

(2016) 03 GUJ CK 0021
In the Gujarat High Court

Case No : Special Civil Application No. 10589 of 2015 with S.C.A. Nos. 10590-10592 of 2015

Krishna Trading Co.

APPELLANT

Vs

Addl. Director General of Foreign Trade

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Citation : (2016) 336 ELT 449

Hon'ble Judges : Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Paresh M. Dave with Paritosh Gupta, Advocates, for the Petitioner; Devang Vyas, Advocate and Ms. Maithili D. Mehta, SC, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.(Common Oral)—Since more or less similar facts are involved in all these petitions, the same were taken up for hearing together and are disposed of by this common judgment.

2. For the purpose of convenience, reference is made to the facts as stated in Special Civil Application No.10589/2015.

3. The petitioner firm established a factory on 22nd December, 1999, for manufacturing textile goods like yarns. The petitioners had applied for various licences under the Exim Policy framed under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. Various licences had been granted to the petitioners by the respondents herein and the petitioners had also utilised licence by importing materials and goods. It is the case of the petitioners that the export obligations flowing from such licences have also been discharged by the petitioners in compliance with the provisions of the Exim Policy. It appears that the respondents herein received instructions from the Directorate of Revenue Intelligence (hereinafter referred to as "the DRI") not to issue any further licences to the petitioners herein and, therefore, when the petitioners

applied for an advance licence in the prescribed form on 12th December, 2005, by a communication dated 16th December, 2005, the respondent informed the petitioners that the application/request for advance licence could not be considered in terms of the letter received from DRI, Ahmedabad. By another letter dated 16th December, 2005, the petitioners were informed that their request for advance licence could not be considered in view of the letter of the DRI and that the petitioners should take up the matter with the concerned DRI, Ahmedabad. Thereafter, a notice dated 23rd December, 2005 came to be issued to the petitioners proposing to put the petitioners under the Denied Entities List under Rule 7(1) of the Foreign Trade (Regulations) Rules, 1993. The petitioner firm filed a detailed reply dated 12th January, 2006 and also submitted various documents like certificate of an independent engineer, application for removal of goods from the petitioners' factory in AR-3, documents showing receipt of the goods sent by the petitioners by various customers who had been Export Oriented Undertakings, agreements between the petitioner firm and prospective customers who had also been 100% EOUs, etc. to establish that the instructions and/or report received by the respondent from DRI, Ahmedabad were not reliable and no proceedings against the petitioners were maintainable only on the basis of such reports/instructions. By a Defaulter Order No. 01/AM2007, dated 30th May, 2006, the respondent herein held that it was evident that the petitioners had diverted duty free imported raw material into the domestic market thereby violating actual user condition mentioned in the advance licence. Accordingly, the petitioners were declared as defaulters and were also refused issuance of further licences under Rule 7(1)(a)(c) of the Foreign Trade (Regulation) Rules. It appears that pursuant to the Defaulter Order, the petitioner firm/partners/Directors had filed separate replies to the respondent explaining how the Defaulter Order was unjustified and why no further action should be taken against them. It appears that subsequently, no further action was taken by the respondent as regards penalty, etc. However, since licences were being denied to the petitioner firm, the petitioners approached this Court by way of a writ petition being Special Civil Application No. 1569/2007 which came to be disposed of by a common order dated 5th February, 2010 whereby the petitioners were relegated to approach the concerned officer who was directed to decide the matter in accordance with law within six months from the date of the said order. Thereafter, the petitioners approached the Commissioner of Central Excise, Surat-I for deciding the Central Excise cases, if any, pending against the petitioners but no development took place for a long time. The petitioners also requested the Joint DGFT, Surat in writing for closing their pending files in respect of licences allotted in past and also for issuing/granting new licences considering the petitioners' application on merits; however, there was no response. In the aforesaid premises, the petitioners once again approached this court by way of a writ petition, being Special Civil Application No. 10600/2012, praying that the defaulter order and the decision of the Joint DGFT in not issuing/granting any licences to the petitioners' firm under the Exim Policy be quashed and set aside. It appears that a group of eight petitions had been filed and by a

common judgment and order dated 1st November, 2012, all the eight petitions came to be disposed of in the following terms :-

