
(2008) 08 SC CK 0130

In the Supreme Court Of India

Case No : Civil Appeal No. 5222 of 2008 (Arising out of S.L.P. (C) No. 16917 of 2006)

General Instruments Company

APPELLANT

Vs

Union of india (UOI) and Others

RESPONDENT

Date of Decision : 25-08-2008

Acts Referred:

Foreign Trade (Regulation) Rules, 1993 — Rule 8

Citation : (2008) 4 BC 122 : (2008) 132 ECC 179 : (2008) 158 ECR 179 : (2008) 229 ELT 642 : (2008) 9 JT 373 : (2008) 11 SCALE 989 : (2008) 11 SCC 775

Hon'ble Judges : D. K. Jain, J;C. K. Thakker, J

Bench : Division Bench

Advocate : M. M. Kulkarni, Party-in-Person, for the Appellant; V. Shekhar Sanjeev K. Bhardwaj, Kiran Bhardwaj, B. Krishna Prasad, Gaurav Agrawal, Anil Katiyar and D.S. Mahra, for the Respondent

Final Decision : Allowed

Judgement

D.K. Jain, J.—Leave granted.

2. This appeal, by special leave, arises out of the judgment and order dated 7th April, 2006 passed by the High Court of Judicature at Bombay in Writ Petition No. 1174 of 2003.

3. Material facts leading to these proceedings are as follows: In the year 1982, M/s Rashtriya Chemicals & Fertilizers Limited (hereinafter referred to as 'RCF'), a Government of India Undertaking, floated a global tender for supply of various types of capital goods required for its That project. Responding to the said tender notice, the appellant, a partnership firm, through its managing partner, Mr. Manohar M. Kulkarni, an ex-army man, submitted its quotation for supply of thermocouple compensating cables and extension cables. The tender was accepted by RCF and by a purchase order dated 13th October, 1982, they agreed to purchase cables worth Rs. 17,49,000/- from the appellant.

4. In order to avail of customs duty exemption on the import of certain raw materials required in the manufacture of capital goods to be supplied to RCF, on 22nd November, 1982, the appellant applied to the Joint Chief Controller of Imports & Exports (for short 'JCCI'), Bombay, for issuance of an import licence with duty exemption entitlement certificate etc. for import of raw materials free of duty or at a concessional rate of duty in terms of Import Policy Book for AM 83. According to the appellant, as they were not clear about the form on which they had to make the application, on the covering letter filed with the applications, with copies to the Advance Licensing Committee as well as to the Special Imprest Licensing Committee at New Delhi, a request was made to forward the said applications to the concerned cell so that an appropriate licence is issued for the aforesaid purpose.

5. On processing of the application, the office of JCCI, Bombay, vide their letter dated 30th November, 1982, called upon the appellant to furnish the essentiality certificate from RCF. Accordingly, the appellant obtained the essentiality certificate from the project authority i.e. RCF, to the effect that they have agreed to purchase goods valued at Rs. 17,49,000/-, from the appellant for their That project under the global tendering procedure and that the That project is fully financed by the Government of India. In the certificate issued by RCF, it was also stated that the appellant was eligible for availing concessional rate of import duty on the raw materials imported by them for manufacture of cables in terms of para 14 of Import Policy 1981-82. The appellant forwarded the said certificate to JCCI, Bombay. In spite of clear knowledge that the That project of RCF was fully financed by the Government of India, the Controller of Imports & Exports, Bombay issued a Special Imprest Licence (SIL), to the appellant on 30th May, 1983, under AM 84 policy, permitting the appellant to import listed raw materials, for approximate value of Rs. 5,78,300/-; without payment of customs duty. However, the licence was subject to the following conditions:

(a) The appellant shall supply to RCF export items as per list attached thereto for an f.o.b value of Rs. 17,49,000/- within 6 months from the date of clearance of the first consignment against the said licence.

(b) To ensure fulfilment of the export obligation under the said licence, the appellant shall execute a bond with 100% bank guarantee as per the proforma given in Appendix-38 of the Handbook of Import Export Procedure 1981-82 for a sum of Rs. 12,14,623.

(c) Goods imported against the said advance licence shall be utilised in accordance with the provisions of Customs Notification No. 11/F- No. 602/14/8/DBK dated 09.06.78, as amended from time to time.

(d) Cash assistance, if any, will be as per the instructions issued by the Ministry of Commerce from time to time.

