
(2003) 08 AHC CK 0212
In the Allahabad High Court
Case No : C.M.W.P. No. 17685 of 1993

Ginni Filaments Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-08-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (2003) 6 AWC 4649

Hon'ble Judges : R.S. Tripathi, J; M. Katju, J

Bench : Division Bench

Advocate : S.C. Agarwala, Kavin Gulati and Bharti Sapru, for the Appellant; U.N. Sharma and S.S.C., for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, J.—This writ petition has been filed praying for a writ of certiorari to quash the impugned demands dated 6.4.1992 Annexure-18 to the writ petition and dated 27.3.1991 Annexure-21 to the writ petition.

2. Heard learned Counsel for the parties.

3. The Petitioner has alleged that it is a 100% export oriented unit engaged in manufacture of fine and super fine cotton yarn. It is alleged in paragraph 2 of the petition that the Petitioner is successfully exporting to the European and Far-East Asian markets and is a recognised export house and it is also a member of Cotton Textiles Export Promotion Council (hereinafter referred to as TEXPROCIL) which is a body constituted under the Imports and Exports Control Act, 1947 and the Exports (Control) Order, 1988. The Petitioner has its factory in Mathura and all the goods which it manufactures are exported. Section 3 of the Imports and Exports (Control) Act, 1947 (hereinafter referred to as an Act) empowers the Central Government to prohibit or restrict the imports and exports by notification in the Gazette. In exercise of that power the Central Government has issued the Exports (Control) Order, 1988. Clause 3 (2) of the said order states that goods

specified in Schedule 3 may be exported on the fulfilment of the terms specified therein. The Petitioner is controlled by the provisions of Schedule 3 (Open General Licence) and the concerned entry related to the Petitioner is Entry 47 (III). This entry provides that any person desirous to make exports to the European Economic Council (E.E.C.) countries will have to obtain allocations for export entitlement from TEXPROCIL. It also states that TEXPROCIL will observe the guidelines issued by the Ministry of Textiles, Government of India. The Government of India, Ministry of Textiles issued notifications dated 31.8.1990, 15.10.1990 and 26.10.1990 Annexures-1, 2 and 3 to the petition. A perusal of the same shows that the Executive Director of TEXPROCIL has been authorised to allocate entitlements for export of yarns, fabrics etc. It further states that the Ministry of Textiles, Government of India shall be the final authority regarding interpretation of any of the provisions of the notifications and that the export entitlement will be allotted only to the exporters registered with the competent Registering authority.

4. In paragraph 15 of the writ petition it is stated that under the Contract Reservation Entitlement System, exporters are entitled to allotment of quotas for purposes of export on the basis of the orders which they have to obtain from foreign buyers before they are entitled to any quota for the purposes of exports. In paragraph 19 of the petition it is stated that the Petitioner had applied for quota for export of cotton yarn to Germany which is an E.E.C. country and obtained 4 orders from four buyers against which TEXPROCIL allotted a total quota of 1,39,400 kgs. to the Petitioner for export to Germany to be made between the period 1.7.1991 upto 31.12.1991. Copy of the entitlement certificate dated 14.6.1991 is Annexure-4 to the writ petition.

5. It is alleged in paragraph 20 of the writ petition that soon after this entitlement certificate was obtained the E.E.C. imposed on various countries including India a duty called "Anti Dumping Duty" to the extent of 15.9% of the export price. "Anti Dumping Duty" means a duty which is imposed by the E.E.C. countries if the price at which the exports are being made by any exporting country is less than the cut off price fixed by the Commission of the E.E.C. countries. This is done in order to avoid under selling by the third World countries. Copy of the order of the Commission of E.E.C. imposing an "Anti Dumping Duty" is Annexure-5 to the writ petition. It is alleged in paragraph 21 of the writ petition that soon thereafter the Petitioner received a Telex message dated 11.7.1991 from one of its buyer GOERTZ and Co. stating that no letter of credit could be opened in Petitioner's favour in view of the "Anti Dumping Duty" vide Annexure-6 to the writ petition. In the meantime the Government of India suspended all shipments of cotton yarns to all countries including the quota countries w.e.f. 21.9.1991 until further notice vide Annexure-7 to the writ petition. In paragraph 23 of the petition it is alleged that the Petitioner by Telex message dated 4.9.1991 wrote a letter to its buyer GOERTZ & Co. stating that since the E.E.C. had decided to withdraw the "Anti Dumping Duty" against Indian yarn, the letter of credit should now be opened in Petitioner's favour. However,

since the Indian Government had banned all exports of cotton yarn GOERTZ & Co. cancelled the contract given to the Petitioner vide Annexures-8 and 9 to the petition.

