

(1988) 02 KAR CK 0031
In the Karnataka High Court
Case No : Writ Petition No. 16279 of 1987

Bangalore Fabrics

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-02-1988

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : (1989) ILR (Kar) 90 : (1988) 3 KarLJ 287

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : G.E. Kotre, for the Appellant;

Final Decision : Dismissed

Judgement

K.A. Swami, J.

In this petition under Articles 226 and 227 of the Constitution, the petitioner has sought for the following reliefs:

"The petitioner prays that this Hon"ble Court be pleased to issue an appropriate Writ or order in the nature of Writ of certiorari, quashing the orders of the third respondent as contained in annexures K and L, that of respondent-2 as contained in Annexure-M and that of respondent-3 as per Annexure-N or alternatively by issue of a Writ of mandamus directing the 1st respondent to hear the appeal without insisting on the production of Bank guarantee and dispose of the appeal on merits.

The petitioner also prays that this Hon"ble Court may please to stay the operation of the order No. 5/1/85/ECA/Bangalore/1104 dated 9-8-1985 passed by the third respondent and order No. 11/189/ACC/ECA III 530 dated 31-10-1985, pursuant to which warrant of attachment has been issued as per Annexure-O.

The petitioner further prays that this Hon"ble Court may be pleased to grant

such other reliefs including the award of costs of this petition as this Hon'ble Court deems fit in the circumstances of the case, in the interest of Justice, equity and good conscience."

2. The petitioner has also filed an application seeking amendment of the petition. The application seeking amendment is allowed.

3. The main grievance of the petitioner is that the appeal preferred by him against the order dated 20-3-1986 passed by the Chief Controller of Imports and Exports in No. 11/189/ACC/85/ECA/III has not been decided on merits on the ground that he has failed to pay the portion of the penalty amount as imposed by the Joint Chief Controller of Imports and Exports, Bangalore. It is in this connection the petitioner has sought for amendment to challenge the validity of the second and third proviso to Clause (b) of Sub-section (1) of Section 4M of the Imports and Exports (Control) Act, 1947 as amended by the Central Act No. 12/76 (hereinafter referred to as the "Act").

4. The amendment is allowed. The petitioner is permitted to challenge the validity of the aforesaid provisions. As prayed for in the application seeking amendment, paragraphs 25(a), 27(a) and 30(a) are treated as part of the main petition. The aforesaid second and third proviso, the validity of which is challenged by the petitioner are as follows:

"Provided further that in the case of an appeal against an order imposing a penalty, no such appeal shall be entertained unless the amount of the penalty 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."

5. The contention of the petitioner is that the aforesaid provisos are violative of Article 14 of the Constitution in as much as they impose unreasonable restriction on the right of the petitioner to have his appeal decided on merits, that the conditions imposed by the aforesaid provisos are impossible of performance and consequently, the right of appeal is rendered illusory; that the third proviso is widely worded, and it does not contain any guidelines for exercise of power by the Appellate Authority thereby it enables the Appellate Authority to exercise its power arbitrarily and thereby render the right of appeal illusory.

6. It is not possible to accept these contentions. The second proviso requires the appellant while preferring an appeal to deposit the amount of penalty imposed by the order against which the appeal is preferred. Unless the amount of penalty imposed is deposited, the Appellate Authority is not entitled to entertain the appeal. Such a provision is necessary in order to ensure prompt recovery of the revenue and also the penalty. The concerned authority will be required to initiate proceedings for recovery of the amount during the pendency of the appeal, in

case the Appellate Authority does not grant an order of stay of the order appealed against. The appeal proceeding may go on for quite a number of years. Consequently, there will be parallel proceedings and at the same time, public revenue will suffer. Therefore, to ensure prompt recovery of public revenue, which is required for the purpose of meeting the expenditure of several welfare activities of the State, a provision of the nature contained in the second proviso is made. In the event the appellant succeeds, he is entitled to be restituted. Even in the absence of a provision similar to the second proviso in question, the authority for valid reasons is entitled, to refuse or grant an order of stay. In the event, the interim order of stay is refused, the appellant is liable to pay the amount of penalty pending disposal of the appeal. Therefore, it is clear that the second proviso does not impose any additional restriction. It only regulates the discretion vested in the Appellate Authority to grant or refuse to grant an order of stay of recovery of the amount of penalty pending disposal of the appeal.