(e) In the event of failure to fulfil the export obligation within the time stipulated, the bond will be enforced and the licence holder shall pay customs duty on the

proportionate quantity of the material corresponding to the products not exported.

6. The requisite Bond in terms of the aforementioned condition (b) was accordingly, executed on 17th June, 1983. The appellant imported raw materials from time to time, aggregating to C.I.F. value of Rs. 3,01,439/-, and cleared the same without payment of duty in terms of the Bond. It is not in dispute that the appellant has utilised entire quantity of the imported raw materials in the manufacture of resultant products, valued at Rs. 17,59,382/-; supplied to RCF in order to fulfil export obligation, as stipulated in the licence, against the export obligation of Rs. 17,49,000/-.

7. Having thus, fulfilled the export obligation, the appellant approached the project authority, viz. RCF, for requisite endorsement on Duty Exemption Entitlement Certificate (for short 'DEEC'). Initially RCF declined to make the endorsement, on the ground that the That Project was financed by the Government of India and not by organisations like the World Bank, OECF, ADB, etc. as contemplated under the Exemption Notification No. 210/82 dated 10th September, 1982. However, later on, RCF made the requisite endorsement on the DEEC book on 2nd February, 1988 to the effect that the appellant had supplied goods valued at Rs. 17,59,382/- during the period from 27th July, 1983 to 10th May, 1984.

8. It appears that in the meanwhile, a show-cause notice dated 5/6th September, 1985, had been issued by the JCCI, Bombay, calling upon the appellant to show cause as to why Bond, in the sum of Rs. 12,14,623/-, furnished by them, should not be enforced as the appellant had violated Clause 1 of the Licence and Clause 5 of the Bond. The appellant was required to appear before Mr. G.R. Nair, Deputy Chief Controller of Imports & Exports on 20th September, 1985, at 3:15 p.m. for a personal hearing, which, in fact, was granted on 29th September, 1985. Not being satisfied with the cause shown, a cyclostyled order dated 4th December, 1985, was passed by Smt. R. Johnny, Controller of Imports and Exports, holding that the appellant had failed to fulfil the export obligation in time and had failed to furnish prescribed documents within the prescribed period, and thus, violating condition No. 5 of the Bond. Accordingly, the appellant was directed to remit the Bond amount of Rs. 12,14,623/-; to surrender the valid R.E.P. licence remaining unutilised and to pay forthwith the customs duty with interest @ 18% on proportionate quantity of the exempt materials. In other words, the supplies made by the appellant to RCF were not treated as discharge of export obligation in terms of condition (a) of the Licence. The appellant was declared to be a defaulter thereby debarring it from getting any licence under the duty exemption scheme or under any other provisions of the Import Export Policy announced from time to time.

9. Consequent upon the forfeiture order dated 4th December, 1985, the Controller of Imports & Exports, vide letter dated 20th December, 1985, denied cash assistance to the appellant. The appeal preferred by the appellant against

the forfeiture order dated 4th December, 1985 was rejected vide order dated 21st May, 1986 issued by Smt. R. Johny, Controller of Imports & Exports on the grounds that: (i) part 'F' of DEEC book duly certified by the project authority had not been submitted and (ii) certificate of exports in original nor the original export documents were furnished by the appellant. Incidentally, the forfeiture order as well as the appellate order was passed by the same officer, namely, Smt. R. Johny, though the appellate order is purported to have been issued with the approval of JCCI.

10. Aggrieved thereby, the appellant preferred second appeal before a Committee of Joint Director General of Foreign Trade, New Delhi.

11. During the pendency of the second appeal, the customs authorities sought to recover customs duty amounting to Rs. 3,71,614.82 from the appellant in respect of the raw materials imported and cleared without payment of duty under the Special Imprest Licence (SIL) dated 30th May, 1983. The proposed action was challenged by the appellant by preferring Writ Petition No. 2038 of 1988. However, when the petition was taken up for final hearing on 21st October, 2002, counsel for the appellant volunteered to deposit the customs duty as demanded. Thereupon, counsel for the revenue made a statement that within two weeks of the deposit of the said amount, a proper show- cause notice shall be issued and the same would be adjudicated in accordance with law. The Writ Petition was, thus, disposed of on the same day. However, while disposing of the Writ Petition, it was ordered that appeal filed by the appellant against the order dated 21st May, 1986 shall be disposed of within a period of six months.

