself a State instrumentality of the Central Government and was subject to its statutory directives. More than all, the case of the STC itself has been that the foreign contract is frustrated and, in that view, it is inequitable to keep the indemnity clause in the Indian contract alive, thus holding over his head the Damocles sword of an uncertain litigation abroad and its chancy consequences.

19. There is much to be said on the question of frustration of the foreign contract and its impact on the indemnity clause [Clause 9 (a)]. Anson, on the Law of Contracts, notes : (Anson : LAW OF CONTRACT, 24 Edn., p. 476)

Most legal systems make provision for the discharge of a contract where, subsequent to its

formation, a change of circumstances renders the contract legally or physically impossible of performance.

.... Where a man specifically undertakes an absolute obligation, he cannot claim to be absolved from liability by the fact that his failure to perform the obligation is due to the occurrence of an event over which he has no control. (Anson : LAW OF CONTRACT, 24 th Edn.,)

Thus, there is an implied condition in ordinary contracts that the parties be exonerated in the case, before the breach, the performance become on account of physical cause or legal prohibitions. The juridical doctrine of frustration need not be explored in depth nor its implementation projected with precision in the present case for simple reason that the rival contention urged with plausibility do not call for a pronouncement the special facts of this case. Mr. Anil Divan broadly suggested, but did not develop the submission on 'frustration' since we thought we would give him a fresh opportunity to do it if it became necessary to rest the conclusion on that doctrine. Shri Watal for the STC, forcefully contended 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 the life of indemnity clause in the Indian contract.

The implied term cannot be set up in opposition to the express terms :

Where the contract (said Lord Sumner) makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other and different provision for the same contingency called by a different name (Ibid., p. 490).

20. The thorny issue being bypassed for the while, the next question is whether the constitutionality of the Exports (Control) Fifteenth Amendment Order, 1979 should be examined closely vis-a-vis pre-ban contracts. Constitutional question should be considered by courts only when it is absolutely necessary, not otherwise. In the present case, broadly speaking, we are not inclined to stand in the way of the full operation of a policy decision by the Central Government in regard to export of silver. Prima facie, national policy in this area should not be interfered with by courts unless compelled by glaring unconstitutionality. Shri Divan, taking sensitive note of our approach, readily agreed that his client would be satisfied even if the silver which he had collected at great expense and trouble and on the export of which he legitimately expected a large profit, were not allowed to be exported, provided the court would give him relief against the inequitable enforcement of the indemnity clause in the contract with the STC.

21. This takes us to the circumstances which were highlighted by Shri Divan and countered by Shri Watal. The Central Government was somewhat neutral, once our inclination was made clear that we were not disposed to permit export of silver even regarding pre-ban commitments.

22. The Bombay High Court discussed at great length in its interlocutory order under challenge the permissibility of export of silver in respect of which commitments had been made prior to February 20, 1971. Indeed, the High Court allowed the pre-ban commitments to be honoured because it was not impressed by the argument of reasonable restrictions based upon national interest. The Judges observed :

All that we heard was that it was a matter of policy, Catchwords like 'national interest' and 'governmental policy' have little relevance and cannot be regarded as conclusive of the right of the

parties.

Comity between instrumentalities is the culture of our Constitution. The High Court allowed export regarding the two 'deeds or contracts' in which the quantity involved was 800 kg. of silver.

Regarding another 3 contracts for 1200 kg. of silver, the court was inclined to permit export subject to certain safeguards. Thus, the order was adverse to the Union of India in that it made a dent in its policy of blanket ban of export of silver after February 20, 1979. For the sake of convenience, we may reproduce the actual direction of the High Court :

That pending the hearing and final disposal of the petition the respondents, their servants and agents be restrained by an order and injunction of his Hon'ble Court from taking any steps or action in furtherance of implementation of the decision dated February 20, 1979 or in any event insofar as the said decision is applicable to the contracts/licences mentioned in Ex.'A' hereto and/or insofar as the said decisions is made applicable to the petitioners and/or in implementation of the decision not to allow the petitioners to export silver pursuant to the said contracts/licenses, and further directing the respondents, their officers, servants and agents by an order and injunction of this Court to allow the petitioners to export silver pursuant to the licenses/contracts mentioned in Ex. 'A' hereto and to do all that may be necessary to enable the petitioners to export silver including the grant of licenses in respect of the contracts in Ex 'A' hereto.

23. This Court, was moved under Article 136 for leave to appeal against this order and, when leave was granted, an application was moved for stay of operation of the judgment and order of the High Court. Upon hearing counsel this Court passed the following order :

Special leave to appeal granted. There will be a partial stay of the operation of the injunction granted by the High Court subject to the following condition :

- (1) The respondents shall be at liberty to export 5.1 tons of silver in pursuance to given contracts entered into with foreign buyers through State Trading Corporation in respect of which licensing endorsements have been made on or before February 20, 1979.
- (2) In respect of the remaining six tons of silver intended to be exported the operation of the injunction granted by the High Court will be stayed.
- (3) In the event this petition is dismissed the court disposing of the appeal should consider in equity giving a direction that if the foreign buyers claim damages for breach of contracts from State Trading Corporation whether STC should at all be permitted to enforce indemnity given by the intending exporters. Subject to this equity being decided at the time of decision of this appeal the injunction granted by the High Court permitting such export will be stayed till the decision of this Court in respect of six tons of silver referred to in para 2.

