(1988) 04 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition No. 650 of 1980

Mettur Beardsell Ltd. APPELLANT

Vs

Apparels Export Promotion Council RESPONDENT

Date of Decision : 11-04-1988

Acts Referred:

Citation : (1988) 36 ELT 257

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Judgement

1. The 1st petitioner is a limited company and it says that it is a recognised export house. The 2nd petitioner is the Director of the said company. For the sake of convenience, both the petitioners are hereinafter referred to as "the petitioners". They are engaged in the business of, among other things, export of ready-made garments through a division which has its office in Bombay. It has been stated in the petition, that the petitioners have exported since 1975 ready-made garments worth over Rs. 385 lakhs.

2. The 1st respondent, according to the petitioners, is a body set up by the 3rd respondent for the purpose of controlling, regulating and issuing a variety of export licences for the export of ready-made garments. Mr. Rawal, appearing for the 1st respondent, however, stated that the 1st respondent, hereinafter referred to for the sake of convenience as "the respondent", is a company registered u/s 25 of the Companies Act. It is not necessary to go into that controversy for the disposal of this petition.

3. However, it is admitted that the respondent is entrusted with the implementation of a policy for the control and regulation of export trade in respect of certain items. In the present case, the respondent, whose name is Apparels Export Promotion Council, is, as its name implies, concerned with the export of readymade garments or apparels. The Policy Statement dated 11th of November, 1978 set out that 60 per cent of the total quotas would be granted for the first half of the year, i.e. for the period January to June 1979, and 40 per

cent would be allocated during the second half of the year, namely July to December 1979. The petitioners applied for certificates, which are hereinafter referred to as "the quota certificates", some time in the month of December 1978. This application was made on behalf of the petitioners in anticipating of certain contracts from Italy where they had an agent. The name of the agent was S & F Exports. One Mr. Ferrari was their representative with whom negotiations had been conducted when he was in Bombay. The petitioners received the certificate on or about 24th of January 1979. It may be stated at this stage that the delay in the issuance of the certificates was partly, at any rate, on account of some stay orders issued by some of the High Courts where this Policy had been challenged. From what has appeared in some of the documents annexed to this petition, it can be surmised that those stay orders were vacated on or about 23rd of January 1979 on probably even earlier.

4. It has been mentioned in the petition that Mr. Ferrari, the representative of the petitioner''s agent in Italy, had insisted that the quota certificates ought to be available with the petitioners on or before 20th of January 1979 in order that the customers from whom Mr. Ferrari was booking orders would confirm the contracts for the purchase of the apparels sold by the petitioners. Unfortunately for the petitioners, the quota certificate could not become available to the petitioners on that petitioners on that date and as a result, Mr. Ferrari wrote a letter to the petitioners that the orders dated 30th of November 1978 for 20,000 pieces of men''s shirts had been cancelled by the customers because the petitioners were not able to obtain the quota certificates for the above orders due to uncertainly by the Government of India in allocating them. He expressed the hope that in future the quota certificate would be obtained sufficiently well in advance. The petitioners made an attempt to get the orders revived by approaching Mr. Ferrari again, but that attempt failed.

5. On 3rd of February 1979, the respondent issued a circular wherein it was mentioned that due to the stay orders issued by some of the High Courts, considerable time was lost in the issue of quota certificates to exporters. These stay orders were subsequently vacated. In the meantime, some of the exporters faced the prospects of their Letters of Credit expiring and even cancellation of the orders. In order to avoid this, some of them shipped their consignments under what is called FCFS (first come first served) ready goods from 1st of January 1979 in order to adhere to their overseas commitments. This was done by them obviously to meet their contractual obligations, because they had entered into contracts. However, part of the quotas allotted to them remained unutilised. The Textile Commissioner in Bombay desired that details of the shipments effected under FCFS ready goods should be supplied so that the matter could be taken up with the Ministry of Commerce. Two forms were enclosed along with this circular. One form was proforma ''A'' which required a statement showing shipments effected under FCFS ready goods, while proforma ''B'' required the details of Letters of Credit and/or contracts cancelled due to late receipt of quota certificates.

