

(2024) 12 BOM CK 0020
In the Bombay High Court
Case No : Writ Petition No.350 Of 2024

Ashwini Ashish Dighe

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 11-12-2024

Acts Referred:

Constitution of India, 1950 — Article 226

Foreign Trade (Development Regulation) Act 1992 — Section 2(a), 9, 9(1), 9(2), 9(5), 13, 15, 15(1)

Citation : (2024) 12 BOM CK 0020

Hon'ble Judges : M. S. Sonak, J; Jitendra Jain, J

Bench : Division Bench

Advocate : Sanjeev Nair, Kevin Gogri, Dhruvi Shah, J.B.Mishra, D.P. Singh, Vikas Salgia

Final Decision : Dismissed

Judgement

Jitendra Jain J

1. By this petition under Article 226 of the Constitution of India, the petitioner is challenging an Order-in-Appeal dated 10 November 2023 passed by the Additional Director General of Foreign Trade (ADGFT) whereby the said authority has refused to entertain the appeal filed by the petitioner on the ground that the rejection letter issued by the Joint Director General of Foreign Trade (JDGFT) is not a decision or order passed by the adjudicating authority and since Section 15 of Foreign Trade (Development Regulation) Act 1992 provides for an appeal from an order made by the adjudicating authority, the appeal is not admissible.

Brief facts :-

2. The petitioner is engaged in the business of manufacturing optical fibers. The petitioner applied for issuance of duty credit scrip under the Merchandise Export from India Scheme (MEIS) with respect to the goods exported to an overseas buyer at UAE but on the instructions of overseas buyer the goods were

warehoused in the Free Trade and Warehousing Zone (FTWZ) Unit at Andhra Pradesh.

3. The above transactions were for the period January 2016 to March 2016. The application made by the petitioner came to be rejected on 3 June 2020 and the said rejection was challenged before this Court in Writ Petition No.5156 of 2021. The Co-ordinate Bench of this Court passed a detailed order and observed that in the absence of documentary evidence, MEIS benefit cannot be granted merely on the basis of pleadings which are prima facie insufficient on the face of record. However, after upholding the rejection order, the coordinate bench granted the petitioner one more opportunity to approach the respondents by filing a fresh application for MEIS benefit along with the entire documentary evidence pertaining to the petitioners' transaction with the overseas buyer. Para 12 and 12.1 of the said order read as under :

12. In view of absence of documentary evidence, and the findings and discussion hereinabove, the Petitioner cannot be granted MEIS benefit merely on the basis of pleadings which are prima facie insufficient on the face of record. Hence the Petition must fail.

12.1. The impugned order dated 03.06.2020 deserves to be upheld. However, since it is the Petitioner's case that it has received consideration in foreign exchange from its overseas buyer against the export goods and is eligible for MEIS benefit, the Petitioner is given one more final opportunity to approach the Respondents by filing a fresh application for seeking MEIS benefit along with the entire documentary evidence pertaining to the Petitioner's transaction with Technocraft Engineering LLC, that is the Petitioner's purported overseas buyer, located in Dubai, UAE, along with: (i) Bills of Receipt; (ii) Bills of Export of Goods; (iii) Export Invoices; (iv) with the Overseas Buyer to deliver the Exp. Dt claimed nor been granted benefit under MEIS in regard to the instant transaction; (vii) Shipping Bills; (viii) Purchase Orders; and, (ix) Tax Invoices. Petitioner shall make the application within two weeks from the uploading of the copy of this judgement and order. In the event such an application is made, the same shall be considered strictly in accordance with law by the Competent Authority / Respondents by according an opportunity of personal hearing to the Petitioner and a speaking order shall be passed.

4. Pursuant to the above, the petitioner applied to JDGFT on 27 January 2022, along with the documentary evidence. The said application and documentary evidence are on pages 164 to 244 of the present petition.