6. In paragraph 25 of the petition it is stated that Petitioner had also obtained a confirmed order for export from M/s. CITOH for a total export of 8,200 Kgs. to Germany but that buyer also informed the Petitioner that in view of the "Anti Dumping Duty" letter of credit could not be opened and subsequently the contract was cancelled vide Annexures-10 and 11 to the writ petition. Other buyers also cancelled their contracts with the Petitioner. It is alleged in paragraph 30 of the petition that the Commission for E.E.C. countries finally removed the "Anti Dumping Duty" against India vide decision of the Commission dated 27.9.1991 Annexure-16 to the writ petition. It may be mentioned that the "Anti Dumping Duty" was revoked on 27.9.1991 but the Government of India banned all exports of cotton yarns vide its order dated 23.9.1991 and this ban continued till 15.10.1991 when it was finally revoked. It is alleged in paragraph 32 of the writ petition that the Petitioner was granted quota for export, which had to be fulfilled between 1.7.1991 and 31.10.1991, but it could not make exports for the above reasons for no fault of its own. The Petitioner had not been able to export any yarn till October, 1991 and hence it wrote to the TEXPROCIL surrendering the balance amount of unutilised quota. Copy of the letter dated 2.11.1991 surrendering the unutilised portion of the quota has been annexed as Annexure-17 to the writ petition. Thereafter the Petitioner wrote to TEXPROCIL for release of the performance bonds executed by the Petitioner in connection with the export of cotton yarn to Germany, as the Petitioner was unable to fulfil its export entitlement for the reasons beyond its control. However, it is alleged in paragraph 35 of the writ petition that to its utter surprise Petitioner received a letter from TEXPROCIL demanding Rs. 5,61,780 to be paid by way of compensation for not fulfilling its export obligations vide Annexure-18 to the writ petition. Against that order the Petitioner filed an appeal before the Textiles Commissioner, Bombay vide Annexure-19 to the writ petition. That appeal was disposed of by means of an order dated 22.12.1992 whereby only 50% of the compensation/penalty imposed by TEXPROCIL was granted by way of relief, but the Petitioner was still required to pay 50% of the total demand created against the Petitioner, i.e., Rs. 2,80,830. It is alleged by the Petitioner that the impugned order is wholly arbitrary and illegal and is liable to be set aside.

7. A counter-affidavit has been filed by TEXPROCIL and we have perused the same. It is stated in paragraph 3 of the same that exports of textiles to the E.E.C. countries is governed by the terms of a Bilateral Agreement between India and the E.E.C. The E.E.C. has imposed quantitative restraints (quota) on certain items of textile imports from India. In pursuance thereof the Government of India has formulated a quota distribution policy for distributing quantities amongst eligible exporters from India. Exports are governed by the Country's Import/Export Policy as framed by the Central Government from time to time. The Ministry of Textiles, Government of India has delegated authority to

TEXPROCIL to distribute quotas and to monitor utilisation of the allotted quotas. An exporter cannot export restricted quota items without a quota/entitlement certificate issued by the TEXPROCIL. In paragraph 6 it is stated that if quotas are not fulfilled they lapse and it is in the national interest that the exporters who obtain quotas for export utilise them to earn valuable foreign exchange for the country. If the allotted quotas are not exported, valuable foreign exchange earnings are lost to the country. It is, therefore, necessary that every exporter be obliged to furnish a performance bond/bank guarantee for fulfilment of its export obligation.

8. The Petitioner applied for and was allotted four quotas under Entitlement Certificate Nos. 2089, 2091, 2092 and 2093 for the total export of 1,39,200 kilos of cotton yarn to Benelux countries. The certificates were issued on 14.6.1991 and were valid for shipment upto 31.12.1991. The performance bond executed by the Petitioner for the export of the cotton yarn under the entitlement certificate clearly stated that the Petitioner shall observe, perform and carry out all the provisions, terms and conditions of the Export Entitlement issued to it vide Annexure-1 to the affidavit. It is stated that it is well settled that the Court should not interfere in such Bank guarantees/ performance bonds.