6. Purporting to act pursuant to this circular, the petitioners submitted a letter on 15th of February 1979, filling, up the forms as required by the circular of 3rd of February 1979, and submitted the same to the respondent. This was subsequently followed by some reminders, but on 10th of October 1979, the respondent addressed a letter to the Manager of the Mercantile Bank at Bombay, who had, as the Policy required, given two guarantees for the due performance of the commitments pursuant to the quota certificates obtained by the petitioners from the respondent. The petitioners protested against this action of the respondent by writing a letter dated 25th of October 1979. Further letters were also addressed by the petitioners. Ultimately, on 22nd of May 1980, the respondent informed the petitions that the petitioners had not utilised 90 per cent of the quota and thus failed to fulfil the obligations in terms of performance bond/bank guarantees furnished by them. Reference was made to the justification for the non utilisation of the quota given by the petitioners and it was mentioned that it was not accepted because it did not fall within the ambit of the guidelines approved by the Government. The petitioners were also informed that the representations/appeals made by the petitioners to the Government had been rejected. The petitioners were, therefore, directed to deposit a sum of Rs. 24,500/- by 6th of June 1980, failing which the respondent would be constrained to stop issue of further quotas. A similar letter in respect of Rs. 19,000/- covered by another bank guarantee was also issued on or about the same date. It is these two letters which are challenged by the petitioners in this petition under Article 226 of the Constitution of India.

7. Mr. Advani, the learned Advocate appearing in support of the petition, has given all the necessary facts which I have summarised above. He has also taken me through the annexures to the petition consisting of the Policy, circulars issued by the respondent and the correspondence between the petitioners and the respondent. It has been contended by Mr. Advani that the respondent is in duty bound to cancel and return the bank guarantees given by the petitioners because, in the first place, the delay in the issue of the quota certificates was not on account of the fault of the petitioners. Secondly, he argued that the petitioners, acting upon the circular issued by the respondent on 3rd of February 1979, had surrendered the quota certificates because of circumstances which were beyond their control. The circular dated 3rd of February 1979, which was further clarified by another circular dated 12th of February 1979, clearly held out a promise on the part of the respondent that the respondent would return the bank guarantees in those cases where the exporters were unable to fulfil their obligations under the quota certificates because of the delay in the issuance of the said quota certificates. The delay in the issuance of the quota certificates itself was, as already mentioned earlier in the judgment, on account of the stay orders issued by some of the High Courts.

8. The third question that arises is whether the respondent is under any obligation either under the Policy which governs the issue of the quota certificates or under any guidelines issued by the Government for the

implementation of the said Policy or, as at some stage argued by Mr. Advani, on the principle of promissory estoppel.

9. Several arguments have been advanced on behalf on both the sides. Mr. Rawal, the learned Advocate appearing for the respondent, has contended that the petitioners have not demonstrated that there is any obligation on the part of the respondent to return the bank guarantees in the admitted non-performance of the obligation by the petitioners pursuant to the quota certificates. I have gone, with the assistance of the learned Advocates, through the Policy for the year 1979, which has been annexed as Ex. ''A'' to the petition. It has not been possible for me to find from this any obligation on the part of the respondent to return the bank guarantees or to relieve an exporter from the obligations arising for the non-performance under the quota certificate. Once the quota certificate is issued on the application made by an exporter, the exporter is bound to show performance in accordance with the export obligations mentioned in the said certificate. There is one paragraph, namely, paragraph 16, in the Policy which gives certain relief to an exporter when there is on his part a short-fall in the performance. The said paragraph is in the following terms :-

"16. Compensation : (a) If the utilisation within the validity period of quota allotment is not less than 90% the full amount of performance bond will be refundable on production of evidence of export i.e. Airway Bill/Bill of Lading; Bank Certificate; EP copy of shipping bill duty endorsed by Customs.

(b) If the utilisation of quota allocation is less than 90% the full amount of performance bond will be forfeited.

(c) Export in conditions of Force Majeure, if the surrender of quota is in excess of 25% of allotment Government may consider debarment of such shippers for quota allotment, in the future."

10. From clause (c) of the said paragraph, it is seen that when the surrender of quota is in excess of 25 per cent of the allotment in the future. Similarly, clause (b) says that if the utilisation of the quota allocation is less than 90 per cent, the full amount of performance bond would be forfeited. On the facts of this case, it is clear that there has been zero utilisation of the quota allocation on the part of the petitioners and, therefore, in terms of paragraph 16 of the Policy, the petitioners are bound to suffer the forfeiture of the entire amount covered by the bank guarantees.

