

(2019) 04 DEL CK 0131

In the Delhi High Court

Case No : Civil Writ Petition No. 7806 Of 2014, Civli Miscellaneous No. 18331 Of 2014

Jindal Poly Films Ltd

APPELLANT

Vs

Director General Of Foreign Trade Prc Cell & Ors

RESPONDENT

Date of Decision : 22-04-2019

Acts Referred:

Foreign Trade (Regulation) Rules, 1993 — Rule 7(1)(k)

Foreign Trade (Development and Regulation) Act, 1992 — Section 14

Citation : (2019) 367 ELT 320

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Sandeep Sethi, Suruchi Aggarwal, Kirtiman Singh

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition, inter alia, impugning an order dated 14.10.2014 passed by respondent no.3 (Assistant Director General of Foreign Trade) under Rule 7.1(k) of Foreign Trade (Regulation) Rules, 1993 declaring the petitioner to be a defaulter and placing the petitioner under the "Denied Entry List". The import of the said order is that all pending / future applications filed by the petitioner for benefits / authorizations from the office of the Director General of Foreign Trade (DGFT) under the Foreign Trade Policy 2009-14 and the procedures therein, would be refused. In addition, the petitioner also impugns orders dated 25.11.2011 (communicating the decision of 01.11.2011); 01.10.2012 and 30.04.2013 passed by the Policy Relaxation Committee (PRC) of DGFT, wherein the petitioner's request for extension of the period of discharging export obligation under advance authorization No. 510136637 dated 27.08.2004 and for clubbing of the said license with advance license No. 0510096846 dated 22.07.2003 and advance license No. 0510266545 dated 21.06.2010 were denied.

2. Admittedly, the petitioner had filed to discharge his export obligation in respect of advance authorization (No. 050136637) dated 22.08.2004. In this regard, a show cause notice dated 04.07.2011 was issued to the petitioner. The petitioner did not respond to the said show cause notice, however, the petitioner made an application seeking extension of the period for discharging the export obligation and also sought clubbing of the advance license with two other licenses ? one dated 22.07.2003 and the other dated 21.06.2010. The petitioner claimed that it had exported 845 MT of excess quantity under the license dated 22.07.2003 and had exported 4262 MT of polyester film against the advance license dated 21.06.2010 without making any imports. The petitioner requested that if the aforesaid two licenses (License dated 22.07.2003 and 21.06.2010) were clubbed, the petitioner's export obligation would stand discharged.

3. The petitioner claims that it is entitled for clubbing of licenses in terms of paragraph 4.20 of the Handbook of Procedures (Volume-1) (hereafter "HoPv1") for the period 2009-14 (amended up to 23.08.2010), as applicable on 29.08.2011, being the date of the petitioner's application for clubbing of licenses. The respondents dispute the above and contend that since the exports were effected beyond the period of export obligation of the earlier authorization (license dated 22.08.2004), the facility of clubbing as provided under paragraph 4.20 of the HoPv1 is not available to the petitioner.

4. In view of the above, the principal controversy involved in the present petition is whether the petitioner is entitled to clubbing of the aforementioned licenses in terms of the Handbook of Procedures under the Foreign Trade Policy. The petitioner also assailed the impugned order dated 14.10.2014 on the ground that it has been passed on the basis that no documents were available on record. The petitioner's claim that the same is palpably erroneous since all relevant documents had been produced by the petitioner and were otherwise on the record of the respondents (DGFT).

5. Briefly stated, the aforementioned controversy arises in the following context:-

5.1 The petitioner is a public company and is, inter alia, engaged in the business of manufacturing and exporting polyester Film (PET Film) and Bi-axially and Polypropylene Film (BOPET Film). The petitioner claims to be one of the leading exporters of PET Film/BOPP and has also been awarded as a Trading House status. Respondent nos.1 to 4 are officials from the Office of Director General of Foreign Trade (hereafter collectively and severally referred to as "DGFT").

During the course of the business, the petitioner had applied for advance authorizations. The controversy relates to only advance authorizations (No. 0510096846 dated 22.07.2003; advance authorization No. 0510136637 dated 27.08.2004; and advance authorization No. 0510266545 dated 21.06.2010).