9. In paragraph 10 of the same it is stated that out of 1,39,200 kilos of cotton yarn allotted to the Petitioner for export to Benelux countries the Petitioner only exported 7,280 kilos to Benelux countries. In paragraph 11 of the counter-affidavit it is stated that anti dumping proceedings were commenced by the E.E.C. prior to June, 1991 and were withdrawn on 27.9.1991 due to efforts of the Government of India. The Petitioner and other buyers were well aware when they applied for export quotas that anti dumping proceedings had commenced. Merely because anti dumping proceedings commence it does not mean that "Anti Dumping Duty" had actually been imposed. In fact, despite the anti dumping proceedings out of a total quota of 4,456 tonnes of cotton yarn allotted for export to Benelux, 4,263 tonnes i.e., 96% was exported from India, which shows that there was no perceptible effect of the anti dumping proceedings on exports.

10. In paragraph 13 of the same it is stated that the Government of India imposed a ban on the export of cotton yarn with effect from 21.9.1991, but the same was revoked in respect of 100% Export Oriented Units with effect from 27.9.1991. Hence the ban on export of cotton yarn on 100% Export Oriented Units like that of the Petitioner was only for a period of 7 days. Even in case of Non-Export Oriented Units the ban was lifted with effect from 15.10.1991. In paragraph 18 of the same it is stated that it is not correct that "Anti Dumping Duty" was levied immediately after the entitlement certificates were obtained by the Petitioner. In fact anti dumping proceedings had commenced prior to the issue of the entitlement certificate to the Petitioner. No duty was in fact levied and even the anti dumping proceedings were subsequently dropped. The E.E.C. initiated the anti dumping proceedings, which were announced in the official journal of the European Communities dated 22.3.1990 and the proceedings were

withdrawn on 23.9.1991. Hence, the Petitioner had clear knowledge about the anti dumping proceedings much before he obtained the entitlement certificate. In paragraph 19 of the same it is stated that the Petitioner did not have a firm contract for the export of cotton yarn and it obtained export entitlement from TEXPROCIL by making false representations.

11. In paragraph 22 of the same it is stated that E.E.C. never imposed "Anti Dumping Duty" against India. Hence the question of revoking "Anti Dumping Duty" does not arise. Only anti dumping proceedings against India had been commenced but there was no actual imposition of "Anti Dumping Duty".

12. A supplementary counter-affidavit has also been filed.

13. In paragraph 4 of the same it is stated that the Petitioner had sufficient time of six months from 1.7.1991 to 31.1.1991 for effecting the shipment of the quantity allotted in its favour. In paragraph 5 of the same it is stated that the Petitioner failed to fulfil the commitments, which were binding and obligatory on it. Simply surrendering of the quota does not imply avoiding the loss of foreign exchange because it is the surrendered quota, which results in non-utilization of the surrendered quantity, which entails the loss of foreign exchange.

14. We have also perused the rejoinder-affidavit.

15. On the facts of the case, we find no merit in this petition. As stated in paragraph 20 of the counter-affidavit, the ban on the export of cotton yarn on 100% of Export Units was only for 7 days from 21.9.1991 to 27.9.1991. Moreover, as stated in paragraph 22 of the counter-affidavit, the E.E.C. never imposed "Anti Dumping Duty" but had only commenced the proceedings. The Petitioner had entered into a performance bond copy of which is Annexure-1 to the counter-affidavit and it cannot resile from the same. It is also not admitted by the Respondents that Petitioner had a firm contract for exports and in fact it has been alleged in paragraph 21 of the counter-affidavit that the Petitioner obtained the entitlement certificates by false representations.

16. In our opinion, the appellate authority has passed a perfectly just and valid order and in fact has given more relief to the Petitioner than should have been granted.

17. As observed by the appellate authority in its order dated 22.12.1991 Annexure-27 to the writ petition, the Petitioner had obtained C.R.E. quota for Benelux countries to the extent of 139.2 tonnes but shipped only 7.2 tonnes. The total quota for all exporters was 4456 tonnes out of which 4,263 tonnes, i.e., 96% from India was exported in that year. Hence it cannot be said that it was not possible to make exports and the appellate authority has rightly observed that there was no perceptible effect of anti dumping proceedings on exports.