"22. Under the circumstances, the petitions are disposed of with following directions :-

(1) The orders impugned in Special Civil Applications No. 10600/2012, 10602/2012, 10605/2012 and 10607/2012 are quashed. The proceedings are placed back before the respondent No. 1 for fresh consideration and disposal in accordance with law. It is directed that if the respondent No. 1 desires to place reliance on any material which is adverse to the petitioners, the same shall be supplied to the petitioners permitting the petitioners to make their representation thereon.

(2) Subject to the petitioners co-operating with such further hearings, respondent No. 1 shall take a final decision as expeditiously as possible and in any case, not later than 28-2-2013.

(3) Once such decision is taken on the show cause notice proceedings and depending on the outcome thereof, applications of the petitioners for grant of fresh advance licences shall be processed in accordance with law and as expeditiously as possible.

23. In group of petitions being Special Civil Applications No. 10601/2012, 10604/2012, 10606/2012 and 10609/2012, respondent No. 1 is directed to take a final decision on the applications of the petitioners for being granted EODC. In the facts of the case, it is provided that if respondent No. 1 is prima facie not inclined to grant such certificate, he shall briefly indicate his tentative reasons thereof, communicate the same to the petitioners permitting them to make representations thereupon. Subject to the petitioners co-operating with expeditious disposal of such an issue, the respondent No. 1 shall take a final decision within three months from the date of receipt of a copy of this order.

24. To avoid any possibility of failure of communication, it is provided that the petitioners shall personally or through their representatives appear before respondent No. 1 on 8th November, 2012 between 11.00 a.m. to 12.00 p.m. his preliminary date is fixed only for convenience and it will be open for the respondent No. 1 to re-schedule this date for any future hearings."

It appears that despite the direction of the court to decide the matters within a period of three months from the date of receipt of a copy of the order, a further show cause notice dated 26th June, 2013 came to be issued by the Joint DGFT, Surat heavily relying on the intensive and serious investigation carried out by the officers of the DRI and calling upon the petitioners to show-cause as to why action as proposed in the notice should not be taken against them. In response thereto, the petitioners' advocate submitted a letter dated 19th July, 2013 before the Joint DGFT, Surat. By an Order-in-Original dated 14th August, 2013, the Joint DGFT, Surat held that no licences/authorizations and EODCs were to be

issued in favour of the petitioner firm. Being aggrieved, the petitioners preferred an appeal before the Additional DGFT, Bombay. By the impugned order dated 16th February, 2015, the Additional DGFT, Bombay upheld the order passed by the Joint DGFT, Surat and further imposed fiscal penalty of Rs. 25 crores on the petitioner firm under Section 11(2) of the Foreign Trade (Development and Regulation) Act, which has given rise to the present petitions.