5.2 The license dated 27.08.2004 was issued to the petitioner under the provisions of duty exemption scheme of FTP 2002-2007 for import of goods without payment of goods as levied. According to the DGFT, the said

Authorisation was issued placing the Authorisation holder (the petitioner) under an export obligation for stipulated value and quantity to be fulfilled within a period of 36 months, i.e. by 26.08.2007. In terms of paragraph 4.24 and paragraph 4.25 of the Handbook of Procedures 2004-2009, the petitioner was required to submit documents as evidence for fulfilment of stipulated export obligation within two months from the date of expiry of said obligation period.

5.3 The aforesaid period for export obligation expired on 26.08.2007. A reminder in this context was issued to the petitioner on 10.09.2009 calling upon him to submit documents for redemption of the authorisation as per paragraph 4.24 of the Handbook of Procedures (HoP).

5.4 DGFT submitted that the petitioner failed to submit the required documents and instead submitted invoice wise detail of exports on 25.09.2009. Consequently, a show cause notice dated 04.07.2011 was issued to the petitioner for failing to fulfill its export obligation, however, the petitioner did not reply to the aforesaid show cause notice. The petitioner was also granted a personal hearing, and the same was attended by the representative of the petitioner on 18.07.2011, wherein he sought for one month's time to submit the requisite documents in terms of the aforesaid export obligation.

5.5 The petitioner claims that by a letter dated 23.08.2011, it submitted all the relevant documents showing details of export obligation under the Annual Advance License dated 27.08.2004, and further requested the DGFT for granting an approval for the extension of the Advance Authorisation and clubbing and redemption of all the aforesaid Advance authorisations (dated 22.07.2003, 22.08.2004 and 21.06.2010). In the said letter, it was stated that the petitioner had fulfilled its export obligation in respect to BOPP Film and Polyester MET Film, however, there was a shortfall of 5028 M.Ts in export quantity in respect to the Polyester Film.

5.6 Thereafter, the petitioner sent another letter dated 29.08.2011 requesting the respondents for granting an approval for the extension of the Advance Authorisation and clubbing and redemption of all the aforesaid Advance authorisations (dated 22.07.2003, 22.08.2004 and 21.06.2010), and provided requisite documents for the same. The Policy Relaxation Committee (PRC), in its meeting dated 01.11.2011, denied the said request by noting that "the gap between the above authorizations is substantial." The said decision was communicated to the petitioner by the impugned order dated 25.11.2011.

5.7 In the meanwhile, a public notice dated 13.10.2011 (Public Notice no. 79 of 2011) was issued amending the Handbook of Procedures (Volume-1) (HoPv1) with effect from date.

5.8 Thereafter, the petitioner submitted a representation dated 20.12.2011 stating that the amendment in the provision of clubbing, that is, paragraph 4.20 of the HoPv1 was introduced by a public notice on 13.10.2011 and thus, it was not applicable to the applications for clubbing made before the date of the said

public notice.

5.9 The petitioner's application was again rejected by the DGFT by a letter dated 01.10.2012, stating that "Justification and reasoning cited by the applicant are not convincing to the committee hence rejected the same reiterating the earlier decision of PRC meeting held on 01.11.2011."

5.10 On 12.04.2013, the petitioner filed another representation to the DGFT stating that the said public notice was not applicable in the case of the petitioner, since the petitioner had already made an application for clubbing on 23.08.2011 which was prior to the amendment, and during that period, there was no restriction of time gap between the authorisations as stated in the amendment.

5.11 The aforesaid application was once again rejected by the PRC in its meeting dated 30.04.2013, reiterating its earlier decision taken in its meeting dated 01.11.2011. The relevant extract of the said meeting is set out below:

"The Committee reiterated its earlier decision on PRC meeting dt.01.11.2011 and once again. If the applicant could not get this case regularized as per the prevalent provisions before the issuance of Public Notice 79 dated 13.10.2011, then relief cannot be granted now for the Authorization issued in 2003 and 2004 period as per the procedure prior to Public Notice 79 dt. 13.10.2011."

5.12 Thereafter, DGFT passed the impugned order dated 14.10.2014 declaring the petitioner as a defaulter and placing the petitioner in the Denied Entity List on the ground that the petitioner did not place on record any documents to prove that Export Obligation has been fulfilled against Advanced Authorization No. 0510136637 dated 27.08.2004.

