

(2006) 11 CAL CK 0020
In the Calcutta High Court
Case No : Writ Petition No. 1622 of 2005

Arya Bhandar (P) Limited and Another	APPELLANT
Vs	
Director General of Foreign Trade and Others	RESPONDENT

Date of Decision : 07-11-2006

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 11, 14

Citation : (2007) 2 CALLT 173 : (2007) 1 CHN 570

Hon'ble Judges : Soumitra Pal, J

Bench : Single Bench

Advocate : J.P. Khaitan and Sumit Ghosh, for the Appellant;

Final Decision : Allowed

Judgement

Soumitra Pal, J.—The petitioner No. 1, a private limited company, engaged in the business of import and export, was served with a show-cause notice alleging non-fulfilment of export obligations. The petitioner by letter dated 15th February, 2005 prayed for time to submit formal reply and sought an opportunity to be heard in person. Thereafter, on 4th March, 2005 had replied to the notice to show cause and prayed for personal hearing. However, on 27th April, 2005 the Joint Director General of Foreign Trade passed the order. Hence, the writ petition.

2. Earlier the writ petition came up for hearing on 9th August, 2005 when the following order was passed:

To enable the Advocate for the respondent to obtain instruction why the impugned order dated April 27th, 2004 should not be set aside on the ground of violation of principles of natural justice and why the authority concerned should not be directed to give fresh decision in the matter after giving reasonable opportunity to the petitioners to present their case, hearing of the writ petition is adjourned for a fortnight. List it as "Court Application". Leave is granted to the petitioners to correct the pagination.

3. Today when the matter is taken up for hearing none appears on behalf of the

respondents. Mr. J.P. Khaitan, learned senior Counsel appearing on behalf of the petitioners submits that the order impugned is ex facie bad on two counts-first, it does not deal with the reply to the notice to show-cause and secondly, though prayer was made for personal hearing, the order impugned was passed ignoring the request in violation of the provisions of Section 14(b) of the Foreign Trade (Development and Regulation) Act, 1992 (for short "the Act").

4. Before dealing with the submissions, it is necessary to refer to Section 14 of the Act, which is as under:

14. No order imposing a penalty or of adjudication of confiscation shall be made unless the owner of the goods or conveyance or other person concerned, has been given a notice in writing-

(a) informing him of the grounds on which it is proposed to impose a penalty or to confiscate such goods or conveyance; and

(b) to make a representation in writing within such reasonable time as may be specified in notice against the imposition of penalty or confiscation mentioned therein, and, if he so desired, of being heard in the matter.

(Emphasis supplied)

5. A perusal of the section shows it is imperative that before passing an order imposing penalty or confiscation, a notice to show cause is required to be served and an opportunity to file reply must be afforded. Further, if the person desired, an opportunity of hearing should be granted. Under the section these are the condition precedents which are required to be observed prior to an order being passed by the authority. The opening words of Section 14 "no order imposing penalty or adjudication or confiscation shall be made." in no uncertain terms postulate that compliance with the provisions of the section is mandatory.

6. Now in order to appreciate the contentions, it is pertinent to refer to the relevant portion of the impugned order, which is as under:

4. A notice of even number dated 31.12.2004 was issued to M/s. Arya Bhandar Pvt. Ltd. 90/2A, M.G. Road, Kolkata-700 007 (hereinafter referred to as the "Notice firm") u/s 11 of Foreign Trade (Development and Regulation) Act, 1992, calling upon the noticee firm and their Directors to show cause u/s 11 of the Act as to why their IEC No. and all the benefits under EXIM Policy should not be suspended and fiscal penalty should not be imposed upon them for violation of the conditions of the advance licence No. P/L/2965739/C dt. 10.01.1983 issued to them. The Notice was given 15 days time for submission of their reply.

5. The reason for the notice arose from the fact that the firm had failed to fulfil the export obligation imposed against the abovementioned Advance Licence and the Licensing Authority had declared the firm as defaulter vide order No. ALS-G/REXP/043107/Adv./CCP/AM"83/III dt. 15.12.2004.

6. I have gone through the facts and records of the case carefully. I find that M/

s. Arya Bhandar Pvt. Ltd. Kolkata-7 had obtained the above Advance Licence for duty-free import with the obligation of Rs. 436430/-.

7. Since the firm have failed to produce any documents in spite of several reminders, and could not even produce the affidavit and indemnity bond in lieu of export documents, it is presumed that they have nothing to say in the matter. Hence, I finalise the show-cause notice presuming that the licence has been mis-utilised.

8. Therefore in exercise of the powers vested in me u/s 11 of the Foreign Trade (Development and Regulation) Act, 1992, I hereby impose a fiscal penalty of Rs. 436430/- i.e. 100% of FOB value of licence + customs duty + interest @ 15% to be paid to the customs authority for import made by M's. Arya Bhandar (P) Ltd. against this licence as well as their Directors jointly.

9. This action is without prejudice to any other actions that may be taken against the notice firm under the Foreign Trade (Development and Regulation) Act, 1992 and the rules and order made thereunder of any other act or law in force.

Joint Director General of Foreign Trade:

(Emphasis supplied)

7. It appears from the writ petition that the petitioner had replied to the notice to show cause and sought for hearing, thus invoking the right conferred u/s 14(b). However, while passing the order, the Joint Director General did not at all consider the reply. In my view, since the petitioner was called upon to submit reply, it was incumbent upon the authority to deal with it. Moreover, as the petitioner had sought for an opportunity of hearing, under the Section 14(b) it was obligatory on the part of the respondent to afford such opportunity. Consideration of the reply to the notice to show cause and grant of hearing - being the fundamentals of rule of law and natural justice - are not idle and empty formalities particularly when infraction of law invites penal consequences. In the instant case, it appears from paragraph 7 of the order impugned the Joint Director General in spite of the written reply had proceeded on the basis of presumption ignoring the materials which were before him. Thus, the order passed is in violation of the express provisions contained in Section 14(b) of the Act. Therefore, the order impugned is ex facie illegal and cannot be sustained.

8. Hence, the order dated 27th April, 2005, passed by the Joint Director General of Foreign Trade, is set aside and quashed. The writ petition is, accordingly, allowed.

9. Let xerox signed copy, if applied for, be made available to the parties urgently.