5. The above-referred application came to be rejected by JDGFT vide communication dated 9 December 2022 by relying upon paragraph 3.06 of the Foreign Trade Policy, which provides those exports made by units under FTWZ are ineligible for duty credit scrip entitlement. The rejection letter further observes that the documents were examined, and no co-relation would be established to substantiate the petitioner's contention. The impugned rejection

letter also records that the petitioner himself has accepted that supplies have been made against the bill of exports, which are covered under the ineligible categories.

6. The petitioner challenged the aforesaid order dated 9 December 2022 passed by the JDGFT by filing an appeal to the ADGFT. The said appellate authority, i.e. ADGFT has dismissed the appeal of the petitioner on the ground that rejection letter is not a decision or order passed by the adjudicating authority against which an appeal can be filed under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992 (the 1992 Act). It is in this backdrop that the petitioner has challenged the said Order-in-Appeal dated 10 November 2023 and the rejection letter dated 9 December 2022 before us.

Submissions of the Petitioner :

7. Mr. Nair learned counsel for the petitioner, submits that the appeal is maintainable under Section 9 read with Section 15 of the 1992 Act and, therefore, the findings of the appellate authority without considering the provisions of Section 9 is erroneous. He submits that the appeal is maintainable under Section 9, read with Section 15. He further submits that the rejection letter is a non-speaking order and has not considered the voluminous documents filed along with the application dated 27 January 2022. In view thereof, the petitioner submits that the petition be allowed in terms of the prayer clause mentioned in paragraph 52 of the petition.

Submissions of the Respondents :

8. Mr. Mishra, learned counsel for the respondent, submits that under Section 15 of the Foreign Trade (Development and Regulation) Act 1992, an appeal ought to have been filed before the Director General and not before the ADGFT and therefore the rejection of the appeal is justified. He further submits that there is no infirmity pointed out in the rejection letter. In the rejection letter it is stated that the petitioner has accepted that the supplies are covered under ineligible categories as per paragraph 3.06 of the Foreign Trade Policy. In view thereof, he pressed for dismissal of the Writ Petition.

9. We have heard learned counsel for the petitioner and the respondent.

Analysis and Conclusions :

10. Before we delve upon the reasoning, it will be apt to reproduce Sections 9 and 15 of the Foreign Trade (Development and Regulation) Act, 1992.

9. Issue, suspension and cancellation of licence.-

(1) The Central Government may levy fees, subject to such exceptions, in respect of such person or class of persons making an application for licence, certificate, scrip or any instrument bestowing financial or fiscal benefits or in respect of any licence, certificate, scrip or any instrument bestowing financial or fiscal benefits granted or renewed in such manner as may be prescribed.

(2) The Director General or an officer authorised by him may, on an application and after making such inquiry as he may think fit, grant or renew or refuse to grant or renew a licence to import or export such class or classes of goods or services or technology as may be prescribed and, grant or renew or refuse to grant or renew a certificate, scrip or any instrument bestowing financial or fiscal benefit, after recording in writing his reasons for such refusal.

(3) A licence, certificate, scrip or any instrument bestowing financial or fiscal benefits granted or renewed under this section shall—

(a) be in such form as may be prescribed;

(b) be valid for such period as may be specified therein; and

(c) be subject to such terms, conditions and restrictions as may be prescribed or as specified in the licence, certificate, scrip or any instrument bestowing financial or fiscal benefits with reference to the terms, conditions and restrictions so prescribed.

(4) The Director-General or the officer authorised under sub-section

(2) may, subject to such conditions as may be prescribed, for good and sufficient reasons, to be recorded in writing, suspend or cancel any licence, certificate, scrip or any instrument bestowing financial or fiscal benefits granted under this Act:

Provided that no such suspension or cancellation shall be made except after giving the holder of the licence, certificate, scrip or any instrument bestowing financial or fiscal benefits a reasonable opportunity of being heard.

(5) An appeal against an order refusing to grant, or renew or suspending or cancelling, a licence, certificate, scrip or any instrument bestowing financial or fiscal benefits shall lie in like manner as an appeal against an order would lie under section 15.

