(2009) 04 DEL CK 0049

In the Delhi High Court

Case No : Writ Petition (C) 17284 of 2005

Cosmique Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Citation : (2009) 04 DEL CK 0049

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Ashwani Kumar, for the Appellant; Kuljeet Rawal, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—Issue Rule. Mr. Kuljeet Rawal, Advocate accepts notice of rule. With consent of counsels, the matter was heard finally.

2. The petitioner seeks quashing of an order of the second appellate committee constituted by the Union Textile Ministry under the Garment Export Entitlement Policy (GEEP); the order is dated 31.08.2004.

3. Briefly the facts are that the petitioner, a garment exporter, during the relevant time categorized certain consignments in No. 350 of the relevant code. This was apparently issued with the concurrence of the Apparel Export Promotion Council (AEPC), the quota administering authority under the scheme. Unfortunately, the quota country, the United States of America (USA) took the position that the goods were to be categorized in No. 336. The change-over made a difference since Category 350 goods were classified as "Non-quota" products whereas Category 336 goods were categorized as "Quota" products. The change-over was permitted by the AEPC, in terms of the an acceptance of the waiver request by the AEPC, eliciting a commitment from the petitioner that 21468 pieces or equivalent quota would be released by 31.01.1995 failing which a bank guarantee for the sum of Rs. 26,62,032/-, being 50% of the total FOB value was to be forfeited. The petitioner was confronted with a speaking order

dated 22.09.1995, forfeiting the sum of Rs. 18,99,667/-. The AEPC''s opinion apparently was based on the fact that he had surrendered only 4035 pieces by June 1995 - although this was not spelt out explicitly in the order. The petitioner felt aggrieved and approached the appellate authority which by order dated 22.06.2001 set aside the speaking order by the Director (dated 22.09.1995) and required the competent authority to pass speaking order after adhering to the principles of natural justice.

4. In compliance with the directions of the appellate forum, a Show Cause Notice was issued to the petitioner, calling upon it to explain why forfeiture of the said amount of Rs. 26,62,032/- not be resorted to for its failure to adhere with the undertaking for surrender of 21,468 pieces in No. 336, by 31.01.1995. Apparently, the respondents had given credit to the surrender of 4035 pieces by June 1995 concededly made by the petitioner in January 1995. The petitioner resisted the respondents on 28.05.2002 stating that the switch over was at the insistence of the US authorities and was unjustified. It also contended having pursued the matter with AEPC not to insist on taking the quota since it was not their fault, yet on being left with no option, 4035 pieces'' quota was surrendered in June 1995. Para 8 of the reply dated 28.05.2002 also stated that the quota equivalent of 17433 was given. In these circumstances, complete waiver of forfeiture was sought.

5. The Senior Director who considered the matter, after reviewing the previous sequence of events whereby the Textile Ministry had remanded the matter to him by order dated 07.04.2003 rejected the petitioner''s contentions, holding as follows:

XXXX XXXX XXXX XXXX In the Visa Waiver request, the exporter had sought change of category from 350 to 336. The exporter had submitted an affidavit dated 25.8.1994 committing himself to surrender 21468 pcs. In category 336 by 31.1.1995, failing which BG No. 77/94 dtd. 19.8.1994 for Rs. 26,62,032/- being the 50% of the total FOB value covered against the aforesaid consignments would be forfeited.

XXXX XXXX XXXX XXXX On the directions of the 2nd Appellate Committee i.e. Ministry of Textiles, the export was issued a show cause notice bearing No. AEPC/ SDN/SO/VW/105/C-10 dated 14.5.2002 and the exporter attended the personal hearing on 28.5.2002 and also submitted a letter dated 28.5.2002 in reply to the Show Cause Notice. In reply to the Show Cause Notice, the exporter had surrendered balance quantity of 17457 pcs. against the required balance quantity of 17433 pcs. covered in 21 QCs obtained through transfer during the year 2002 and pleaded for waiver of the balance forfeiture amount.

As per the directions from Regd. Office, AEPC therefore forfeits an amount of Rs. 18,99,667/- for non-compliance of the stipulations. However, if the exporter is aggrieved with the decision of the AEPC, he will have the option to prefer an appeal to the Office of the Textile Commissioner, New CGO Complex, New Marine

Line, Mumbai within 60 days of the issuance of this order and obtain a stay from the office of the Textile Commissioner, failing which the EMD amount covered in this case will be invoked without making any further reference to the exporter. The exporter is also required to submit a copy of the appeal to the AEPC, Naraina within the stipulated period for the purpose of making required comments to the Textile Commissioner''s Office.

XXXX XXXX XXXX XXXX

6. The petitioner appealed to the first appellate forum. In its appeal too, it mentioned that the surrender of 17033 pieces has been made in 2002 and had not been rejected. It is evident from the reading of the grounds urged in support. The order in appeal dated 21.06.2004, rejected the petitioner''s contentions in the following terms:

DISCUSSIONS:

During the hearing of the said appeal, Shri Prithvi Manaktala, MD & Shri Suresh Bhagat, Company Secretary of M/s. Cosmique Limited appeared before the Senior Officers'' Appellate Committee of this Office on 23.02.2004 at the AEPC, Naraina, when Shri R.N. Sharma, Sr. Director of the AEPC, Naraina was also present. It was informed by AEPC at the time of hearing in the case sheet presented on 23.02.2004 that the case pertains to Held up consignment involving surrender of the quota by 31st January of the following year. The exporter has gone to 2nd Appellate Committee against the order of the 1st Appellate Committee. The 2nd Appellate Committee have remanded the case to AEPC, so that the proper Show Cause Notice could be issued to the exporter, AEPC has issued Show Cause Notice and the exporter surrendered the balance quantity after issue of Show Cause Notice. However, AEPC has issued speaking order since quota had been surrendered after issuance of show cause notice by the AEPC. Shri Prithvi Manaktala, MD & Shri Suresh Bhagat, Company Secretary informed that they have surrendered the quota after issue of show cause notice dtd. 14/5/2002 by the AEPC against the held up consignment during the quota year 1994. In terms of the Policy against the held up consignment during the particular year the quota should be surrendered by 31st January of the following year. However, in this case the balance quantity has been surrendered by the exporter after 14/5/2002 i.e., after issuance of show cause notice on 14/5/2002 and hence the exporter is not eligible for relief.

