BOMBAY HIGH COURT

State

Vs.

Abdul Aziz Aminuddin

Criminal Appeal No. 99 of 1961

(Naik and Abhyankar, JJ.)

03/04.08.1961

JUDGMENT

Naik, J.

1. This is an appeal by the State from an order of acquittal. The material facts lie within a narrow compass and may be briefly set out as follows: There is a Co-operative Society known as Malegaon Powerloom Said Manufacturers Co-operative Association, Ltd., Malegaon. This Society was registered under the Co-operative Societies Act. The respondent (original accused No. 1) was the Chairman and Mohamed Gofran, Mohammed Amir Gofran, Mohamed Ishak, Mohammed Siddik, Abdul Majid, Abdul Rehman and Haji Imamuddin were members of the Society at the material time. On 10th January 1955 accused No. 1, as the Chairman of the Association, made an application for the issue of a license for importing silk yarn for consumption in the powerlooms of the members of the Association. On 2nd January 1956 a license was issued to the said Association permitting imports upto the limit specified therein. Warden and Co., who have their office at Bombay represent certain manufacturers in foreign countries. On 13th May 1956 accused No. 1 placed an order with Warden and Co., for importing 120 deniers and 150 deniers of silk yarn. Accordingly, Warden and Co., placed order with the foreign manufacturers for supplying them with the necessary quantity of silk yarn. Letters of credit were opened by the Association and Wardan and Co., stood guarantee in respect of the payment of the amount of the price of the goods to be imported. The goods ordered by Warden and Co., were received in the months of July and August. The particulars relating to the arrival of these goods have been mentioned at Exhibit E by Warden and Co., and these particulars are as follows:

1. 149 cases of 60 deniers, dull III.
2. 65 cases of 120 deniers bright I.
3. 25 cases of 150 deniers Bright Hanks.

In all, 239 cases containing silk yarn, arrived and were taken delivery of by Warden and Co., in the months of June and July. Out of this 25 cases of 120 deniers Bright I, were delivered to the Silk Processing and Lace Mills, according to the instructions of the Association for doubling the yearn. Similarly, 25 cases of 150 denier bright hanks were also delivered to the Association, 13 cases were delivered on 19th September 1956 and 12 cases on 27th September 1956. Considerable correspondence took place between Warden and Co., on one hand and the Association on the other regarding the delivery of the remaining quantity. On 17th July 1956, Warden and Co., wrote a letter to the Association stating that they had written letters requesting the Association to take delivery of the ordered goods, but that they had not yet heard anything from the latter in that respect. They further stated that the market in art silk yarn was going down every day. Therefore, they requested that immediate arrangement for delivery may kindly be made to avoid further unpleasantness. They wrote a second letter on 27th July 1956 pointing out that on the credit and reputation of accused No. 1 the Chairman of the Association, the Company indented the goods without asking for any deposit. They also pointed out that the market rates of art silk yarn had already gone down and were still showing a downward tendency. They, therefore requested the Association to make full payment and to obtain delivery of the goods within a fortnight and in case, it did not do so, Warden and Co., would be forced to sell the goods in the market at the risk and cost of the Association. On 16th August 1956, accused No. 1 as the Chairman of the Association, wrote a letter to Warden and Co., stating that the Association had received art silk of 60 deniers dull III, but the consumers complained that they were not of the same quality as the goods ordered by them. He, therefore, refused to accept delivery of the same. Accused No. 1, therefore, requested Warden and Co., (hereinafter referred to as the Company) to exchange the silk yarn with one of better quality. On 22nd August 1956, the Association, wrote a second letter, which is in the nature of a reminder. On 28th August 1956 it wrote a third letter stating that the Association had received three cases of 60 deniers dull III cones and it was found that they are below the standard of the sealed sample given to it by the Company. The letter then refers to certain conversation that was supposed to have taken place between Abdul Latif and the Managing Director of the Company and adds:

> "We hereby confirm your agreement to dispose of this yarn at our cost and risk and to pay us damages for this yarn as suggested by our Association."

There is an endorsement on behalf of the Company to the following effect:

> "We confirm the above". On 17th September 1956, the Association wrote another letter to the Company, the contents of which it is not necessary to refer for the purpose of this appeal. On 24th September 1956 it wrote another letter to the Company. This letter refers to sending five cases of 120 denier Bright art silk to the Silk Processing and Lace Mills for doubling purpose. On 19th October 1956, again the Association wrote a letter to the Company the contents of which are not relevant for the present purpose. On 9th November 1956, the Company wrote a letter to the Association, which is somewhat

important in that letter, they stated:

> ". . . . Kindly note that it your accounts are not finalised within the next week from this date, we will be reluctantly compelled to, in accordance with our contract, dispose of the stock held by us and to appropriate the amounts received by us towards your outstandings. . . . ."