12. The Appellate Committee, comprising of two Joint Director Generals of Foreign Trade, New Delhi, while observing that the second appeal filed by the appellant was not maintainable as in the current Hand Book of Procedure of Export-Import Policy, there was no provision for second appeal against the forfeiture order, in deference to the directions given by the High Court, heard the appeal on merits. Vide order dated 21st February, 2003, the Committee held that although the forfeiture order and the order passed in the first appeal were in accordance with the policy yet in view of the fact that the forfeiture order had not been actually implemented at the Bank's level and practically no amount had been transferred out of the appellant's account to the Government's account, the forfeiture order, did not have any financial effect on the appellant and hence no relief was required to be given in the second appeal. Accordingly, the second appeal was also dismissed.

13. At this juncture, it may also be noted that in the light of the forfeiture order dated 4th December, 1985, the licensing authority had initiated departmental proceedings against the appellant and vide an order dated 4th May, 1987, the Deputy Chief Controller of Imports & Exports, Bombay debarred the appellant and its partners from receiving any import licences, customs clearance permits, allotment of imported goods from any canalising agency, and from importing any goods from AM 88 to AM 90. The first appeal preferred by the appellant against

the departmental order was dismissed by the Joint Chief Controller of Imports & Exports on 28th July, 1987. However, the second appeal filed by the appellant was partly allowed by the Additional Chief Controller of Imports & Exports on 18th June, 1992 by reducing the period of debarment upto 31st March, 1989. While allowing the appeal partly, the appellate authority, inter alia, observed that there was no mis-utilisation of imported goods, and at no point of time the appellant had concealed any information. But they had not been able to identify and choose a correct scheme of import licence to execute the order. The appellate authority finally concluded thus:

The appellants may have mis-comprehended the policy in force. But, they did not object when the special imprest licence under reference was granted to them under the deemed export category with specific export obligation with reference to 100% duty free imports. Since they accepted the conditions of the licence and also executed a bond to abide by the conditions of the licence which carried an export obligation, it was incumbent on them to complete formalities in support of their contention of having discharged export obligation notwithstanding that the imported goods were utilised for the execution of the project. The project they executed or supplied they made towards the execution of the RCF, That Project was not a project falling under the category of deemed exports. This project was not aided by IDA/IBRD. Their request for conversion of their supplies to RCF, That Project in the deemed category of exports was duly considered by the competent authority in the Import Trade Control Organization. Under letter dated 30.10.1985, their request was not considered as the supplies made by them to RCF, That Project were not covered under the category of deemed exports. They were advised to convert the special import licence into project import licence by paying the customs duty with penal interest thereon with the consent of Ministry of Finance. But they did not do so considering the fact that the appellants misunderstood the provisions of the policy in force and that there was no malafides on their part, I am inclined to take a lenient view.

14. Being dissatisfied with order dated 22nd February, 2003, the appellant preferred a fresh Writ Petition in the Bombay High Court. During the pendency of the Writ Petition, the appellant sought leave of the Court to make a fresh representation to the concerned Ministry, seeking conversion of Special Imprest Licence (SIL) dated 30th May, 1983 into a Project Import Licence. However, the said representation was rejected on 22nd August, 2003 on the ground that there was nothing like "Project Import Licence" and as the imports were made in the year 1983 when the Project Import Regulations of 1965 were in force, it was not possible to verify the conditions after twenty years.

15. In the judgment under appeal, after elaborate discussion and particularly having regard to the afore-extracted observations of second appellate authority in its order dated 18th June, 1992, the High Court came to the conclusion that : (i) forfeiture order against the appellant was uncalled for; (ii) even though the second appellate authority has held that there is no financial implication on

account of the forfeiture order, yet on account of the said order, the appellant was made liable to pay entire customs duty with interest and penalty; (iii) the lapse on the part of licensing authorities in issuing a licence with Bond conditions which were impossible to perform had serious financial implications on the appellant; (iv) once it is accepted that it was a mistake to issue Special Imprest licence to the appellant and the conditions attached to the Bond and the licence were wholly impossible to perform, the licensing authorities ought to have taken remedial steps immediately, particularly when Rule 8 of the Foreign Trade (Regulation) Rules, 1963, empowered JCCI to rectify the error by amending the licence. Finally, the High Court disposed of the Writ Petition with the directions that : (a) in the light of order dated 21st February, 2003, the Bond/bank guarantee executed by the appellant on 17th June, 1983 shall not be enforced; and (b) within six weeks from the date of its order, JCCI, Bombay shall amend the Special Imprest Licence (SIL) into a licence which may entitle the appellant to seek regularisation of the imports already made under the said licence at concessional rate of duty, if permissible under the Customs Act. However, the High Court declined to grant appellant's prayer for Cash Compensatory Support, hereinafter referred to as CCS, permissible under the Special Imprest Licence (SIL). It is this part of the order which is impugned in the present appeal.