FINDINGS:

We have carefully gone through the records of the case and on examination it is clear that the exporter has not surrendered quota in time as per Policy.

ORDER:

Since the exporter did not surrender the quota by 31st January of the following year against the held up consignment, as per undertaking given, the committee hereby upholds the forfeiture, as per AEPC speaking order No. AEPC/DN/VW-

BG/105/C-10/2165 dtd. 09.04.2003.

7. The petitioner further appealed to the second appellate committee, which rejected the appeal without any special or additional reasons and concurred with the findings of the first appellate authority.

8. It is contended by the petitioner that the impugned orders are extremely arbitrary and onerous. It is contended that even though the AEPC had obtained a commitment that the quota to the extent of 21468 pieces would be released by 31.03.1995, yet the relevant provisions of the GEEP Scheme, by para 16 stated that such a compulsion can be enforced only in the event the quota was unavailable with AEPC at the relevant time. The said provision reads as follows:

16. Guidelines for obtaining release of held-up consignments a) Where a shipment effected in a non-quota category or in another restrained category is reclassified by the importing country into a restrained category, EC/Visas for the reclassified category should be issued after the exporter surrenders the necessary quota in any systems other than FCFS. If FCFS balance is available for allotment, EC/Visas may be issued, without the exporter surrendering any quota, by debiting to such FCFS balance. The stipulations of this para will also apply to cases where a change of buyer is required for a shipment that had been effected in FCFS System or in any of the other systems after obtaining extension beyond 30th September and to cases where a change of importing country is required.

9. It is submitted that the respondents accepted the surrender of 4035 pieces and gave adjustments; then again chose not to give any credit to the surrender made in 2002 which was expressly brought to their notice. The petitioner contends that this fact has not been denied in any of the orders; on the contrary they are silent.

10. The respondents contend that the quota administering authority takes into account the relevant circumstances prevailing at the point of time and insists upon the conditions which have to be necessarily followed by the exporter. In this case, the petitioner approached the quota administering authority for switch-over from Category 350, (a non-quota product) to category 336, a quota product. It was required to submit and surrender the quota apparently on the basis of the then contemporaneous determination of overall availability. It also undertook that in the event of failure to comply with such condition, to agree for forfeiture of bank guarantee. All that the impugned order has done is to enforce that. Learned Counsel submitted that the late furnishing of quota or mention of it in reply to the Show Cause Notice or indeed even in the grounds of appeal is of no avail because same have to be surrendered in a time-bound manner.

11. It is evident that the facts necessary to decide the case are extremely narrow. The petitioner had concededly exported a quantity of garments to the US; the certificate of AEPC was about its falling within category 350. The US authorities determined that the relevant clause was 336. In these circumstances, the petitioner appealed seeking switch-over and release of the appropriate quota

from the quota administering authority. The quota administering authority at that time insisted that the quota equivalent corresponding should be released by the stipulated date, i.e. 31.03.2005. The petitioner did not do so but instead released 4035 by June 1995. The respondents'' position is that having agreed to surrender certain quantum by the relevant time, the petitioner committed himself to a course of action and cannot now resile from it and contend that forfeiture of principal amount equivalent to the quota - after surrender equivalent of 4035 pieces is arbitrary.

12. The above sequence of facts would show that initially, when the consignment was certified, there was no dispute, at least in the AEPC amount that the products were appropriately classifiable in category 350. A supervening event beyond the reach of the petitioner, i.e. determination by the quota country, the US authorities that the product was classifiable in 336 altered this whole understanding. At that stage, the petitioner was compelled to seek waiver. Now, para 16 of the guidelines states that "EC, Visas may be issued to an exporter surrendering any quota by adapting to any FCS balance." The respondents are silent as to whether there was any quota available at the relevant time in 1994-95. Concededly, they have given credit to the quota equivalent of 4035 pieces surrendered in 1995. This conduct itself shows that the stipulation of time within which such quota was to be surrendered was not treated as inflexible. None of the orders, either the order of the Special Director or the appellate authority have dealt with the petitioner''s surrender of 17033 pieces quota, although in 2002.

13. The Court has considered the copies of appeals to the first appellate authority as well as second appellate authority Both these explicitly mention surrender of the said 17033 pieces. It can, therefore, be concluded that the quota equivalent was accepted by the respondents. In these circumstances, the Court is of the opinion that the respondent authorities -did not apply their minds to the material before them in concluding that the petitioner had to be subjected to forfeiture of the bank guarantee furnished by it to the extent of Rs. 18,99,667/ =.

14. For the above mentioned reasons, the writ petition has to succeed; it is accordingly allowed. The impugned orders are quashed; the amount deposited with the respondents shall be refunded to the petitioner within eight weeks from today.