4. Mr. Paresh Dave, learned advocate for the petitioners vehemently assailed the impugned order by submitting that the same is wholly illegal and without jurisdiction, inasmuch as, penalty thereunder is imposed on the petitioner firm without there being any proposal to impose penalty on the petitioner firm in the proceedings. It was submitted that the proceedings against the petitioners are concluded in gross contravention and violation of the directions issued by this Court and, therefore, there is an abuse of the process of law on the part of the respondents. It was urged that the specific directions issued by this Court for taking a final decision in the matter not later than 28th February, 2013 has been violated with impunity by the respondents and that the specific direction to supply to the petitioners any material on which the respondents desire to place reliance has also not been obeyed by the second respondent and an adverse order has been passed against the petitioners in violation of both the directions issued by this Court. It was pointed out that though the Joint DGFT, Surat had been directed to decide the case as expeditiously as possible, the authority decided the case much later only in August, 2013. Referring to the order dated 1st November, 2012 passed by this Court, it was pointed out that the Court had specifically directed the Joint DGFT, Surat that if that authority desires to place reliance on any material which is adverse to the petitioners, the same should be supplied to the petitioners permitting them to make their representation thereon. Inviting attention to the order passed by the Joint DGFT, Surat, it was pointed out that he has placed reliance upon certain details and reports about the investigation; however, no such material was provided to the petitioners. It was submitted that, therefore, there is a complete violation of the principles of natural justice. Referring to the impugned order, it was pointed out that the appellate authority has also placed reliance upon various materials which have not been provided to the petitioners, and therefore, the impugned order also suffers from the vice of breach of principles of natural justice apart from the fact that the order to the extent it imposes fiscal penalty is without authority of law, inasmuch as, no proposal for such penalty was ever made nor were the petitioners put to notice in that regard. Referring to the above order passed by this Court, it was pointed out that the court has observed that the investigation made by the DRI may be a starting point; however, the respondents were required to decide the proceedings independently. That there is an utter violation of the principles of natural justice, inasmuch as, the material relied upon is not furnished to the petitioners. It was submitted that in view of the fact that the Export Obligation Discharge Certificates (EODCs) have not been issued, the bank guarantees furnished by the petitioners are lying with the respondents and the

petitioners are facing undue prejudice on account of the same. It was argued that in the petitioners' appeal, no such penalty could have been passed without following the due procedure in law. It was submitted that when the Court relegated the petitioners to the proceedings before the second respondent, it was not permissible for the second respondent to issue the second show cause notice, that too, beyond the period stipulated by the Court for concluding the matter and hence, the second notice is wholly without jurisdiction. It was submitted that in the aforesaid premises, the impugned orders passed by the respondents are required to be set aside. It was argued that in view of the fact that the business of the petitioners have been closed down, the question of issuing fresh licences may not arise; however, the EODCs applications made by the petitioners are to be decided independently and expeditiously.

5. Opposing the petitions, Ms. Maithili Mehta, learned standing counsel for the respondents placed reliance upon the contents of the affidavit-in-reply filed on behalf of the respondents wherein their stand is that the petitioner herein by not joining the Directorate of Revenue Intelligence or the Central Excise authorities had tried to obtain undue advantage. It is the case of the respondents in the affidavit-in-reply that inquiries made by the DGFT, Surat reveal that M/s. Khan Garments with whom the petitioners were carrying on business only on paper, is defunct, and not in operation for a long period and no person is available on the said address. The unit was sealed during the course of investigation by DRI, Hyderabad on 19th July, 2001 and apparently did not function thereafter and that the said unit has misused the EOU/DEEC/DFRC scheme. It was further pointed out that the Development Commissioner, Vishakhapatnam SEZ had also reported that M/s. Raja Textiles was granted LOP dated 20th October, 2000 for manufacture and export of processed fabric of polyester/cotton spun etc. The unit had started production on 1st October, 2003 and had not effected any export as per their records and was defunct since 2004 and has not submitted any periodical reports. It was submitted that the investigation done by the DRI, Ahmedabad, confirmed in the report that the petitioner and other firms had sold off raw materials imported against all advance licences without utilising such raw material in compliance with the conditions of advance licences and, therefore, the DGFT, Surat office was not in a position to issue any advance licence/authorization because of violation of terms and conditions of licences. Besides, the Directorate of Revenue Intelligence also made it clear that the petitioners do not have any facilities for manufacturing the goods and in fact, the very existence of the factory of the petitioners and other firms is doubtful. Referring to the impugned order, it was pointed out that the concerned authority has found various irregularities and that the firms to which the petitioners are reported to have made supplies are defunct and not in existence. It was submitted that the petitioners were duly furnished with the show cause notice issued by the DRI and, therefore, were aware of the material which was in the possession of the respondent authorities and hence, the submission that the relevant material was not furnished to the petitioners cannot be accepted. It was submitted that the

investigations which have been carried out by the customs authorities clearly show that the petitioners have not supplied the products to the 100% EOUs and have not fulfilled the necessary conditions, under the circumstances, the respondents were wholly justified in refusing to grant the advance licences to the petitioners. It was submitted that considering the nature of the illegalities committed by the petitioners, the penalty imposed under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992 is wholly justified. It was, accordingly, urged that the respondents have duly complied with the directions issued by this Court while passing the impugned order and hence, there is no warrant for interference by this Court.