16. Mr. M.M. Kulkarni, a partner of the appellant-firm, sought permission to argue the case on behalf of the appellant on the ground that on account of several rounds of litigation, spanning over two decades, because of erroneous licence issued by the licensing authorities, the firm had closed down and, therefore, did not have the financial capacity to engage the services of a lawyer. We granted the permission and heard him at some length.

17. At this juncture, it will be relevant to note that during the course of hearing on 23rd January, 2008, learned senior counsel appearing on behalf of the Director General of Foreign Trade fairly stated that in view of the aforementioned observations of the High Court, he would discuss the case with the officers of the concerned department and possibly the appellant might get some relief, particularly in the matters relating to 13 independent orders/import licences, confiscated/forfeited by the licensing authority by virtue of order of forfeiture dated 4th December, 1985. Further hearing in the matter was, thus, deferred.

18. Pursuant to and in furtherance of the said offer, the office of the Zonal Joint Director General of Foreign Trade examined the representation made by the appellant on 14th March, 2008. A personal hearing was also granted to the representative of the firm. Vide order dated 8th April, 2008, the Foreign Trade Development Officer informed the appellant that out of CCS claim of Rs. 5,52,032.92, they have been found to be eligible for claim of Rs. 4,19,916/-, and the department was ready to pay the said amount. However, as regards the balance CCS claim etc., and interest thereon, the letter reads thus:

Since balance claim of Rs. 1,31,953/- was not supported by the required documents, vide this office letter dated 26.3.2008 you were advised to furnish

documentary evidence showing that the project was funded by bilateral or multilateral external assistance. Against this letter, you had replied vide your letter dated 31.3.2008 stating that the project was funded by OECF Fund. In support of your contention you have quoted certain information from web site of OECF and claimed that project was funded by OECF, but no documentary evidence from the project authority i.e. RCF Ltd. (Rashtriya Chemicals & Fertilisers Ltd.) was furnished by you in support of your claim. In fact, you have furnished a project authority certificate dated 18.3.1983 issued by the RCF Ltd. in support of W.P. No. 1174/03 filed before the Hon'ble Bombay High Court, which was annexed as Exhibit - D to the petition at page No. 31 showing project was funded by Govt. of India Fund.

You had also appeared for personal hearing on 7.4.2008 and contended that Part 'F' of DEEC Part II was certified by the project authority i.e. RCF Ltd., therefore, it is construed that supplies were funded by the OECF Fund and requested to give benefit for this amount also. Your this contention cannot be hold good since Part 'F' of DEEC Part II merely bears the information of invoice No. & date, description of supplied items, quantity and FOR value thereof. But it has nothing to do with the source of finance of the project. In fact, the supplies were financed by Govt. of India Fund; therefore, this supply does not fall under para 131 of Hand Book of Procedure, as such, not eligible for CCS benefit to the extent of Rs. 1,31,953/-.

Regarding additional claim of Rs. 14,478/- raised by you vide your letter dated 31.3.08, it is to inform you that this claim was not originally included in the writ petition No. 1174/03 filed before the Hon'ble High Court of Bombay, which is a subject matter of SLP No. 16917/2003 filed before the Hon'ble Supreme Court of India. Even this claim is not supported by the required documents, therefore, your additional claim of CCS cannot be considered.

Regarding payment of interest, it is hereby informed that the debarring order was in force and maintained by the Appellate Authority vide their Order dated 18.6.1992. It was in force upto 27.2.2008 i.e. till the date of Order of the Hon'ble Supreme Court of India in respect of SLP No. 16917/2003. There was no delay at the part of the deptt. As such, no interest can be paid against the above claim.

19. It is clear from the afore-extracted communication that a substantial claim for CCS stands allowed and the balance claim of Rs. 1,31,953/- has been disallowed for want of documentary evidence to show that the project was funded by bilateral or multilateral external assistance. It is pertinent to note that in the said letter there is no indication as to why in the first instance CCS claim for Rs. 4,19,916/- had been denied to the appellant.

