

(2013) 01 MAD CK 0181

In the Madras High Court

Case No : Writ Petitions No"s. 25032 and 25033 of 2003 and Miscellaneous
Petitions No"s. 30783 and 30784 of 2003

Bharath Textiles and Proofings Industries Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-01-2013

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(2), 22

Citation : (2013) 19 GSTR 280

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Advocate : S. Dayaleeswaran, for the Appellant; P. Mahadevan, Senior Central
Government Counsel Nos. 1 and 4 and D. Vijayakumar, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.—Since the issue involved in both the writ petitions relate to a common question of law and fact, and filed by the same petitioner, these writ petitions were heard together and they are disposed of by this common order. The petitioner in W.P. No. 25032 of 2003, is an industry engaged in the manufacture and export of industrial fabrics and they have challenged the order passed by the third respondent dated August 18, 2003. By the said order, the third respondent informed the petitioner that in terms of the EPCG licence dated January 11, 1995, the petitioner ought to have completed the export obligation on or before March 31, 2002, which is an extended date and since the petitioner was registered as a sick industrial company by the Board for industrial and financial reconstruction (in short "BIFR") only on July 24, 2003, beyond the deadline fixed for completing the export obligation, the petitioner is not eligible for extension of benefits under paragraph 5.5.1 of the Exim Policy and the extension sought for by the petitioner cannot be granted. Consequently, in the impugned order the petitioner was directed to make arrangements for payment of duty saved, amount on default being an amount of Rs. 7,39,200 together with

interest at 15 per cent. totalling Rs. 16,53,890.

2. The petitioner has filed the other writ petition in W.P. No. 25033 of 2003 wherein they have sought for issuance of writ of mandamus directing the third respondent to consider the claim of the petitioner made in their representation dated March 22, 2003 for the purpose of fulfilment of export obligation in respect of the EPCG licence dated January 11, 1995 and discharge the petitioner from all liabilities.

3. The undisputed facts are that the petitioner is a manufacturer and exporter of industrial fabrics like, cotton canvas, chemically processed canvas and polyester cotton canvas and tarpaulin. The petitioner applied for licence under the export promotion capital goods scheme (EPCG Scheme). As per paragraph 38 of the Exim Policy 1992-97, the application made by the petitioner was favourably considered and they were issued a licence dated January 11, 1995 to import capital goods for the total CIF value of Rs. 1,64,36,480 and the goods were to be imported within 24 months. Among the various conditions set out in the licence, one of the conditions being that the petitioner had to complete the export obligation by exporting the goods worth US dollar 20,83,864 within a period of five years from the date of issue of the licence. Condition No. 5 of the licence stipulates that the petitioner should execute legal undertaking and bank guarantee as indicated in paragraph 102 of the Handbook of Procedures as amended from time to time by the Directorate General of Foreign Trade. The petitioner imported the goods and cleared the consignment vide bill of entry dated May 15, 1995 and also furnished bank guarantee for Rs. 20,00,000 in terms of the conditions stipulated in the licence.

4. Thereafter, the petitioner by letter dated January 18, 2000 addressed the Directorate General of Foreign Trade informing that the export obligation to be fulfilled is less than the amount indicated in the licence in view of the lesser value of import goods and, therefore, sought for reduction of the bank guarantee amount and along with the said letter, the petitioner submitted attested statement from their bankers and chartered accountant regarding the statement of exports. It was further stated that the petitioner had fulfilled 57 per cent. of export obligations as per the original licence and if the value is reduced, they would have completed 64 per cent. The petitioner also made a request to the Directorate General of Foreign Trade to revise the export obligations in the licence as per the actual value of the plant and machinery which was imported and to extend the period of fulfilment from January 11, 2000 to January 11, 2001. By a subsequent representation dated June 18, 2001, the petitioner sought for further extension of time up to March 31, 2002. As regards the petitioner's request for extension of period of export obligations, the petitioner was advised to submit an application in terms of public notice No. 3 (RE 2001), dated March 31, 2001 by submitting a bank guarantee covering the customs duty in proportion to the unfulfilled export obligations with 24 per cent. simple interest thereon from the date of import up to September 30, 2002 and the bank