Again on 13th November 1956 the Association wrote a letter stating:

> ". . . . As the price of the art silk yarn has fallen greatly, it is not possible for our Association to take delivery of the balance goods. As such, you are therefore, requested to dispose of the balance goods lying with you in such a manner that our Association suffers no loss whatsoever but gets a not profit of at least 4 per cent on these goods.. . . . ."

It is common ground that thereafter Warden and Co., proceeded to sell away the silk yarn in the open market. That is why the members of the Association including accused No. 1, who is the Chairman, were prosecuted for an offence under section 5 of the Imports and Exports (Control) Act, 1947, (hereinafter referred to as the Act of 1947). The case for the prosecution was that the members of the Association have contravened the terms of the license by consenting to dispose of the silk yarn that was imported on condition that the yarn would be utilized for the manufacturing purposes by the members of the Association themselves.

2. All the accused pleaded not guilty to the charge. Accused No. 1 submitted a lengthy written statement and contended as follows: The Association was not in good financial position to purchase all the yarn at one time. They, therefore, asked the company to finance, the import of goods and indent the same for them. When the goods arrived, the Association paid the money and took delivery of the part of the silk yarn imported and distributed the same to the members. As regards the remaining part, when the sample was shown to the members, it was found that the goods were defective. The Association thereafter asked the company to exchange the yarn for better one, as they refused to do so, the Association did not take delivery of the remaining goods. The Association had no other alternative but to give consent to selling the goods by the Company, because the latter had threatened them to sell the yarn. The Association asked for damages for the loss of profit and the Company sent a cheque for a sum of ₹ 5,040, which has been deposited in the bank account of the Association.

3. The trying Magistrate, in the first place, held that the breach of the conditions, of the license does not amount to the breach of the order. Therefore, even if it is held proved that the Association consented to the selling away of the goods by the Company in violation of the terms of the licensee, they would not be guilty of the offence of section 5 of the Act of 1947. In the second place, the trial Magistrate accepted the theory set up for the defense viz., that the goods were of an inferior quality and that is the reason, why the Association was not prepared to accept the delivery. He also held that the Company had the right to have the goods sold by reason of the

fact that the Association refused to accept delivery on making payment. Consequently, he acquitted all the accused. It is against that judgment that the State has preferred an appeal against accused No. 1, who was the Chairman of the Association. The State has not preferred any appeal from the order of acquittal in favor of the remaining accused.

4. Mr. Kotwal, the learned Government Pleader, contended that in holding that the breach of the conditions of the licensee does not amount to the breach of the order, the trial Magistrate has ignored the provisions of Rule 5 (4) of the Order issued by the Central Government under the provisions of section 3 of the Act in 1955. He also contended that there is no satisfactory evidence to show that, as a matter of fact, the goods that were sent by the suppliers from foreign countries were of inferior quality and, therefore, could not be used by the manufacturers. He also urged that Warden & Co., had no right whatsoever, to sell away the goods and that the Company in collusion with the members of the Association had devised a subterfuge for enabling them to sell away the goods in open market. He also argued that the entries in the outward register have been fabricated with a view to show that attempts were made to inform the Controller of Imports that the goods were unusable and they should be allowed to be substituted.

5. We propose to discuss first, the question as to whether the breach of conditions of the license amounts to contravention of the order within the meaning of that expression in section 5 of the Act of 1947. For this purpose, it would be desirable to trace the history of the various Orders that were passed by the Central Government, prohibiting imports and controlling them. In 1943 the Central Government issued a Notification under the provisions of Rule 84(3) of the Defence of India Rules regulating imports of certain kinds of goods. One of the provisions of this Order was that goods of the description specified in the schedule thereto could not be imported without obtaining a special license in that behalf. After the enactment of the Imports and Exports (Control) Act of 1947, a fresh Notification was issued on 6th March 1948. Sub-clauses (v) of clause (a) of the said Notification provided that the licensing authority may impose such other conditions, which it considers expedient from the administrative point of view and which are not inconsistent with the provisions of the Act. This notification (we prefer to call it an Order, because that is how it has been referred to in the relevant section in the Act of 1947) was issued under the powers conferred upon the Central Government by section 3 of the Act. Section 3 of the Act of 1947 runs thus (relevant portion cited);

> "The Central Government may, by order published in the Official Gazette, make provisions 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-
> (a) the import, export, etc. . . .
> (b) the bringing into any port or place in India of goods of any specified description . . . ."