Reasons and Conclusion

6. As observed above, the principal controversy involved in the present petition is whether the petitioner is entitled to clubbing of its three licenses in question. The petitioner claims that it had exported 845 MT of Polyester Films in excess of its export obligations under the annual advance license dated 22.07.2003. However, it had fallen short of performing its export obligations under the annual advance license dated 22.08.2004. In terms of the said license, the petitioner was required to export 3000 MT of BOPP Film; 1,425 MT of Polyester Met Film; and 21,000 MT of polyester Film. The petitioner claims that whereas it discharged its full export obligations in respect of BOPP Film and Polyester Met Film, it would only export 15,972 MT of polyester Film, which fell short of the export obligation to the extent of 5,028 MT. The petitioner claims that it had exported 4,262 MT of polyester Films against annual advance license dated 21.06.2010 and without importing any product. If the excess export of polyester film under the annual advance license dated 22.07.2003 and the export under the annual advance license dated 21.06.2010 are clubbed, the petitioner would have made good the deficit in export obligation in respect of annual advance license dated 27.08.2004. The Tabular statement as annexed with the petition is set out

below:-

Export details in terms of Quantities and values against all three Annual Advance Authorizations

Annual Advance Authorization No. & Date

Export Product

Qty to be exported w.r.t. imports made (MT)

Qty actually exported (MT)

FOB Value of exports actually made (INR)

0510096846 DATED 22.07.2003

POLYSTER FILM

14,775.00

15,618.00

1,420,485,253.00

0510136637 DATED 27.08.2004

POLYSTER FILM

21,000.00

15,972.00

1,518,360,700.00

0510266545 DATED 21.06.2010

POLYSTER FILM

-

4,262.00

624,049,339.00

TOTAL

35,775

35,852.00

3,562,895,292.00

7. The petitioner"s application dated 29.08.2011 seeking extension of period for export obligations and clubbing of the aforesaid license was considered by the Policy Relaxation Committee (PRC) at a meeting held on 01.11.2011 and the same was rejected, as the Committee was of the view that "the gap between the

above authorizations is substantial".

8. It was contended by Mr Sethi that the said decision was liable to be set aside, as the petitioner was entitled to facility of clubbing under paragraph 4.20 of the HoPv1 as applicable on the date of the petitioner's application dated 29.08.2011. At this stage, it would be relevant to refer to the provisions relating to facility of clubbing as set out in Handbook Procedure (HoP) as applicable on 29.08.2011. Paragraph 4.20, 4.20.3 and 4.20.4 of the said HoP are relevant and are set out below:-

"4.20 Facility of clubbing shall be available only for redemption/ regularisation of cases and no further import or export shall be allowed. For this facility, authorisations are required to have been issued under similar Customs notification even pertaining to different financial years. However in case of Authorisations issued in 2004-09 period or thereafter, Advance Authorizations with different customs notification can be clubbed.

xxxx xxxx xxxx

4.20.3 Facility is available only for Advance Authorisation(s) where there is shortfall in fulfilment of EO, and which is sought to be clubbed with an advance Authorisation(s) which is valid for imports. For expired Authorisation(s) with EO shortfall and which is sought to be clubbed with an advance Authorisation(s) which is valid for imports, applicant shall pay composition fee for EO period extension as per paragraph 4.22 below.

4.20.4 Wherever exports are effected beyond EO extension period (allowed vide paragraph 4.22 below) of earlier authorisation, no clubbing shall be permitted."

9. The petitioner has relied upon paragraph 4.20 of the HoPv1, which clearly provides that facility of clubbing would be available for redemption/ regularization of cases and not to further import or export.

However, paragraph 4.20 must be read in conjunction with paragraph 4.20.3 and 4.20.4 of the HoPv1. It is expressly provided under paragraph 4.20.3 that where the shortfall in fulfillment of export obligation is sought to be clubbed with an advance authorization which is valid for import, the applicant may not pay the composition fee for the period of extension as per paragraph 4.22 of the HoPv1. Paragraph 4.22 and sub-paragraph therein contained provisions for extension of export obligation in certain cases. In the present case, the export obligation period under an annual advance license dated 21.06.2010 had already expired. There is some controversy whether the said period was 18 months as contended on behalf of DGFT or 24 months as claimed by the petitioner. However, there is no dispute that the said period had expired. It is also not disputed that the maximum period, for which extension could have been granted under paragraph 4.22 of the HoPv1, has also expired. Mr Kirtiman Singh had contended that under the HoPv1 as applicable on the date of issuance of the advance authorization dated 22.08.2004 under paragraph 4.22 of the HoPv1, and HoPv1,

as applicable at the time of advance authorization dated 22.07.2003 was issued, the exporter was entitled to two extensions of six months each. The first extension was permissible on payment of composition fee of 1% of the unfulfilled FOB value of export obligation, and the second extension was subject to payment of composition fee of 5% of the unfulfilled FOB value of export obligation.

