
(2010) 01 KAR CK 0018
In the Karnataka High Court
Case No : Writ Petition No. 2437 of 2007

Karnataka Malladi Biotics Ltd.

APPELLANT

Vs

Director General of Foreign Trade

RESPONDENT

Date of Decision : 07-01-2010

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 11, 11 (2), 16
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15 (1)

Citation : (2010) 255 ELT 30

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : T. Rajeswara Sastry and Associates, for the Appellant; Rosa Paramel and N.R. Bhaskar, CGSC, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—Heard the Counsel for the petitioner and the respondents 1 to 3. The Counsel for the Union of India, though represented, remains absent.

2. The petition is filed questioning the order passed by the second respondent, rejecting the appeal filed by the petitioner on the ground that recommendations of the Board for Industrial Finance and Reconstruction (hereinafter referred to as the "BIFR" for brevity) provide only for waiver of customs duty and did not concern the fiscal penalty imposed under the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the "1992 Act" for brevity).

3. The background to this is that the petitioner which is a company under the Companies Act, 1956 is a manufacturer of bulk drugs at its factory in Tubinakere, Mandya District in the State of Karnataka. It manufactures amongst others, Dextromethorphan Hydro Bromide USP/BP and exports the same. It had obtained an Export Promotion Capital Goods Licence during March 1996 from the third respondent which enabled the petitioner to import certain capital equipments at concessional rate of customs duty and was permitted to import capital goods worth Rs. 2,338,882/- equivalent to US \$ 64,987 CIF with a

condition that the petitioner would export the finished goods worth US \$ 259,948, which is approximately four times the CIF value of the imports and earn equivalent amount from any convertible foreign currency within a period of five years from the date of license. The petitioner accordingly imported goods as permitted in the said licence between March 1996 and December 1996 and thereby saved customs duty to the extent of Rs. 5,38,525/-. The petitioner commenced commercial production in March 1997. However, the petitioner was faced with cancellation of export orders and a sudden crunch in the price of certain products under the domestic and international markets and consequently, the cash-flow dried-up and seriously affected the working capital of the petitioner compelling the petitioner to suspend the manufacturing activities in June 1997. Though the petitioner did manage to revive the operations in August 1998, the production levels were low and therefore, the petitioner incurred heavy losses during the financial years 1997-1998 and 1998-99. That due to erosion of the net worth of the company, it was declared as a sick industry and a reference was made u/s 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985 in April 1999 to the BIFR.

The BIFR, on hearing the petitioner's case declared it as a sick unit and appointed IDBI as the Operating Agency. The rehabilitation proposal having been submitted and on long deliberations, a revised proposal was also submitted. The Operating Agency submitted its report on 25-7-2002, with the petitioner's proposal before the Board. The Board, after considering the report, circulated the Draft Rehabilitation Scheme and obtaining consent of all concerned including the JDGFT, Bangalore. The scheme was finally sanctioned as per Annexure-B to the writ petition.

The Commissioner of customs had thereafter issued a Demand-cum-Show-cause Notice for the differential customs duty of Rs. 5,38,525/- which was said to be payable on the goods imported under the licence and it also realized and appropriated an amount of Rs. 4,86,800/- by enforcing bank guarantees which had been executed by the petitioner in this regard. Thus, the balance amount of customs duty payable was about Rs. 51,725/-. In the meanwhile, JDGFT, Bangalore, raised a demand on the petitioner and initiated action to impose penalty on the petitioner under the provisions of the 1992 Act and the petitioner's request to consider the rehabilitation package approvals, which would require waiver of the penalty, was rejected by an order dated 16-7-2004 and a penalty of Rs. 23,38,882/- was imposed on the footing that there was non-fulfillment of export obligation by the petitioner. The petitioner was also debarred from obtaining any kind of licence under the provisions of the 1992 Act. An appeal having been filed against the said order before the Additional Director General - Foreign Trade, New Delhi, the same was dismissed only on one ground, namely that the relief granted by the BIFR was in relation to customs duty liability and would not include the fiscal penalty levied under the provisions of the 1992 Act, which is sought to be challenged in the petition.

4. The Counsel for the petitioner while reiterating the above sequence of events would submit that in identical circumstances, the Delhi High Court in *Dencap Electronics Private Limited v. ADGFT* 2006 (194) E.L.T. 389 (Delhi.) after an analysis of the provisions of Section 11 of the 1992 Act in extenso and placing reliance on a judgment of the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, has held that no penalty can be imposed u/s 11(2) of the 1992 Act in the circumstances where non-fulfillment of export obligation was attributable to the factors beyond the control of the assessee and where there is no violation of the provisions of the 1992 Act at the time of importation and the Counsel would submit that this decision would apply on all fours to the present case on hand. The Counsel also places reliance on Section 16 of the 1992 Act which reads as follows:

16. The Central Government, in the case of any decision or order, not being a decision or order made in an appeal, made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, may on its or his own motion or otherwise, call for and examine the records of any proceeding in which a decision or an order imposing a penalty or redemption charges or adjudicating confiscation has been made and against which no appeal has been preferred, for the purpose of satisfying itself or himself as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit.

Provided that no decision or order shall be varied under this section so as to prejudicially affect any person unless such person

(a) has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied, and

(b) has been given a reasonable opportunity of making representation and, if he so desires, of being heard in his defence.