18. The question whether the Petitioner could make the exports or not for which it had obtained entitlement orders is essentially a question of fact and this Court under Article 226 of the Constitution cannot ordinarily interfere with findings of

fact as it is not functioning as a Court of First Appeal. It has been stated in the counter-affidavit that "Anti Dumping Duty" has not actually been imposed but the proceedings for imposing it were going on. This is also evident from Annexure-6 to the writ petition, which is the TELEX message from GOERTZ & Co., which only states that E.E.C. Commission is close to finalising the "Anti Dumping Duty" in Indian yarn. Hence this TELEX message makes it evident that "Anti Dumping Duty" was in fact not imposed but there were proceedings going on for imposing it. A perusal of Annexure-9 to the petition shows that by its TELEX message dated 28.9.1991 GOERTZ & Co. stated that it shall cancel all contracts since the Government of India has banned exports of cotton yarn from India. This shows that the contract was not cancelled due to "Anti Dumping Duty" but due to the ban by Government of India. The TELEX message of CITO H Annexure-11 to the writ petition shows that CITO H cancelled its contract because its customers could not wait for the final decision on "Anti Dumping Duty". This also indicates that there was no final decision to impose "Anti Dumping Duty". It was only contemplated at one time, but in view of the opposition from the Government of India, the proposal was dropped.

19. As regards the ban by the Government of India, that was only for seven days with respect to 100% exports units like the Petitioner as stated in paragraph 13 of the counter-affidavit, and hence the Petitioner cannot complain about that. At any event, as already stated above, this Court cannot sit as a Court of appeal over the question of fact as to whether Petitioner was able to make exports or not. As observed by the appellate authority in its impugned order, 96% of the total quota was exported from India. When a party does not makes exports after getting the entitlement quota then the country suffers, as it does not get the necessary foreign exchange. Hence, it has to be penalized for not keeping to its commitment.

20. For the reasons given above, there is no merit in this petition and it is dismissed.

21. The Petitioner is directed to make payments as directed in the impugned order within two months from today along with interest at 12% per annum from the date of the impugned order till the date of the payment.

22. It may be mentioned that this Court had stayed the operation of the impugned demands dated 6.4.1992 and 27.3.1993 by its interim order dated 21.5.1993 which was extended till further orders vide order dated 30.9.1993. For this reason the Petitioner did not make the payment as demanded and hence in our opinion it has to pay interest on the same. Had the Petitioner made payments when demanded the Respondent would have invested the same somewhere and earned interest on it. Instead, due to the interim order of this Court the Petitioner retained the amount with it and earned interest on the same. In Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others, the Supreme Court observed: "the interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be

neutralized."

23. It may be mentioned that there is a misconception about interest. Interest is not a penalty or punishment at all, but is the normal accretion on capital. For example, if "A" has to pay a certain amount to "B" at a particular time, but he does not pay the same at that time but detains the money for a certain number of years, he earns interest on the same. Had "A" paid that amount to "B" at the time when it was payable then "B" would have invested that money somewhere (either in FDR or in some Scheme of a Bank or a Financial Institution or by purchasing some shares or other securities etc.). Hence, if "A" pays the amount to "B" after a lapse of time then in all fairness "A" should not only pay the principal amount but also the interest which he has earned thereon to "B". Money doubles in six years (due to compound interest). Hence Rs. 100 of today will become Rs. 200 after six years and Rs. 400 after 12 years. Hence if "A" had to pay "B" Rs. 100 at a particular time, but delays the payment by 12 years then in all fairness he should pay Rs. 400 to "B" after 12 years otherwise "A" will be in fact gaining Rs. 300 simply by delaying the payment. Hence even by losing a case he really wins it due to the interim order he has obtained.

24. Hence, in our opinion, ordinarily in all cases where a legal payment has been held up by an interim order of this Court, or for some other reason, then interest should also be awarded (unless prohibited by a statutory provision) otherwise the party even by losing the case really wins it. In the present case the Petitioner withheld the payment which it should have made more than ten years ago and has naturally earned interest on the same. Hence the Petitioner has not only to pay the amount demanded but also pay the interest at 12% per annum from the date of the demand notices to the date of payment and this payment must be made to the Respondent within two months along with the principal amount demanded.