15. Appeal.—

(1) Any person aggrieved by any decision or order made by the adjudicating authority under this Act may prefer an appeal,—

(a) where the decision or order has been made by the Director General, to the Central Government;

(b) where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the adjudicating authority authorised by the Director General to hear the appeal, within a period of forty-five days from the date on which the decision or order is served on such person: Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the aforesaid period, allow such appeal to be preferred within a further period of thirty days: Provided further that in the case of an appeal against a

decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of penalty or redemption charges has been deposited by the appellant: Provided also that, where the Appellate Authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose.

(2) The Appellate Authority may, after giving to the appellant a reasonable opportunity of being heard, if he so desires, and after making such further inquiries, if any, as it may consider necessary, make such orders as it thinks fit, confirming, modifying or reversing the decision or order appealed against, or may send back the case with such directions, as it may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Provided that an order enhancing or imposing a penalty or redemption charges or confiscating the goods (including the goods connected with services or technology) of a greater value shall not be made under this section unless the appellant has been given an opportunity of making a representation, and, if he so desires, of being heard in his defence.

(3) The order made in appeal by the Appellate Authority shall be final.

11. The first issue that needs to be addressed is whether an appeal is provided under Section 15 against a letter rejecting the petitioner's application for grant of MEIS scrip. Section 9 of Foreign Trade (Development and Regulation) Act, 1992 provides for issuance/ suspension/cancellation of licence. Section 9(1) provides that the Central Government may levy fees in respect of application for a licence, certificate, scrip etc to be granted or renewed. Section 9(2) provides for processing of such application after making necessary inquiries for grant or renewal as the case may be of the licence, certificate, scrip etc and for recording reasons for refusal. Section 9(5) provides that an appeal against an order refusing to grant or renew or suspending or cancelling a licence, certificate, scrip etc shall lie in like manner as an appeal against an order would lie under Section 15. Section 15(1) begins with appeals from orders passed by the adjudicating authority.

12. Section 2(a) of the Foreign Trade (Development and Regulation) Act, 1992 defines "adjudicating authority" to mean, unless context otherwise requires the authority specified in or under Section

13. Section 13 provides that any penalty may be imposed or any confiscation may be adjudged under this Act by the Director General or by such other officer as may be authorised by notification in the official gazette. Admittedly, when an application is made for issuance of MEIS scrip by the exporter, no penalty is imposed or any confiscation order is passed and therefore provisions of Section 13 read with Section 2(a) which defines "adjudicating authority" would not be applicable. Therefore, when Section 9 deals with issuance of MEIS scrip and the

application made for the same and processing of the same, the authority who would be processing the application under Section 9 would not be an adjudicating authority. However, when Section 9(5) provides for appeal in like manner as an appeal against an order would lie under Section 15, it would contemplate an order passed by the authority who need not be an adjudicating authority as defined in Section 2 (a) read with Section 13 of the Foreign Trade (Development and Regulation) Act 1992 but has trappings of the adjudicating authority. Therefore, when there is a reference to Section 15 in Section 9(5), it would mean that an appeal filed under Section 15 refusing to grant or renew or suspend or cancel a licence, certificate, scrip, etc would mean an order passed not by the adjudicating authority as defined by Section 2(a) of the 1992 Act. Therefore, it would not be correct for the respondents to contend that since the rejection order is not passed by the adjudicating authority as defined under the Act, no appeal would lie.

13. Alternatively, the definition of "adjudicating authority" defined in Section 2(a) of the Act begins with "unless the context otherwise requires". In the instant case, while processing the application for issuance of MEIS scrip under Section 9, the authority who would be processing the application and after making inquiry as he may think fit before granting or renewing or refusing of grant or renew the licence etc. would have to be treated as an adjudicating authority for the limited purpose of Section 15 read with Section 9 because, he is the authority who is deciding the claim of grant of scrip to the applicant and if so construed, then, the letter rejecting the application for issuance of MEIS scrip will have to be treated as a decision or order by an adjudicating authority which would be appealable under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992. Therefore, even on this count, the appeal would be maintainable.