10. Paragraph 4.20.4 of the HoPv1 makes it explicitly clear that wherever the exports are effected beyond the export obligation extension period of earlier authorization, no clubbing would be permitted. Mr Sethi had earnestly contended that the export obligation period must be considered in reference to the licenses sought to be clubbed. This contention is, plainly, unpersuasive as it runs contrary to the plain language of paragraph 4.20.4 of the HoPv1, which expressly refers to the extension period of the earlier authorization. Thus, if exports made under the licenses issued at a later point of time are sought to be clubbed with authorization issued earlier, the clubbing facility can be provided only if the export obligation period of the authorization issued at a prior point of time allowed under paragraph 4.22 of the HoPv1 has not expired. In the present case, the petitioner had made no application for extension of the export obligation period under the license dated 22.08.2004 at the material time. As noticed above, the export obligation period had expired. Further, the maximum period for which extension could have been granted under paragraph 4.22 of the HoPv1 had also expired. The petitioner made an application for extension on 23.08.2011, which is much after the said period had expired.

11. In view of the above, the facility of clubbing of the licenses in question under paragraph 4.20 of the HoPv1 is unavailable to the petitioner. It is in the aforesaid context that PRC had considered the petitioner's request at a meeting held on 01.11.2011 and had decided to reject the same as "the gap between the above authorization is substantial". This Court finds no infirmity with the aforesaid decision.

12. The petitioner had once again made a representation by a letter dated 20.10.2011 contending that paragraph 4.20.3 of the HoPv1 had been amended by a public notice no. 79 dated 13.10.2011, however, the same was not applicable as the petitioner's application had been made prior to the date of the public notice.

13. It is relevant to state that by the aforementioned public notice No. 79 (RE-2010)/2009-14 dated 13.10.2011, paragraph 4.20 of the HoPv1 was amended by the DGFT. Sub-paragraph 4.20.3 of the HoPv1, as amended by the aforesaid public notice, reads as under:-

"4.20.3 Only such Advance Authorisations shall be clubbed which have been issued within 36 months from the date of issue of the earliest Authorisation that is sought to be clubbed, whether such Authorisations are valid or not."

14. Mr Sethi had earnestly contended that prior to such amendment, there was no restriction regarding clubbing of advance authorizations and an advance

authorization issued beyond 36 months could also be clubbed with the earlier authorization. The said contention is unmerited, as it fails to consider the restriction imposed under paragraph 4.20.4 of the HoPv1 as applicable prior to the amendment made in terms of the public notice dated 13.10.2011. Although, there was no specific period specified between the issuance of two authorization that could be clubbed, it was expressly stipulated that for the exports effected beyond the export obligation extension period of an earlier authorization, clubbing would not be permitted. Thus, necessarily, the exports made under the later authorization could be clubbed with the export obligation of the earlier authorization, provided the exports were effected within the export obligation period of the earlier authorization as extended under paragraph 4.22 of the HoPv1.

15. The PRC considered the petitioner's representation at a meeting held on 01.10.2012 and reiterated its decision taken on 01.11.2011.

The said decision cannot be faulted.

16. The petitioner once again made a representation claiming that it was entitled to clubbing of advance authorizations on payment of composition fee, as contemplated under sub-paragraph 4.20.3 of the HoPv1 as applicable prior to the issuance of the public notice dated 13.10.2011. The petitioner once again reiterated in its representation dated 12.04.2013 that sub-paragraph 4.20.3 of the HoPv1, as introduced by the public notice dated 13.10.2011, was inapplicable to the application made by the petitioner and, therefore, its request for clubbing of the licenses be considered.

17. The PRC considered the aforesaid representation dated 12.04.2013 in its meeting held on 30.04.2013 and reiterated its earlier decision. The relevant minutes of the said meeting are set out below:-

"The Committee reiterated its earlier decision of PRC meeting dt. 01.11.2011 and once again. If the applicant could not get this case regularized as per the prevalent provisions before the issuance of Public Notice 79 dated 13.10.2011, then relief cannot be granted now for the Authorisation issued in 2003 and 2004 period as per the procedure prior to Public Notice 79 dt. 13.10.2011."

