

(2013) 04 BOM CK 0024

In the Bombay High Court

Case No : Writ Petition No. 1913 of 2012

M/s. Oriental Export Corporation

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-04-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Trade (Development and Regulation) Act, 1992 — Section 15, 15(1), 9, 9(2), 9(5)

Citation : (2013) 4 ALLMR 111 : (2013) 293 ELT 481 : (2013) 21 GSTR 24 : (2013) 119 SCL 403

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Mayur Khandeparkar with Mr. Jamshed Ansari, for the Appellant; A.J. Rana with Mr. Salil M. Shah and Mrs. S.V. Bharucha instructed by y Mr. J.P. Chaturvedi for Respondents 1 to 3 and Mr. S.P. Bharti, for the Respondent

Final Decision : Dismissed

Judgement

1. The Petitioner seeks a direction to the Respondents, more particularly the Director General of Foreign Trade, to revalidate, renew and extend the period of the Duty Free Import Authorization ("DFIA") License. The Petitioner seeks to challenge the orders passed by the Foreign Trade Development Officer between 18 May 2011 and 5 July 2011 (Exhibits-D-1 to D-10) declining to revalidate the DFIA licenses on the ground that the request could not be considered in terms of paragraph 2.13.1 of the Hand Book of Procedures. Between 23 April 2008 and 25 November 2010, 24 DFIA Licenses were issued to the Petitioner by the Joint Director General of Foreign Trade. According to the Petitioner, it complied with the export obligation following which the Third Respondent issued a certificate of discharge of the export obligation. The Petitioner applied for revalidation of the licenses, which request was rejected as noted by diverse orders annexed at Exhibits-D-1 to D-10 to the petition.

2. A preliminary objection has been raised to the maintainability of the petition

on the ground that a statutory alternate remedy was available to the Petitioner which the Petitioner failed to avail of within the period prescribed and the petition under Article 226 of the Constitution filed after the expiry of the prescribed period ought not to be entertained.

3. To appreciate the submission a reference to the relevant statutory provisions will be necessary. Section 9(2) of the Foreign Trade (Development and Regulation) Act, 1992 provides as follows:

9. Issue, suspension and cancellation of licence.-

(1)...

(2) The Director-General or an officer authorised by him may, on an application and after making such inquiry as he may think fit, grant or renew or refuse to grant or renew a licence to import or export such class or classes of goods or services or technology as may be prescribed and, grant or renew or refuse to grant or renew a certificate, scrip or any instrument bestowing financial or fiscal benefit, after recording in writing his reasons for such refusal."

(3)...

(4)...

Section 9(5) which provides an appeal, reads as follows:

9(5) An appeal against an order refusing to grant, or renew or suspending or cancelling, a licence, certificate, scrip or any instrument bestowing financial or fiscal benefits shall lie in like manner as an appeal against an order would lie u/s 15.

Section 15(1) provides as follows:

15. Appeal.- (1) Any person aggrieved by any decision or order made by the Adjudicating Authority under this Act may prefer an appeal,-

(a) Where the decision or order has been made by the Director General, to the Central Government;

(b) Where the decision or order has been made by an officer subordinate to the Director General, to the Director-General or to any officer superior to the Adjudicating Authority authorised by the Director-General to hear the appeal,

within a period of forty-five days from the date on which the decision or order is served on such person:

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the aforesaid period, allow such appeal to be preferred within a further period of thirty days:

Provided further that in the case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained

unless the amount of the penalty or redemption charges has been deposited by the appellant:

Provided also that, where the Appellate Authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose.

4. Under sub Section 2 of Section 9 of the Foreign Trade (Development and Regulation) Act, 1992, the Director General or an officer authorized by him, may, on an application and after making an inquiry, grant or renew or refuse to grant or renew a license to import or export such class or classes of goods as may be prescribed. Sub Section 5 of Section 9 stipulates that an appeal against an order refusing to grant or renew a license or suspending or cancelling a license certificate, scrip or instrument visiting financial or physical benefits shall lie as an appeal against an order would lie u/s 15. Section 15(1) stipulates an appeal against an order of an adjudicating authority. An appeal lies to the Central Government against an order of the Director General. Where the order of adjudication has been passed by an officer subordinate to the Director General, an appeal lies to the Director General or to any officer superior to the adjudicating authority prescribed by the Director General. Sub Section 1 of Section 15 prescribes a period of 45 days from the date of service of the decision of the order for filing an appeal. Under the proviso, the Appellate Authority is empowered to allow the appeal to be preferred within a further period of thirty days if it is satisfied that the Appellant was prevented by sufficient cause from preferring the appeal.