As stated above, the Order of 1948 was issued by the Central Government by virtue of the

powers conferred upon them by section 3 of the Act. Section 5 of the Act of 1947, which is the penalizing section runs thus:

> "If any person contravenes, or attempts to contravene, or abets a contravention of any order made or deemed to have been made under this Act, he shall without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878 (VIII of 1878), as applied by sub-section (2) of section 3, be punishable with imprisonment for a term which may extend to one year, or with fine or with both".

It would thus be seen that the act, which was penalized by section 5 of the Act of 1947, was the act of contravention or attempted contravention or abetment of contravention of any order made under the Act. The Order issued on 6th March 1948 merely provided that officer issuing the license may issue the license subject to the conditions laid down therein and these conditions have been enumerated in sub clauses (I) to (v) of the said Notification. The Order did not contain any provision to the effect that the person to whom the license is issued is bound to obey the conditions of the license. That being the case, the question arises as to whether the breach of any of the conditions imposed by the licensing authority would amount to the breach of the order. Since there was no provision which laid down that the conditions of the license must be complied with, it follows that the breach of the conditions would not amount to the breach of the order. The conditions, after all, are imposed by the licensing authority and unless the Order itself provided that the licensee is under an obligation to comply with these conditions, the breach of the conditions of the license would not amount to the contravention of the Order. This was the view that was taken by the Calcutta High Court in *C. T. A. Pillai v. H. P. Lohia*[1], The relevant observations are to be found at page 90. In 1955, however a new Notification was issued by the Central Government on 7th December 1955, by virtue of the provisions of section 3 of the Act of 1947 which replaced the Notification issued in 1948. Rule 5 of this Order is important. It relates to the conditions of license and in effect. Provides that the licensing authority may impose conditions as specified therein. Clauses (4) of Rule 5 lays down:

> "The licensee shall comply with all conditions imposed or deemed to be imposed under this clause".

The effect of this provision is that, the Order itself lays down that the conditions of the license must be complied with. In other words the contravention of the conditions of the license is tantamount to contravention of the Order itself. The Order itself provides that the conditions of the license shall be complied with. It, therefore, follows that non-compliance with the conditions of the license amounts to contravention of the Order.

6. Mr. Peeerbhoy, for the respondent raised two contentions on this point. First of all, he suggested that clause (4) of Rule 5 of the Order of 1955 amounts to a twice delegated legislation,

in that it authorizes the licensing authority to lay down a rule, the breach of which would amount to an offence. We are unable to accept this line of reasoning. Rule 5 of the Order empowers the licensing authority to impose conditions on the lines laid down in the various clauses of that Rule. Now the conditions of the license can be attacked on two grounds. First of all they can be attacked on the ground that they are not in conformity with the conditions mentioned in the various clauses of Rule 5 of the Order of 1955. Secondly, they can be attacked on the ground that they are opposed to the provisions of section 3 of the Act of 1947. Section 3 of the Act in effect, provides that the Central Government may pass order providing for prohibiting, restricting or otherwise controlling the imports and exports. Mr. Peerbhoy argued that the licensing authority may impose any conditions according to his whim and those conditions may even be unreasonable and in that case, it would not be property to hold that breach of such condition amounts also to the breach of the Order. This argument is beside the point. If the conditions imposed by the licensing authority travel beyond the scope of the object mentioned in section 3 of the Act or the ambit of Rule 5, the condition can successfully be attacked as invalid and not binding. So long as there is no challenge to the conditions imposed on the licensee on any of the grounds available under section 3 of the Act of 1947 or Rule 5 of the Order, it must follow that the conditions are reasonable and proper and are within the ambit of the powers conferred upon the licensing authority. Once we hold that the conditions laid down by the licensing authority cannot be impugned on any of the grounds that are open to the accused No. 1, then the bottom of argument advanced

[1](1957) AIR. Cal. 83

by Mr. Peerbhoy would be knocked out. It is not as if the licensing authority has the power of laying down the penalty. All that the licensing authority can do, is to lay down certain conditions and the Order provides that the licensee shall comply with these conditions. This provision does not depend upon the whim or the caprice or the sweet will of the licensing authority, but, this is a provision made by the Order itself. There is, therefore, no question of any double delegation. The Rules have been made by the Central Government by virtue of the powers given to them by section 3 of the Act of 1947.