18. Mr Sethi had contended that the aforesaid minutes indicated that the PRC had considered the petitioner's case under the procedure as amended by the Public Notice No. 79 dated 13.10.2011. He submitted that the same was erroneous, as the petitioner's application ought to be considered as per the provisions of HoPv1 as applicable on 29.08.2011 (the date on which the petitioner had made its request for clubbing of licenses). The said contention is, plainly, unmerited. The observations made by the PRC on 30.04.2013 must be read in the proper context. As is clear from the opening sentence, the PRC had reiterated its decision taken at the meeting held on 01.11.2011, the observation that no relief could be granted to the petitioner for authorizations issued in 2003-04. The further observations made by PRC only clarify that the petitioner's

case had been considered as per the prevalent provision as existing prior to the issuance of the Public Notice dated 13.10.2011. The said observations cannot by any stretch be interpreted to mean that the PRC had considered the petitioner's request on the basis of paragraph 4.20 of the HoPv1 as amended by the Public Notice dated 13.10.2011. In view of the above, this Court finds no infirmity with the decision of the PRC in rejecting the petitioner's application for clubbing of advance licenses.

19. Mr Sethi had further contended that the observation that the licenses could not be clubbed after a substantial gap was erroneous, as DGFT had in the past clubbed licenses where the time period between the issue of the said license exceeded to 36 months. The petitioner had affirmed that its advance license No. 0510196846 dated 26.12.2006 had been clubbed with AA No. 0510263004 dated 26.04.2010. In this regard, Mr Kirtiman Singh handed over a copy of the relevant extract of the meeting of the PRC held on 01.01.2013, which indicates that PRC had decided to grant extension up to 48 months in the export obligation period with regard to the earlier authorization, namely, AA No. 0510196846 dated 26.12.2006. Thus, the exports under the license issued later (AA No. 0510263004 dated 26.04.2010) was within the extended export obligation period of the earlier license dated 26.12.2006.

20. The next issue to be examined is the petitioner's challenge to the order dated 14.10.2014. Mr Sethi had contended that the said order is proceeded on the basis that the petitioner had not provided any documents to prove that export obligations had been fulfilled against the advance authorization dated 27.08.2004 and the said conclusion was patently erroneous. He earnestly contended that the petitioner had provided all documents as is apparent from the contents of the letter dated 29.08.2011.

21. The aforesaid contention is unpersuasive. The petitioner was required to discharge its export obligations under the advance license dated 27.08.2004 within a period of 18 months (as is apparent from the copy of the license annexed alongwith the petitioner). However, according to the counter affidavit filed on behalf of the DGFT, the said obligation is required to be completed within a period of 36 months. Admittedly, the petitioner was required to submit documents to evidence fulfillment of the export obligation within a period of two months from the date of the expiry of the said period. However, the petitioner failed and neglected to do so. In view of the above, the DGFT issued a reminder dated 10.09.2009 advising the petitioner to submit the relevant documents. However, the petitioner did not do so. Thereafter, on 04.07.2011, DGFT issued a show cause notice under Section 14 of the Foreign Trade (Development and Regulation) Act, 1992 for non-fulfillment of export obligation. The petitioner had not submitted any document in response to the said notice as well. Thereafter, the petitioner was afforded a personal hearing and the Senior Manager of the petitioner appeared for a personal hearing held on 18.07.2011 and sought for one month's time to submit the export obligation documents. It is affirmed on

behalf of DGFT that no such documents were submitted. The petitioner disputes the same and claims that large number of documents were filed by the petitioner under the cover of its letter dated 23.08.2011.

22. Although, there is some dispute with regard to the said letter, however, without going into the said controversy, it is apparent from the plain reading of the letter dated 23.08.2011 that it was not in response to the show cause notice but an independent request for providing clubbing facility and approval for extension of the export obligation. Thus, concededly, the petitioner had not discharged its export obligations as required. In view of the above, the decision of DGFT to pass an order under Rule 7.1(k) of the Foreign Trade (Regulation) Rules, 1993 cannot be faulted. Thus, no interference with the impugned order dated 14.10.2014 is warranted.

23. In view of the above, the petition is unmerited and is, accordingly, dismissed. The pending application is disposed of.