14. Therefore, the ADGFT/Appellate Authority rejecting the appeal because the rejection letter is not a decision or the order passed by the adjudicating authority would not be the correct reading of the appeal provision.

15. Mr. Mishra, learned counsel for the respondents submitted that the appeal ought to have been filed under Section 15(1)(b) to the Director-General if the decision or order has been made by an officer subordinate to the Director-General or to any officer superior to the adjudicating authority authorized by the Director-General to hear the appeal. It is his submission that the appeal has not been filed with the Director-General but with ADGFT and, therefore, the rejection is justified. In our view, firstly, this is not the basis on which the appeal order is passed, and, therefore, the respondents cannot make any submission on this count. Even otherwise the second part of Section 15(1)(b) provides that an appeal can be preferred before any officer superior to the adjudicating authority authorised by the Director-General to hear the appeal.

16. Mr. Mishra fairly stated that ADGFT is an authority superior to JDGFT whose rejection order is challenged. If that be so, we fail to understand as to how the respondents can contend more, particularly in the light of second part of Section

15(1)(b) that the appeal would not lie before the ADGFT and before the Director-General only. In our view, this is contrary to plain reading of Section 15(1)(b) itself and, therefore, the contention raised on behalf of the respondents (although not forming basis of the appeal order) is to be rejected.

17. In any case, the Order-in-Appeal dated 10 November 2023 refers to Notification 101 (RE-2013)/2009-2014 dated 5 December 2014. The central government has authorised ADGFT to function as an appellate authority against the orders passed by the JDGFT. This notification is referred to in paragraph 3 of the Order-in-Appeal. Therefore, even on this count, Mr. Mishra's contention is to be rejected since the correct authority to hear the appeal is the authority that passed the order, i.e., ADGFT.

18. Therefore, from any angle, the appeal was filed with the correct authority, but the correct authority rejected it on the erroneous ground that the rejection order is not the decision/order passed by the adjudicating authority, which we have already opined is incorrect. Therefore, in our view, the impugned order dated 10 November 2023 rejecting the petitioner's appeal as non-admissible is required to be quashed and set aside.

19. The petitioner, pursuant to the order passed by this Court in Writ Petition No.5156 of 2021, made a fresh application on 27 January 2022 for issuance of scrips with the office of JDGFT and enclosed various documents in support thereof which are annexed from pages 164 to 244 of the present petition. However, JDGFT in his rejection order dated 9 December 2022 has curiously, without discussing anything, rejected the claim of the petitioner mainly on the ground that the supplies have been made against Bill of Exports, which are covered under the ineligible categories without considering the contention of the petitioner that the Export was made to overseas buyers on whose instructions, the goods were warehoused in the Free Trade and Warehousing Zone Unit at Andhra Pradesh. Whether such a transaction would be covered by para 3.06 of the FTP, along with other issues is required to be considered. The rejection order is not speaking since it further states that no co-relation could be established, but with respect to what item co-relation could not be established has not been specified.

20. It is a settled position that the quasi-judicial authority speaks his mind through his order, and, therefore, the order dealing with the application should have been a speaking order showing clearly the reason for coming to the conclusion. In our view, this is absent in the impugned rejection letter. Therefore, in the interest of justice, we quash and set aside the rejection letter dated 9 December 2022 and remand the application dated 27 January 2022 back to the file of respondent no.4 for fresh consideration after giving an opportunity of hearing to the petitioner and direct the respondent no.4 to pass a speaking order deciding the application of the petitioner dated 27 January 2022.

21. In view of the above, we pass the following order :-

ORDER

(i) The impugned order dated 10 November 2023 rejecting the petitioner's appeal as non-admissible is quashed and set aside.

(ii) The rejection letter dated 9 December 2022 passed by the JDGFT and the Order-in-Appeal dated 10 November 2023 passed by the ADGFT is quashed and set aside.

(iii) Respondent no.4-JDGFT is directed to consider the petitioner's application dated 27 January 2022 after giving a hearing to the petitioner and passing a speaking order on the said application on or before 31 March 2025.

22. The rule is made absolute in the above terms. No order as to costs.