7. The second line of attack pursued by Mr. Peerbhoy was based on the ground that the legislature felt it necessary to amend the provisions of section 5 of the Act of 1947. The provisions of section 5 of the Act were amended in 1960 and the amending provision came into force on 7th March 1960. The amending provisions does not apply to this case, because the contravention has taken place prior to 7th March 1960. But, that is not the question, which we are considering. The only question which we are considering is, whether without amending section 5 of the Act, the Order issued by the Central Government under section 3 thereof, can make a provision compelling compliance with the conditions of the license so that the breach of these conditions would amount to breach of the Order. In order to appreciate this argument, it is necessary to cite the section as amended in 1960. Section 5 of the Act, as amended, runs thus:

> "If any person contravenes or attempts to contravene or abets a contravention of

> any order made or deemed to have been made under this Act or any condition of a license granted under any such order, he shall,be punishable with imprisonment, etc. . . . ."

Mr. Peerbhoy's argument was that it was wholly unnecessary for the legislature to amend section 5 of the Act of 1947, if their object was, achieved by incorporating Rule 5(4) in the Order of 1955. We are unable to accept this line of reasoning. The legislature thought it fit to amend the provisions of section 5 of the Act of 1947, to remove all doubts and to allow no room or scope for any kind of argument. In other words, the provision is intended to clarify the existing legal position. The amendment appears to have been conceived in the spirit of what is known as abundant caution. The Statement of Object contained in the Bill, which later on became the amending Act, explains the necessity of amending section 5 as follows:

> ". . . . to amend Section 5 of the Act so as to expressly provide that breach of a condition of the license is also an offence punishable under the Act."

We, therefore, feel no hesitation in holding that even in the absence of the amendment of section 5 of the Act, the contravention of the conditions of the license amounts to contravention of the Order by virtue of the provisions of Rule 5(4) of the Order of 1955.

8. Mr. Peerbhoy then contended that the obligation to comply with the conditions of the license imposed by Rule 5(4) is on the holder of the license, and in this case the Association is the holder of the license Accused No. 1, according to him, is not the holder of the license. In order to understand this argument, it is necessary to see why and for what purpose the Association is formed. The application was made by the Association for a license on 12th January 1955. Against the column, "Name of the industry and the purpose for which the raw materials are required" it is stated:

> "Members of the Association for the purpose of manufacture of sarees and borders".

In recommending the application to the Textile Commissioner, Bombay, the Textile Controller, Bombay, states: (Part of Exhibit A).

> ".. . . . The Malegaon Powerlooms Sadi Manufacturers Association, Ltd. Malegaon, was an approved retail agency for the distribution of yarn during the period when there was controlled distribution of year. This office has no objection, if the Association's application is recommended to the Controller of Imports for the Imports of art silk yarn."

In the written statement at paragraphs (3) and (4), accused No. 1 stated as follows:

> "The members of our Association, are poor powerloom weavers and it is the object of the

> Association to help the members by securing cheap raw material and by other means. During the period of controls, i.e. between the years 1944 and 1952, the Association used to secure cotton yarn quota from the Government and distribute the same among its members at controlled rates."

In paragraph (4), it is stated:

> "In 1955, I applied on behalf of the Association, to the Controller of Imports for a license to import art yarn.. . . . . . ."

This will show that the Association is not a body of manufacturers. It does not by itself undertake any manufacturing activity. The Association is composed of members, who are manufacturers and an Association has been formed, so that the imported quota would be equitably distributed amongst the members of the Association. In other words, the Association is just a distributing agency. At this stage, it is necessary to note that, one of the conditions of the license is that the goods will be utilized for consumption. That condition runs thus:

> "This license is issued subject to the condition that the goods will be utilized only for consumption as raw material or accessories in the license-holder's factory and that no portion thereof will be sold to any party."

Since the Association has no factory of its own, it follows that goods cannot be utilized by the Association for consumption in the factory. The license (Exhibit C) is headed by the words "AU". The letters "AU" convey the meaning of Actual User. It is, therefore, clear that although the license is issued in the name of the Association, the goods are intended for distribution to the members of the Association who are manufacturers. If this view is correct, then it must follow that the obligation cast by Rule 5(4) of the Order is not only binding open the Association but is also binding upon the members of the Association and each of them is bound to comply with the conditions as actual user of the goods that have fallen to his share in the process of distribution.