20. It was submitted by Mr. Kulkarni that having come to the conclusion that on the facts of the case, order of forfeiture dated 4th December, 1985 was not warranted, the High Court erred in not granting the consequential relief viz. the claim for CCS, as the same had been denied only on account of the forfeiture

order, declaring the appellant to be a defaulter. It was also contended that, in any case, there was no justification in respondents' withholding the CCS in respect of other independent export orders, when all the conditions specified therein had been fulfilled. We may also note that in the written submissions filed after the conclusion of the hearing, it is stated that RCF has now issued a certificate, dated 27th May, 2008, showing that two orders, namely, KC 263 and KT 995 were financed by Overseas Economic Corporation Fund (for short 'OECF') and thus, CCS against both these orders are payable. It was, thus, pleaded that the respondents should be directed to forthwith release the CCS claim along with interest for the delayed payment.

21. Mr. Gaurav Agrawal, learned Counsel appearing on behalf of the Director General of Foreign Trade, filed written submissions, opposing the grant of CCS and the interest thereon. It is pointed out that having got the licence converted from Special Imprest Licence to Project Import Licence, as per the directions of the High Court, the appellant cannot, now, contend that RCF- That project being a foreign funded project, they are entitled to the claim for CCS. In support of the submission that CCS is permissible only in a case of Special Imprest Licence, our attention was drawn to condition No. 4 in the Special Imprest Licence dated 30th May, 1983. Insofar as the claim for interest is concerned, it is urged that apart from the fact that such a claim was made for the first time in April, 2003, when W.P. No. 1174/2003 was filed, the order of forfeiture cannot be said to be malafide inasmuch as, way back on 30th October, 1985, i.e. prior to the forfeiture order, the appellant was advised to get their import regularised by approaching the Ministry of Finance by paying customs duty with penal interest but the appellant did not heed to the advice of the respondents.

22. It is trite that no man should suffer a wrong by technical procedure of irregularities. The Rules or procedures are the handmaids of justice and not the mistress of the justice. *Ex debito justitiae*, we must do justice to him. (Vide *A.R. Antulay Vs. R.S. Nayak and Another*,). However, in the present case, although we feel that the appellant has suffered on account of confusion in the nature of the licence to be issued to it but appellant's main prayer for conversion of Special Imprest Licence into a Project Import Licence having been granted by the High Court, the wrong caused stands remedied to a large extent.

23. Having considered the matter in the light of the afore-noted subsequent intervening events, in particular the conversion of Special Imprest Licence into Project Import Licence, in terms of direction (b) by the High Court, we are of the opinion that insofar as CCS claim is concerned, no further relief can be granted to the appellant. In that view of the matter, the certificate, stated to have been now issued by RCF to the appellant, and annexed with the written submissions dated 3rd June, 2008, is of no avail to the appellant. Nevertheless, in our judgment, in view of the fact that the second Appellate Authority had reduced the period of debarment, pursuant to order dated 4th May, 1987 passed on account of the order of forfeiture dated 4th December, 1985, only upto 31st

March, 1989 and the fact that the High Court vide its order dated 7th April, 2006 has held that order of forfeiture against the appellant was uncalled for, there was no justifiable reason for the Director General of Foreign Trade for not releasing CCS amount at least on the passing of the order by the High Court. It was only during the course of hearing of this appeal that learned Counsel for the said respondents offered to get the claim re- examined and as such now by order dated 8th April, 2008, the appellant's claim to the extent of Rs. 4,19,916/- has been found to be in order. In the premises, it is manifest that the respondents retained the amount due to the appellant as CCS without the authority of law and are liable to pay the same forthwith.

24. In view of the afore-going discussion, the appeal is partly allowed; the respondents are directed to release the CCS claim which has been determined to be due to the appellant within four weeks from today alongwith interest at the rate of 9% per annum from 7th April, 2006 till the date of actual payment.

25. We may clarify that we have not expressed any opinion on the merits of appellant's claim for CCS of Rs. 14,478/- against export order KT-995 as also the rate of customs duty payable by the appellant on the imports of raw materials as appeals on both the issues are stated to be pending before the concerned appellate forums. As and when the appeals come up for hearing, these will be decided strictly on their own merits without being influenced by any observation hereinabove.

26. The appellant will be entitled to the costs of this appeal.