11. However, Mr. Advani says that this clause of forfeiture was to a great extent relieved by the policy decision which was announced by the circular of 3rd of February 1979. I have already summarised the contents of that circular. It has not been possible for me to uphold the contention of Mr. Advani that this particular circular of 3rd of February 1979, read with the circular of 12th of February 1979, relieves the forfeiture which must visit upon those exporters who have not been able to do the required performance pursuant to the quota certificates. If one reads these two circulars carefully, as has been pointed out by

Mr. Rawal, it is easily seen that in those cases where the exporters took certain steps in order to save their contracts by substituting the ready made goods for the contractual goods which they would have been otherwise required to export pursuant to the quota certificates, it was thought that certain steps regarding relieving them from forfeiture as per the policy decision were to be taken. In the case of the petitioners no such action was taken by them to meet their contractual obligations. This was because the petitioners did not have any contractual obligations. Admittedly, no contracts had been entered into when the petitioners received their quota certificates on 24th of January 1979 because earlier they had already been told by their agent in Italy that the customers in Italy had cancelled their orders. The petitioners were aware that their quota certificates had become ineffective and, therefore, they made some attempt to redeem their losses by requesting Mr. Ferrari to persuade the customers in Italy to reconsider their decision, but this was of no avail. In my opinion, therefore, the circulars of 3rd of February 1979 and 12th of February 1979 are of no assistance to the petitioners.

12. It has been next argued that the respondent must be held bound by the promise contained in these circular of 3rd of February 1979 and 12th of February 1979. The doctrine of promissory estoppel has been invoked. But, in my opinion, the contention based upon this doctrine is misplaced on the facts of this case. The question of estoppel arises only when a party makes a representation to another party, that another party acts on that representation and that another party would not have acted but for that representation and acting upon the said representation, that another party has altered his position prejudicially to itself. The question of promissory estoppel is a mixed question of law and fact. Neither the necessary law nor the necessary facts have been pleaded in the petition.

13. Apart from the paucity or absence of pleadings, I do not see how it could be said that the petitioners have acted upon the representation, if any, contained in the circulars of 3rd of February 1979 and 12th of February 1979 and that they would not have acted otherwise except for the said representation. There is no question of their altering their position to their prejudice in any manner by surrendering the quota certificates which, in any case, had become useless to them. The invocation of the doctrine of promissory estoppel in the instant case, therefore, in my opinion is misplaced.

14. Mr. Advani has also relied upon certain averments in the petition wherein it has been stated that the petitioners contacted the 1st respondent and one officer of the 1st petitioner company had a meeting with Mr. Sarjit Singh, an officer of the 1st respondent in the Delhi office, who, according to the petitioners, was satisfied that the petitioners failure was bona fide. It has also been alleged that Mr. Sarjit Singh promised that he would be issuing instructions for the return of the relevant performance bond/guarantees, if it was confirmed by the petitioners that the petitioners had returned the quota certificates within 60 days from the date of receipt of the quota certificates. The petitioners say that they have done

so and, in view of the promise given by Mr. Sarjit Singh on behalf of the respondent, the respondent should be compelled to return the bank guarantees or should be compelled not to act upon the bank guarantees. Mr. Advani pointed out that there has not been any affidavit-in-reply to this petition either on behalf of the first two respondents or on behalf of the 3rd respondent, which is the Union of India. That itself, in my opinion, is not a sufficient ground for directing that the respondent should not act upon the bank guarantees given on behalf of the petitioners. Mr. Sarjit Singh''s designation has not been mentioned in the petition, nor has it been shown that he was authorised to hold out any promise on behalf of the respondent. Thirdly, Mr. Sarjit Singh could not give in law any promise which would be inconsistent with the Policy Statement governing the right and obligations of the parties. For these reasons, I am reluctant to hold that the respondent are under any obligation not to act upon the bank guarantees.

15. Mr. Rawal had initially raised a preliminary objection that the 1st respondent is neither a State nor any statutory body which is amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. Since I went into the merits of the position, I have not thought it fit to decide that question

16. It is hoped that merely because the petitioners have filed this petition and have not paid the amounts pending the petition, the respondent will not debar the petitioners from being considered for the quota certificates in future.

17. In the result, the petition falls. Rule is discharged but with no order as to costs. This order is stayed till 15th of June 1988.