6. From the facts noted herein above, it is apparent that in connection with the show cause notice issued by the respondents, the petitioners had approached this Court by way of writ petitions being Special Civil Application No. 10600/2012 and allied matters. Such petitions came to be disposed of by this Court by issuing the directions which have been extracted herein above, The facts as emerging from the record reveal that pursuant to the order dated 1st November, 2012 passed by this Court, the second respondent after a considerable delay and much beyond the time stipulated by this Court, by an order dated 14th August, 2013 decided not to issue any licences/authorizations and EODCs to the petitioner firm. According to the said respondent, the investigation conducted by DRI, Ahmedabad had been communicated in the show cause notice dated 5th February, 2007 citing therein the gross and glaring misuse of the goods imported by the firm under various advance authorizations issued by that office and that such show cause notice issued by the DRI is available with the firm. It is also the case of the second respondent that the office of the said respondent had also on its part verified the fact of misuse of the scheme from its own sources. In view of the serious misuse of the scheme by the firm, the respondents had invoked Section 7(1)(c) of the Foreign Trade (Regulation) Rules, 1993 and Section 9 of the Foreign Trade (Development and Regulation) Act, 1992 and, therefore, decided not to issue any licences/authorizations and EODCs to the firm.

7. From the above order, it is evident that in effect and substance, the second respondent has placed reliance upon the contents of the show cause notice issued by the DRI and accepting the same to be gospel truth, has based its conclusions thereon. On a reading of the order in its entirety, it is clear that the same does not discuss the nature of the irregularities committed by the petitioner, nor does it spell out as to what was the nature of the misuse of the scheme detected by the office of the second respondent upon verification through its own sources.

8. In appeal, the first respondent - Additional Director General of Foreign Trade has, in view of the fact that the letters granting personal hearing to the party in three of their cases were received back undelivered from postal authorities with remarks "Address moved", found that the same creates doubt as to whether the appellants therein were in existence at the given address or not. After referring

to the submissions made on behalf of the petitioners, the first respondent has recorded her findings from Paragraph 18 onwards. In Paragraph 20 of the order, the first respondent has found that the Joint DGFT had carried out independent investigation and had specifically investigated the case of purported supply of material to M/s. Khan Garments and M/s. Raja Textiles to whom the petitioners claim to have supplied the goods and the reports received from the concerned authorities were contrary to the claim of the petitioners. In Paragraph 22, it has been observed that the independent investigation was carried out by Joint DGFT, Surat. Report was called from the Commissioner of Central Excise, Hyderabad and from the Development Commissioner, Vishakhapatnam. In Paragraph 23, reference is made to the report dated 8th September, 2006 of the Central Excise office to DGFT, Surat and the subsequent paragraph refers to independent investigation carried out by the Joint DGFT and the report received from the Development Commissioner, SEZ, Vishakhapatnam vide letter dated 19th October, 2006. Having regard to the dates of the reports referred to in these paragraphs, it is evident that all this material relates to a period much before Special Civil Application No. 10600/2012 and allied matters came up for hearing before the High Court. In Paragraph 25 of the impugned order, reference is made to the above reports and the statement of Nirmal Tarachand Sharma as recorded by the DRI under Section 108 of the Customs Act, 1962. In the next paragraph, reference is made to the DRI findings and in Paragraph 27, reference is made to the adjudication order dated 7th May, 2014 made by the customs authorities pursuant to the show cause notice issued by DRI on 5th February, 2007. It may be noted that the order-in-original which was subject matter of challenge before the first respondent is dated 14th August, 2013 and was passed much prior to the date of the adjudication order. The first respondent has thereafter referred to and relied upon the findings recorded by the Commissioner of Customs, JNCH and the order issued on 12th May, 2014 and inter alia referred to independent investigations carried out by the Commissioner of Customs, JNCH. In Paragraph 28, the first respondent has noted that during the course of appellate proceedings, the petitioners had not been able to satisfy the authority that they had not misused the imported duty free goods nor had they had been able to satisfy the authority that they have not violated the actual user condition and terms and conditions attached to advance authorizations. The final findings are recorded in Paragraphs 29 to 31 of the order which read thus :-