guarantee to be valid up to March 31, 2003. The details sought for by the Directorate General of Foreign Trade was furnished by the petitioner by their letter dated July 31, 2001 and on receipt of the same, the third respondent though initially appears to have accepted the statement by a communication dated September 12, 2002 called for the documents towards discharge of export obligations up to March 31, 2002. The details sought for by the third respondent was furnished by the petitioner. Thereafter, by a letter dated January 24, 2003, the third respondent directed the fifth respondent-bank to pay the amount which was covered under the bank guarantee and sought to encash the bank guarantee. Subsequently, by a letter dated February 10, 2003, the petitioner was informed that in terms of the current Exim Policy further extension cannot be granted beyond March 31, 2002. In response to these communications, the petitioner by their letter dated February 26, 2003 submitted that the calculation made by the Department in respect of the quantum of export obligation was not correct and the petitioner submitted a revised calculation and undertook to extend the bank guarantee for a further period up to March 31, 2003. It is submitted that the petitioner had been incurring losses and as the accumulated losses was equal to their entire net worth they applied to the BIFR to register them as a sick industrial company and to appoint an operating agency for the purpose of rehabilitating the petitioner-industry. Simultaneously, the third respondent was informed by the petitioner by a letter dated March 22, 2003 that they have achieved the entire export obligation during the extended period up to October 11, 2002 and the relevant documents in support of their stand were also submitted to the third respondent. The reference made by the petitioner to the BIFR dated November 20, 2002 was received by the BIFR on December 3, 2002 and the case was registered as case No. 129 of 2003 and the same was informed to the petitioner vide the communication from the BIFR dated March 17, 2003.

5. The petitioner is now aggrieved by the impugned order passed in the name of the third respondent by the Foreign Trade Development Officer dated August 18, 2003 whereby their request for extension of period for fulfilment of export obligations was rejected.

6. I have heard Mr. S. Dayaleeswaran, the learned counsel for the petitioner, Mr. P. Mahadevan, the learned senior Central Government counsel for respondents Nos. 1 and 4 and Mr. D. Vijayakumar, the learned counsel for respondents Nos. 2 and 3 and carefully perused the records.

7. The learned counsel for the petitioner raised a preliminary objection that the impugned order passed is not an order passed by the third respondent, who is the competent authority but, by the foreign trade development officer and there is nothing on record to show that he has been authorised to communicate the order of the Directorate General of Foreign Trade and as such the impugned order is wholly without jurisdiction and contrary to the Foreign Trade (Development and Regulation) Act and the Import and Export Policy and the Sick Industrial Companies (Special Provisions) Act, 1985.

8. The learned counsel for the petitioner further submitted that the respondents having accepted that the petitioner-industry is a sick industry and registered with the BIFR vide case No. 129 of 2003, ought not to have rejected the request of the petitioner for extension of time to fulfil the export obligation by adopting the provision under paragraph 5.5.1 of the Exim Policy, 2002-07.

9. The learned counsel lastly submitted that the petitioner has now been rehabilitated by a scheme framed by the BIFR during 2007 and the major export obligations have also been fulfilled and only 19.79 per cent. remained unfulfilled as on March 31, 2002.

10. The learned standing counsel appearing for respondents Nos. 2 and 3 vehemently contended that the impugned order can be passed either by the third respondent or such other officer who has been duly authorised by the third respondent. According to him, in the instant case, the impugned order came to be passed by the competent authority, viz., the third respondent--the Directorate General of Foreign Trade and the decision of the third respondent alone was communicated by the foreign trade development officer, who has been authorised to do so by the third respondent and, therefore, it does not suffer from the vice of lack of jurisdiction. He further contended that the period of licence expired on March 31, 2002 and the petitioner ought to have fulfilled the export obligation before the said cutoff date and the petitioner was registered as a sick industrial company only on July 24, 2003 and therefore, the third respondent rightly refused to apply paragraph 5.5.1 of the Exim Policy 2002-07, hence, the impugned order calls for no interference.