5. There is no dispute before this Court, during the course of hearing, that the orders of the Foreign Development Officer were subject to the remedy of an appeal u/s 9(5) read with Section 15, since the effect of those orders is to deny the request for renewal or revalidation. The Petitioner failed to avail of the statutory remedy within the period of forty five days or even within the further period of thirty days prescribed by the proviso to Section 15(1). The petition before this Court was filed only on 11 May 2012. Undoubtedly the jurisdiction under Article 226 of the Constitution can be exercised in an appropriate case notwithstanding the existence of an alternate remedy which is provided by the statute. For instance, where an order is passed in violation of the principles of natural justice, recourse to the statutory alternate remedy is not a bar to the maintainability of a writ petition under Article 226 of the Constitution *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, . But ordinarily the exercise of jurisdiction under Article 226, in the face of an alternate remedy, can only be by way of an exception where an order has been passed without jurisdiction or in violation of fundamental rights or in breach of the principles of natural justice. In the present case, the Petitioner failed to espouse the alternate remedy which is available and has approached this Court much after the period prescribed by the statute has expired. Such a petition, in our view, cannot be

entertained. To do so would be to allow a circumvention of a statutory provision which the writ jurisdiction cannot permit. Fiscal statutes and regulatory enactments create specific statutory remedies against orders of adjudication by quasi judicial bodies. A period of limitation is provided. Article 226 cannot be taken recourse to where within the limitation provided by law, the statutory remedy was not availed of.

6. On merits it has been urged on behalf of the Petitioner that the ground on which revalidation was refused was that revalidation was not permissible in view of the terms of paragraph 2.13.1 of the Hand Book of Procedures. This is questioned. In view of our finding on the issue of maintainability, the second question on merits will not arise. However, for the sake of completeness, we will deal with the submission on merits hereafter. For the reasons which we now indicate, there is no substance in the contention on merits.

7. Paragraph 4.72 of Chapter-V of the Foreign Trade Policy stipulates that once an export obligation has been fulfilled, a request for transferability of the authorization may be made before the concerned registering authority and once transferability is endorsed, the authorization holder may transfer the DFIA. Paragraph 4.23 provides for the grant of one revalidation for a period of six months from the date of expiry. Paragraph 2.13 of the Hand Book of Procedures provides that the Regional Authority ("R.A.") concerned may revalidate the import authorization on merits for six months from the date of expiry of the validation. An export license can only be revalidated by the R.A. concerned on the recommendation of the DGFT for six months at a time and for a maximum of twelve months from the date of expiry of the validity. Paragraph 2.13.1 stipulates, however, that no revalidation of a freely transferable authorization shall be permitted unless the validity has expired while in the custody of the customs authority/R.A. In the present case, the export licenses which are annexed as Exhibits D-1 to D-24, all have an endorsement of transferability. Therefore, in terms of paragraph 2.13.1, revalidation of such freely transferable authorization was not permissible unless the validity had expired while in custody of the Customs authority/R.A. In the affidavit-in-reply filed by the Respondents it has been stated that the Petitioner while applying for revalidation did not state that the licenses expired under the custody of the Customs authority/R.A. nor was any certificate produced from the Customs authorities to this effect. The averment in the affidavit-in-reply has not been controverted. In these circumstances, plainly even on merits, the Petitioner was not entitled to the grant of revalidation.

8. For these reasons, we have come to the conclusion that the petition is not maintainable on the ground that the statutory alternate remedy which was available to the Petitioner, was not availed of and the prescribed period u/s 15 has elapsed. However, we have also found, on evaluating the alternate submission of the counsel for the Petitioner, that there is no merit in the grievance. The petition shall accordingly stand dismissed. There shall be no order

as to costs.