7. Further the 2nd and the 3rd provisions are required to be read together. The third proviso takes into consideration the hardship that is likely to cause to such persons who are not in a position to deposit the penalty amount along with the appeal. In order to ensure that such persons also are not deprived of the right of appeal, the third proviso empowers the Appellate Authority if it is of the opinion that the deposit to be made by the appellant will cause undue hardship to him, it may at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose. Thus the third proviso in a way relaxes, rather takes away the rigour of, the second proviso. It enables the Appellate Authority to entertain an appeal without the deposit of the amount of penalty by the appellant if it causes undue hardship to the appellant.

8. Thus a reading of the 2nd and 3rd provisos together makes it clear that a care is taken by the statute to safeguard the right of appeal and to enable those appellants who are not in a position to deposit the amount of penalty to have their appeal decided without depositing the amount of penalty. Therefore, it is not possible to accept the contention that the second proviso imposes a restriction on the right of appeal and renders the right of appeal illusory. It is for the appellant to show that he is not in a position to deposit the amount of penalty. The circumstances which the appellant has to place before the Appellate Authority must be such as to demonstrate the inability of the appellant to deposit the amount of penalty and the hardship that would be caused to him if the deposit of the amount of penalty is insisted upon. In such an event, the Appellate Authority is empowered to dispense with such deposit either unconditionally or subject to such conditions as it may impose. The discretion given to the Appellate Authority under the third proviso has to be exercised judicially. If the Appellate Authority acts, arbitrarily and in spite of the circumstances placed before it showing undue hardship that would be caused to the appellant, insists upon deposit of the amount of penalty and refuses to dispense with depositing of the amount of, penalty either unconditionally or subject to such conditions, the performance of which does not cause hardship to the appellant, such an order

can successfully be challenged in a petition under Article 226 or 227 of the Constitution. Therefore, it is clear that the third proviso sufficiently safeguards the right of appeal. Such of those appellants who will not be in a position to deposit the amount of penalty and the insistence to deposit the amount of penalty causes undue hardship to them, can seek relief under the third proviso. The contention that the third proviso gives vast discretion to the Appellate Authority to dispense with the deposit either unconditionally or subject to such conditions as the Appellate Authority may impose, therefore, it is violative of Article 14 of the Constitution cannot be accepted for the simple reason that the discretion the Appellate Authority is empowered to exercise is a judicial discretion and it does not permit arbitrary exercise of power. The discretion has to be exercised with reference to the facts and circumstances of each case. If the Appellate Authority fails to exercise the discretion properly and judicially, it is open to the appellant to challenge the same in a petition under Article 226 or 227 of the Constitution. Hence it is not possible to hold that the second and the third provisos to Clause (b) of Sub-section (1) of Section 4M of the Act are violative of Article 14 of the Constitution. Hence the contentions of the petitioner as to validity of the aforesaid provisos are negatived and both the provisos are held as valid and constitutional.

9, The Appellate Authority, as already pointed out, is empowered to relax the condition. It is in exercise of that power, the Appellate Authority has relaxed the condition and has permitted the petitioner to furnish a Bank guarantee for a sum of Rs. 80,000/- only, whereas the petitioner, as per the order under appeal, was required to pay a penalty of Rs. 8,04,522/-. In the instant case, the Appellate Authority has shown maximum concession to the petitioner by the order dated 14-6-1986. The authority first called upon the petitioner to furnish Bank guarantee for a sum of Rs. 1,20,680/- only, though as per the 2nd proviso the appellant was required to deposit the entire amount of penalty of Rs. 8,04,522/- Again on a further request made by the petitioner, it has been reduced to Rs. 80,000/-. That being so, the Bank Guarantee now directed to be, furnished by the petitioner is less than 10% of the penalty amount. Hence I am of the view that the Appellate Authority has exercised the discretion properly and judicially.