And the Counsel would submit that it is clear from the tenor of the said section that it was necessary for the first respondent to have considered the revision application by the petitioner and the same having been rejected, only on the ground of maintainability is illegal. The Counsel would also point out that having regard to the object of the Sick Industrial Companies (Special Provisions) Act, 1985, the grant of relief of rehabilitation by the Board, would necessarily encompass all such liabilities which are sought to be enforced as against the petitioner of being waived and once such a relief is granted, the question of implementation by the concerned entity is axiomatic for otherwise, the very relief granted by way of rehabilitation is set at naught and would submit that the BIFR having taken into consideration the customs duty liability arising under the 1992 Act and that customs duty having been waived in terms of the rehabilitation package that was approved by the Board and recommendations having been made in this regard for waiver of the customs duty, penalty, which is inextricably

linked with the liability to pay customs duty, it would follow that it would also stand waived and it is for the competent authorities to implement the same as a matter of course unless challenged by way of an appeal. In the facts and circumstances of the case, recommendations of the Board having attained finality, the demand now made is, therefore, contrary to the recommendations of the Board and would militate against the interest of the petitioner and the relief granted by the Board would be set at naught if the impugned demand is not quashed and therefore, would seek interference of this Court.

5. While the Counsel for the respondents 1 to 3, while reiterating the statement of objections that are filed on behalf of the respondents, would submit that the imposition of penalty is in accordance with the provisions of the Act and having regard to the terms under which the exemption was granted, there is failure on the part of the petitioner, on the face of it, in complying with the requirements subject to which such exemption was granted. In any event, the question of waiver of fiscal penalty is not in the hands of the respondents 1 to 3 and in this regard, would place reliance on the modified order passed by the BIFR, dated 24-3-2004 which reads as follows:

7. The Bench having perused the letter dated 8/20-1-2004 sent by the office of the Joint Director General of Foreign Trade to the Board observed that para-8(E) (ii) of the Sanctioned Scheme would need to be modified as the customs duty and or interest thereon can be considered for waiver only by Ministry of Finance (Dept. of Revenue) and/or Chief Commissioner of Customs, Chennai Sea Port and not by the DGFT.

8. Having heard the submissions made by those present in the review hearing and after taking into account, the material facts on record, the Bench directed as follows:

(i) the company would submit on an immediate basis a draft proposal for the merger of KMBL and EBPL after obtaining concurrence from the UTI, SBI and KIADB who have not yet accorded their concurrence in the said merger. IDBI (MA) will examine and send it to the Board;

(ii) the company would liquidate the arrears amounting to Rs. 46,49,293/- by making the due payment to KIADB within a period of one month from today, as agreed to by Id. Counsel for the company at the hearing; and

(iii) para 8(E)(ii) of the Sanctioned Scheme needs to be modified in the light of Para 7 of these proceedings.

And therefore the Counsel would submit that the writ petition preferred against these respondents is misconceived and the respondents are bound to act in accordance with the Act and the terms under which the petitioner was granted the relief. The waiver, if any, is to be considered by Ministry of Finance, Department of Revenue or the Chief Commissioner of Customs, Chennai Sea Port and not by the DGFT. The Counsel, therefore, would submit that the petition as

against respondents 1 to 3 ought to be dismissed. Given these facts and circumstances, as rightly contended by the Counsel for the petitioner, the rehabilitation package is intended to bring the petitioner - company out of a state of distress and put it back on the rails. The BIFR having recommended waiver of customs duty, it follows that for the period that the petitioner remained sick would have to be ignored in the petitioner considering whether had complied with any requirement of the export obligations. It follows therefore that the concerned respondents afford the waiver of Fiscal penalty since they have not chosen to challenge the recommendations made by the BIFR, which has attained finality. Insofar as respondents 1 to 3 having been directed to waive the customs duty in the first instance is concerned, as rightly pointed out by the Counsel for the respondents 1 to 3, the same has been duly modified and it is now made clear that the waiver of fiscal penalty is to be considered by the Ministry of Finance or such other competent authority and is not within the competence of the DGFT. Having regard to this position, in the opinion of this Court, the very object of the Sick Industrial Companies (Special Provisions) Act, 1985 and the recommendations of the BIFR made insofar as the petitioner is concerned, would be set at naught if the petitioner is not granted the benefit of waiver of the fiscal penalty that is imposed. Since the recommendation made by the BIFR has attained finality, it is as a matter of course that the concerned authority would have to pass appropriate orders for waiver of the penalty for otherwise, the very relief granted under the Act is set at naught and the object of the Act is defeated.

6. Therefore, the writ petition is allowed. Annexure-A and D are quashed. The respondents are restrained from recovering the fiscal penalty sought to be imposed till such time that the concerned Ministry of Finance takes a decision as to the waiver of the fiscal penalty which has been recommended by the BIFR. The fourth respondent is therefore directed to consider the case of the petitioner for waiver of fiscal penalty as recommended by the BIFR and to pass appropriate orders at the earliest. Respondent No. 3 is directed to refund the sum Rs. 5.00 Lakh deposited by the Petitioner in terms of the order of this Court dated 21-3-2007, within a period of 4 weeks from the date of receipt of a copy of this order.