"29. Based on the above, I find that opportunity has been given and has been availed of by the party for hearing before the Jt. DGFT, Surat subsequent to the order of High Court of Gujarat at Ahmedabad dated 5-2-2010. Also due investigation have been carried out independently by Jt. DGFT, Surat on whether the Resultant product which was to be manufactured out of imported material was actually supplied to the 100% EOU unit of M/s. Khan Garments, Andhra Pradesh and M/s. Raja Textiles, Hyderabad. I find that after due investigation carried out by JDG, Surat, by way of calling detailed report from the concerned authorities it is seen that the resultant product has not been supplied to 100%

Export Oriented Units contrary to what was claimed by the appellant. The appellant has also not been able to prove either before the Jt. DGFT, Surat or before this Authority that they have not misused the imported duty free goods and has not violated the Actual User conditions of the Advance licences defeating the purpose for which it was issued. Therefore, it is seen that the appellant has wrongly availed the import duty exemption benefit against import of approximately CIF value of Rs. 70 Crores without fulfilling its required Export Obligation and therefore have caused considerable damage to the public exchequer.

30. Further, also I find that due investigations have meticulously been carried out by the Customs Authorities, JNCH and the Commissioner of Customs has conclusively concluded after carrying out detailed investigation that the appellant have not supplied the Resultant Products to 100% EOUs nor have they fulfilled the AU condition. Further, the Commissioner of Customs during his investigation has found that the imported material on which duty waiver has been taken by the appellant has been sold in the local market violating AU condition.

31. I, therefore, hold the appellants guilty of contravening the provisions of Rule 13(2) of the Foreign Trade Regulations Rules, 1993 i.e. for disposing the materials imported duty free against the advance licences in a manner contrary to the conditions in violation of the terms and conditions of the advance licences."

In the light of the above findings recorded by her, the first respondent has upheld the order-in-original passed by the second respondent and considering the gravity of the offence and the fraud committed by the first petitioner, in exercise of powers vested in her under Section 15(2) of the Foreign Trade (Development and Regulation) Act, 1992, imposed a fiscal penalty of Rs. 25 crores on the company under Section 11(2) of the said Act.

9. On a plain reading of the impugned order and more particularly, considering the findings recorded by the first respondent, it is evident that the first respondent has placed reliance upon the investigation carried out by the Commissioner of Customs, JNCH as well as by the Development Commissioner, SEZ, Vishakhapatnam. However, it is the specific case of the petitioners that these reports have not been furnished to the petitioners. This Court in its order dated 1st November, 2012 made in Special Civil Application No. 10600/2012 had specifically directed the Respondent No. 2 that in case that respondent seeks to place reliance on any material which is adverse to the petitioners, the same shall be supplied to the petitioners permitting the petitioners to make their representation thereon. Nonetheless, the aforesaid directions appear to have been totally ignored by the respondents herein while passing the impugned orders, inasmuch as, both the respondents have placed reliance upon the investigation carried out by the DGFT through its own sources, which has not been furnished to the petitioners. Evidently therefore, the impugned orders suffer from the breach of principles of natural justice.

10. Moreover, by the impugned order, a fiscal penalty of Rs. 25 crores has been imposed upon the petitioner firm under Section 11(2) of the Foreign Trade (Development and Regulation) Act. From the record of the case as referred to herein above, it is evident that at no point of time were the petitioners put to any notice as regards any proposal to impose any penalty upon them. Under the circumstances, the order of penalty, which has been imposed without issuing any notice to the petitioners in respect thereof, clearly suffers from the vice of breach of the principles of natural justice.