10. As far as the merits of the case is concerned, learned Counsel for the petitioner contends that due to the change in policy, the petitioner could not comply with the export obligations. It is a case in which a thorough investigation has been done by the authority and maximum opportunity had been afforded to the petitioner to prove his case. The petitioner exported certain raw-silk worth C.I.F. Rs. 4,02,761/- against the licence on 27-4-1982 and the export obligation period was upto 27-10-1982 and it was incumbent upon him to produce before 27-11-1982 documentary evidence of having exported the goods and realised foreign exchange. In spite of giving sufficient opportunity, no evidence whatsoever was produced by him within that date. Thereafter, again there was a request made by the authority to furnish details of the export made by him within the period he was required to export. To this there was no response from

the licensee the petitioner.

11. In the meanwhile, the Customs, Bombay, informed the office of JCCI & E, Bangalore by their intimation dated 14-3-1985 that a sum of Rs. 1,81,247-45 as on 27-4-1982 is due from the licensee on account of their failure to fulfil the export obligation and the same is recoverable from him. A copy of the intimation was also sent to the licensee - the petitioner. The genuineness of the export order pleaded by the licensee was also investigated as per his reference with M/s. Niko & Co; P.B. No. 41429, Nairobi, Kenya, which was supposed to have purchased the exported material. On investigation it was found that it was a non-existing firm. Ultimately, the authority has found the following facts as established:

1) M/s Bangalore Fabrics have imported raw silk worth Rs. 40,02,761/- on 27-4-82 against advance licence No. P/L/0336166 dated 23-12-81 without paying customs Duty etc; of Rs. 1,81,242-45 even when they were in knowledge that their foreign buyers (on the basis of whose export order the licence was obtained) was not existing.

2) M/s Bangalore Fabrics was under obligation to export 1600 kgs of Natural Silk Dupion Fabrics before 27-10-82, earn foreign exchange equal to Rs. 6,65,000/- and furnish proof thereof within 27-11-82. This condition has been violated and no extension was sought before expiry of time.

3) M/s. Bangalore Fabrics were aware of the non-existence of the foreign buyer, but suppressed this fact from the licensing authority with mala fide intention of utilising the raw silk for purpose other than for which the licence had been issued.

4) M/s Bangalore fabrics did not fulfil the export obligation in respect of the other buyer who was existing neither did they provide any reason for failure to make exports to the overseas buyer;

5) M/s Bangalore Fabrics have not produced any original document like Bill of entry, DEEC book, shipping bills etc; attested by Customs in spite of repeated request for the same by the Licensing Authority vide their letters/ Notices dated 28-3-83, 5-7-83, 12-12-83, 13-1-84, 24-5-84, 26-10-84 and did not even respond to the show cause notice dated 26-10-84.

6) Ample and more than reasonable opportunity has been provided for furnishing the proof in evidence of having fulfilled the conditions of license legal agreement as also to defend the case on the Show Cause Notice dated 2-5-1985. However, no convincing and valid grounds supported by documents were made."

12. Thereafter, there was an appeal preferred before the Chief Controller of Imports and Exports at New Delhi. He also considered the appeal on merits and found that there was no substance in the contention urged by the petitioner. Accordingly, the Appellate Authority confirmed the order and advised the petitioner to deposit the penalty amount of Rs. 8,04,522/- within 30 days (Annexure-M). It was against this, the petitioner preferred an appeal before the

Board of Revenue. The appeal has been dismissed because the petitioner has not complied with the condition precedent for filing the appeal.

13. On going through the impugned orders, it is apparent that at no stage the difficulty encountered by the petitioner due to change of export policy was contended. The very plea of the petitioner that he exported certain goods to some firm in the Foreign Country itself was found to be false. The rest of the defence of the petitioner was make believe one. In addition to this, a case was also tried to put forth before the Authority on the ground that the yarn had not been utilised and it was available in the godown. On his request the godown of the petitioner was inspected and no yarn was found in the godown. These facts go to show that the petitioner knowing full well that he did not comply with the export obligation tried to mislead the authorities by pleading that he exported the fabrics to a foreign firm which was non-existing.

14. In the circumstances, the penalty imposed is just and proper and it is necessary to check the illegal activities of such persons connected with import and export trade.

15. For the reasons stated above, there is no ground to issue rule. The petition is accordingly rejected.