Liberty to the respondents to file additional Memo because the matter is being treated for final hearing and not merely the interim order made by the High Court.

The printing and filing of statements of cases dispensed with. Liberty to file additional documents from record during vacation. Appeal to be heard on July 17, 1979 as 1st item.

24. It is significant that there is a specific provision in the aforesaid order in clause (3) which is the

foundation of the equitable jurisdiction that are propose to exercise in the present case. It is noteworthy that the STC has at no state, moved for modification of this order and has acquiesced in it. Thus, now when the appeal itself is being disposed of, it becomes our obligation, in conformity with the ad interim order to consider whether, in equity, we should give a 'direction that if the foreign buyer claims damages for breach of contracts from STC, STC should at all be permitted to enforce indemnity given by the intending exporters'.

25. Indeed, there is an express indication in the order that this question of equity will be decided at the time of the disposal of the appeal. It is also made clear to the said order that what will be disposed of by this Court will not be the interlocutory matter only but the entire subject-matter connected with the silver export pending before the Bombay High court.

26. Let us recapitulate the facts relevant to the equities of the situation. The High Court had passed an ad interim order which, if carried out, would have facilitated that export of large quantities of silver. Naturally, the Union of India would have been adversely affected if this relief had not been negated by an interim stay by this Court. In this context, the significance of the direction by our learned brother, Desai J. cannot be missed. As we have indicated earlier, we are inclined to agree tentatively with the larger relief that the Union of India has claimed, namely, a prohibition of the export of silver pursuant even to pre-ban commitments. It must be permission to export silver in pursuance of contracts concluded prior to the ban. We must also notice that the indigenous supplier Damani, had collected a huge quantity of silver and offered delivery to the STC in full compliance with the contract. The first respondent had done all it could to fulfil the contract. Once the embargo on the export is upheld by us, the consequent financial loss of the first respondent must be considered from an equitable angle. It is iniquitous that on top of that it should be exposed to the risks, perhaps remote yet real, of the foreign buyer involving the STC in a long-drawn out litigation fought on foreign soil. That would be double injury. (Daughter gone and the ducats too !) Of course, if the legal consequence resulted in double damage, Damani would have had to bear it in the normal circumstances. However, in the present case, this Court, while granting leave and ad interim stay, had put a condition in its order contained in clause (3) thereof. Justice and equity have been made a component of the final disposal and we cannot forsake that direction.

27. The jurisdiction under Article 136 has extraordinary amplitude and abundant ambience. Its reach and range are regulated by correction of injustice and the rainbow of colours shaping the final direction may also depend as much on justice as on law. Giving realistic consideration to the many equitable facets of the facts present in the case to which we have made reference, we are satisfied that the Central Government must be content with the larger victory of total ban even on concluded contracts. The STC, notwithstanding its independent personality, is an instrumentality of the State and must be satisfied that the policy of the State is being upheld by this Court, although confined only to this case. We do not unravel the intricate folds of the law bearing on the position of the STC vis-a-vis the Central Government. In an appropriate case that question may have to be investigated. So far as the present appeal is concerned, the least that justice demands is not to expose the first respondent to the liabilities under the indemnity clause. We expressly leave open as a general proposition of law the question of automatic absolution from the indemnity clause so far as indigenous suppliers are concerned. The present case need not rest on the larger proposition but can be disposed of on the special situation and the narrow jurisdiction founded on equitable considerations springing from the ad interim order made by this court.

28. Counsel for the STC, it is apt to state, did represent that the chances are remote of the foreign buyer being able to establish damages for breach of contract in so clear a case of frustration as the

present one. Even so, he did not want to take the risk of being made liable if that liability was not available to be passed on under the indemnity clause to Damani. We have given enough reasons to hold why this recondite liability apprehended by the STC should not weight against equity which induces us to release Damani from the indemnity obligation.

29. We hold, confined to the facts and circumstances of this case, that Clause 9(a) which creates the indemnity clause shall not be enforced by the STC against Damani even if the unlikely event of the former being made liable by the foreign buyer takes place. Subject to this direction, we allow the appeal but make it clear that in the view we have taken, a final pronouncement on the other issues has become otiose. The writ petition pending in the Bombay High Court must necessarily end in keeping with the final direction we have issued now.

30. Each party will, by their voluntary gesture, pay a sum of Rs. 2000 each to the Legal Aid Society (Supreme Court) but otherwise will best their respective costs.

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