11. Another aspect of the matter is that the respondents in the impugned orders have placed reliance upon the investigation carried out by the DRI and the investigation carried out independently by the DGFT, Surat. However, in neither of the orders have either of the said respondents referred to or discussed any of the material which has been placed on record by the petitioners. Significantly, in Paragraph 6.7 of the affidavit-in-reply filed on behalf of the respondents, it has been stated that in view of the orders of the Gujarat High Court, the DGFT, Surat office reviewed all the cases of the firm and forwarded copies of the ARE-3 submitted by the petitioner firm to the Central Excise office for confirmation of supplies made by the firms. Thereafter, the concerned Central Excise office sent a letter dated 18th March, 2013 to the DGFT, Surat confirming that all ARE-3 are verified and found correct. DGFT, Surat wrote a letter on 22nd April, 2013 to the Central Excise office for further verification of ARE-3 and it was found that in reply to a DGFT letter dated 28th August, 2006, a reply dated 8th September, 2006 was received from the office of the Superintendent of Customs and Central Excise, Patancheru, which revealed that M/s. Khan Garments with whom the petitioner was carrying business only on paper is defunct and not in operation for a long period and no person is available at the said address etc. Evidently therefore, contradictory information has been received by the respondents from the Central Excise authorities at Surat and from the authorities at Patancheru. However, no explanation is forthcoming as to why the reports of the Central Excise authorities at Surat confirming the supplies made by the petitioners are sought to be discarded and the inquiry made from the Customs and Central Excise authorities at Patancheru is found to be more reliable. Thus, it appears that all material in favour of the petitioners has been discarded and only that material which points against the petitioners has been considered by the authorities. Therefore, the impugned order also suffers from the lack of fair play on the part of the authorities.

12. On a perusal of the affidavit-in-reply, the stand of the respondents appears to be that the DRI has instructed them that the petitioners' EODC applications should not be considered. In the opinion of this Court, the respondents herein, namely, the Additional Director General of Foreign Trade and the Joint Director General of Foreign Trade are independent authorities constituted under the Foreign Trade (Development and Regulation) Act, 1992 and are not governed by the directions of the Central Excise or the Customs authorities. Therefore, the respondent authorities are not justified in acting as per the dictates of the DRI,

Ahmedabad instead of carrying out independent inquiry on its own and acting in terms thereof. When the respondents decide the applications of the petitioners, they are expected to consider the same independently without in any manner being swayed by any instructions issued by the DRI. It is evident, therefore, that the impugned orders have not been passed independently but appear to have been passed under the dictates of the DRI whereby the DRI authorities have directed the authorities not to grant the EODC applications made by the petitioners. The impugned orders, which suffer from various legal infirmities as discussed herein above, therefore, cannot be sustained.

13. Having regard to the period which has elapsed since the issuance of the show cause notices, the business of the petitioners has come to a standstill and hence, at this stage, the petitioners are not interested in obtaining advance licences and hence, the petitioners have not pressed the petitions qua considering their applications for licences. It is, however, clarified that as and when the petitioners apply for advance licences, the respondent authorities shall consider the same in accordance with law and on merits.

14. For the foregoing reasons, the petitions succeed and are accordingly allowed. The impugned order dated 16th February, 2015 passed by the first respondent, Additional DGFT, Bombay as well as the order dated 14th August, 2013 passed by the second respondent are hereby quashed and set aside in each of the petitions. The matters are restored to the file of the second respondent to be decided afresh in accordance with law. It is further clarified that in case the second respondent is desirous of placing reliance upon any material adverse to the petitioners, other than the material on record, copies of the same shall forthwith be furnished to the petitioners and they shall be given an opportunity to deal with the same. Thereafter, the proceedings shall be concluded within a period of three months thereof. Rule is made absolute accordingly in the aforesaid terms with no order as to costs.