11. On considering the submissions made on either side and taking note of the materials placed on record, it is not in dispute that the petitioner-industry had become a sick industrial company registered under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The petitioner sought for reference to the BIFR by their application dated November 20, 2002. The said application was received by the BIFR on December 3, 2002 and the case was registered as case No. 129 of 2003. For the purpose of entertaining reference from an industry to declare it as a sick industrial company, the attested balance-sheet and the annual report of the company ending as on March 31 of the relevant year are required to be taken into consideration. It cannot be disputed that the sickness of an industry does not occur instantaneously but, on account of various factors which ultimately culminates into an industry becoming sick. According to the petitioner, it became a sick industrial company even within the extended period granted by the Directorate General of Foreign Trade, i.e., March 31, 2002. In the annual report of the company ending March 31, 2002, the petitioner had clearly established that it had been incurring accumulated losses much prior to the cut-off date and, therefore, required to be registered as a sick industrial company by the BIFR. This aspect of the matter was accepted by the BIFR as the BIFR had reason to believe that the petitioner has become a sick industrial company and accordingly, the reference was entertained u/s 15(2) of

the Act. Therefore, the observation in the impugned order that the cut-off date shall be only the date on which the reference was entertained, i.e., during July, 2003 cannot be held to be a valid decision since the sickness of an industry cannot be given a static date that too the date of registration of the case by the BIFR rather the appropriate interpretation should be to find out as to when the sickness occurred more particularly having reference to the non-fulfillment of export obligation. At this stage the object of the Sick Industrial Companies (Special Provisions) Act, 1985 has to be borne in mind.

12. The Hon''ble Supreme Court in *Navnit R. Kamani and Others Vs. R.R. Kamani*, explained the object of the legislation and held that it has been enacted with the view to afford maximum protection of employment; optimise the use of the funds, etc.; salvaging the production of assets; realising the amounts due to the banks, etc.; and to replace the existing time-consuming and inadequate machinery by efficient machinery for expeditious determination by a body of experts. Therefore, the Act has been enacted to safeguard not only the economy of the country, but also to protect viable sick units and it is aimed at reviving and rehabilitating sick units. Even under the Act, sickness is not defined in precise terms, rather it is a symptom of ailment and not an ailment itself. In the absence of a standard definition for sickness in industries, we are required to take into consideration various parameters, which if present would give a broad indication that the unit is a sick industrial undertaking. In the instant case, we are not concerned with invocation of bank guarantee, but to consider the question as to whether paragraph 5.5.1 of the Exim Policy could be applied to the facts of the case. Therefore, the long line of decision, which have considered the effect of section 22 of the Act on such proceedings is not required to be considered in the instant case, rather would not be applicable to the facts on hand.

13. It is stated by the learned counsel for the petitioner that in the attested balance-sheet as on March 31, 2002, it has been established that the petitioner has been incurring substantial loss. Therefore, the third respondent in order to assess the petitioner's genuinity ought to have examined this aspect of the matter and, thereafter, with those facts, should have applied paragraph 5.5.1 of the Exim Policy and then taken a decision whether the extended period of 12 years for fulfilment of export obligations could be granted to the petitioner. However, this appears to have not been done in the instant case. Therefore, this court is of the view that the matter requires to be reconsidered by the third respondent. In the result, W.P. No. 25033 of 2003 is disposed of and W.P. No. 25032 of 2003 is allowed, setting aside the impugned order passed by the third respondent and the matter is remanded to the third respondent, who, in turn, shall afford an opportunity to the petitioner to submit a fresh representation along with all documents in support of their stand that the industry had become a sick industrial company much prior to the cut-off date, i.e., March 31, 2002. On receipt of such documents, the third respondent shall afford an opportunity of personal hearing and take a decision on merits and in accordance with law. The petitioner shall submit such representation within a period of six weeks from the

date of receipt of a copy of this order and on receipt of such representation, the third respondent shall take a final decision as indicated above within a period of six months thereafter. No costs. Consequently, connected miscellaneous petitions are closed.