9. Conceding, for a moment, that the principal obligation lies upon the Association, the question is, whether the members of the Association are liable as abettors. Section 5 of the Act of 1947 penalizes abatement of contravention of any order. Mr. Peerbhoy, however, contended that unless the principal accused is also prosecuted, the abettors cannot be proceeded with. Alternatively, he suggested that, if abettors are to be proceeded then, the prosecution will have to bring home guilty intention or guilty knowledge to the members concerned. He conceeded that the offence of contravention contemplated by section 5 of the Act of 1947, did not require any mens rea. He, however, argued that, so far as the abettors are concerned, mens rea will be an essential part of the offence of contravention. In that connection, he referred to the provisions of Section 107, Indian Penal Code and argued that aiding or abetting must be intentional. In the view that we have taken above, it is not necessary to pronounce any verdict on this contention. It is sufficient

to note that abetment has not been defined in the Imports and Exports (Control) Act of 1947. That being the case, we will have to take into account the definition of that term contained in Section 3(1) of the General Clauses Act, 1897. Sub-section (1) provides:

> "Abet, with its grammatical variations. . . . . . shall have the same meaning as in the Indian Penal Code."

All the definitions contained in Section 3 of the Act, however, are subject to the qualification, which is laid down in that section to the following effect:

> "In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context . . . . ."

Although, therefore, the definition contained in section 107, Indian Penal Code, will be applicable, it is necessary to find out as to whether there is anything repugnant in the subject or context. Section 5 of the Act of 1947 by itself makes no reference to mens rea. Abetment of the contravention of the Order is coupled together with contravention itself in the same provision. It must, therefore, be treated as standing on the same footing. In our view, therefore, the offence of abetment also would not require any kind of mens rea.
10. Apart from this legal aspect, in the present case there is no dispute that accused No. 1 was aware of the terms and conditions imposed in the licence. It is also undisputed that he has given his consent to the Company for selling away the goods. Of course, according to accused No. 1, the sale was necessitated by reason of the fact that the prices of art silk had gone down. We will deal with this aspect of the defence a little later. For the purpose of the present argument we are assuming that no such defence is available to accused No. 1 and in that case, it is quite clear that accused No. 1 knew conditions therein and he acted in violation of those terms intentionally and deliberately. Mr. Peerbhoy faintly suggested that accused No. 1 only carried out the wishes of the majority of the body of the Association, as its Chairman. Now, it is not the defence of accused No.1 that the resolution was carried by majority of members nor is it his case that in the meeting, where this question was discussed, he voted against the proposition for allowing the Company to seel away the goods. Mr. Peerbhoy complained that if the Association had been made an accused the entire record would have been brought before the Court. There is no doubt that the Association could have been prosecuted. But, after all, the Association must act through certain human agency and that agency is the managing committee. The members of the managing committee can certainly be prosecuted for the offence of contravention and it is not open to them to say that, because the Association is not an accused, they should get certain benefit, even if they have not claimed any.

11. The next line of argument pursued by Mr. Peerbhoy was that, there is no specific provision in the Act of 1947, under which the office holders of the Association or the managing members thereof, have been made specifically liable in that connection, he referred us to Section 10 of the

Essential Commodities Act, 1955. In order to appreciate Mr. Peerbhoy's argument based on Section 10 of that Act, it is necessary, first of all, to refer to Section 8 of the same Act Section 8 runs thus:

> "Any person who attempts to contravene or abets a contravention of any order made under Section 3 shall be deemed to have contravened that order."

It will thus be noticed that abetment of contravention and an attempt at contravention are placed on the same footing as contravention. Section 10 of the said Act runs thus:

> "(1) If the person contravening an order made under Section 3 is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly."

We are unable to understand how these provisions assist Mr. Peerbhoy in the argument he is advancing. Section 10 of the Essential Commodities Act, is a special provision and applied to those who ere in charge of and were responsible for the conduct of the business of the company at time of the contravention of the Order. It will at once be noticed that the liability of the Officer-holders under Section 10 does not depend upon their abetment. Whether they have abetted or not, they will still be liable for the contravention, if it is found that they were, at the relevant time, incharge of and were responsible to the company for the conduct of the business thereof. Merely because this special provision has not been incorporated in the Act of 1947, it does not follow that the officers are not liable. They may not be liable merely because they happen to be officer-bearers, as would be the case under Section 10 of the Act of 1955. If it is, however, found as a fact that they were guilty of abetment, they would obviously be liable for the offence of contravention.
The rest of the judgment is not material for this report.
Appeal allowed.