
(2003) 02 DEL CK 0039
In the Delhi High Court
Case No : CWP No. 7380 of 2001

Mukta Sons

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-02-2003

Acts Referred:

Citation : (2003) 2 AD 645 : (2003) 103 DLT 508 : (2003) 43 SCL 616

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Ajay Bhatnagar, for the Appellant; Navin Chawla, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—Under the provisions of Foreign Trade (Development and Regulation) Act, 1992 (for short 'the Act'), respondent No. 1 notified the Export and Import Policy for the period 1992-97 (hereinafter referred to as 'the EXIM Policy'), under the provisions of para 88 C of this EXIM Policy a total quantity of 3 kgs. of gold from the Minerals & Metals Trading Corporation (MMTC) on 1st July, 1994 vide contract No. L-0963 dated 30th June, 1994. It may be mentioned that in para 88 various schemes for export of gold/silver jewellery and articles are stipulated. Para 88 C deals with " Gold and Silver jewellery and articles Export Promotion and Replenishment Scheme" and reads as under:

"88 C. Gold and Silver jewellery and articles Export Promotion and Replenishment Scheme:"

Against export of gold/silver jewellery and articles, the scheme provides for replenishment of gold/silver through the designated branches of SBI or any other agency nominated by the Ministry of Commerce, at a price indicated in the certificate issued by the SBI/agency after purchase of gold/silver. The scheme shall be limited to exports which are supported by irrevocable letter of credit, payment of cash on delivery basis or advance payment in foreign exchange. Export of gold jewellery may also be allowed on collection basis (documents

against acceptance). The exporter has the option to obtain gold/silver from SBI in advance. On presentation of required documents, appropriate Release Order and Gem Replenishment license may be issued by the licensing authority.

The value addition will be calculated with reference to the value of gold content (including wastages) and silver content (without wastages) at the price at which the gold and silver is booked by SBI. The minimum value addition for gold and silver jewellery/articles shall be 15% and 25% respectively."

2. In terms of the aforesaid scheme, after getting the gold from the MMTC, the petitioner was required to export the gold jewellery made from the said supply of gold, within a period of 120 days, i.e., from 1st July, 1994 to 27th October, 1994. For fulfillment of its obligation, the petitioner furnished a bank guarantee of Rs.12 lacs which was the actual cost of gold prevailing on the date of advance as fixed by the MMTC. Another bank guarantee in the sum of Rs.2,70,000/- was also furnished for difference between domestic and international price of gold and other Government duties/levies and customs duty livable on that quantity which is not exported. Clause 152 (1) of the Hand Book of Procedures- Volume-1 states the procedures which is to be followed for exporting gold jewellery under the Scheme specified in para 88 C of Export Promotion. As per clause 152 (1), export against an export order shall pertain to a single buyer overseas. This export was allowed by air freight and Foreign Post Office through the Customs House at Bombay, Calcutta, Madras, Delhi, Jaipur, Bangalore and Kochi as mentioned in para 152 (7).

3. It is the case of the petitioner that it manufactured in time the gold jewellery articles for exports to a single buyer in United Arab Emirates(UAE) in terms of clause 152 (1) of the Hand Book of Procedure- Volume-I as per scheme stipulated in para 88 C. It is further alleged that when the petitioner was in the process of export of the manufactured plain jewellery out of the gold supplied by the MMTC to the single buyer in UAE , the epidemic of plague in India in September, 1994 spread like wild fire resulting in banning of air flights to India by a number of foreign countries. This unprecedented crisis due to spread of killer disease created considerable anxiety worldwide, while also exacting a heavy economic toll in India. In financial terms the plague's toll was much greater, costing the Indian economy excess of \$ 600 million. Many countries stopped air and ship traffic to and from India. The foreign buyer was from UAE where the air flights from India were not permitted to land. Due to chaos prevalent and adverse publicity, the foreign buyer over telephone to petitioner conveyed that he was not interested to receive any export consignment from the petitioner and the contract was rescinded by him. The petitioner thus alleges that because of aforesaid reason it could not export within the stipulated period solely due to spread of epidemic of plague over which it had no control. The petitioner accordingly made request to respondent No. 2 on 27th October, 1994 for extension of period for export obligation to enable it to find out another buyer. Pending this extension it also located a buyer and finalised the terms and

conditions with him on the condition that supplies would be received by it well in advance before Christmas i.e., before 25th December, 1994. However, extension was received by it from respondent No. 2 only on 16th January, 1995 by which time Christmas was already over and Therefore this new buyer also backed out and refused to purchase the jewellery. The petitioner, in these circumstances, made further request for extensions on 23rd January, 12th and 13th February, 1995. However, in the meantime, the MMTC invoked both the bank guarantees in November, 1994 thus cost of full amount of gold as well as national and international price difference.

4. On 16th August, 1995 the respondent No. 4 issued a show cause notice to the petitioner alleging that it had failed to discharge its export obligation and Therefore why penalty be not imposed u/s 11(2) of the Act for violation of clause 88 C of Export Promotion. The petitioner sent reply dated 25th August, 1995. Thereafter respondent No. 4 fixed personal hearing on 18th April, 1996 but the petitioner could not attend the same due to illness of his daughter and hospitalisation of its manager. The petitioner sent a letter for fixing another date. The petitioner alleges that no reply was received and instead impugned order dated 5th February, 1998 was passed imposing penalty of Rs.20 lacs. The petitioner preferred appeal there against on 28th September, 1998 and in terms of Section 15 of the Act it sought personal hearing and also moved application for dispensing with pre deposit of penalty. On this application of pre-deposit order dated 12th January, 1999 was passed asking the petitioner to furnish bank guarantee of Rs.2 lacs. The petitioner however did not furnish this bank guarantee on the alleged ground that as it had suffered heavy losses in business since October, 1994 it was not possible for it to furnish the bank guarantee. For non-furnishing of bank guarantee, respondent No. 3 dismissed the appeal of the petitioner vide order dated 11th June, 1999. The petitioner filed review petition seeking review of this order but did not receive any order thereon. In the meantime on 23rd October, 2001, petitioner received letter from respondent No. 5 for deposit of Rs.20 lacs which was the penalty imposed upon it failing which recovery proceedings were threatened. At this stage, the petitioner filed the present writ petition challenging Order- in-Original dated 5th February, 1998 and Order- in-Appeal dated 11th June, 1999.

5. From the factual matrix narrated above, it is clear that the appeal of the petitioner was dismissed because it could not comply with the order of furnishing bank guarantee in the sum of Rs.2 lacs. The petitioner was allowed time on two occasions, 5th March, and 9th April, 1999 for this purpose, before the case was listed for hearing before the Appellate Committee on 11th June, 1999 on which date the petitioner's appeal was dismissed. This order was received by the petitioner in July, 1999. The petitioner did not take steps to challenge the said order at that time. It is only when recovery proceedings were initiated against the petitioner by issuing recovery order dated 23rd October, 2001 calling upon it to deposit the penalty amount that the petitioner filed the present writ petition. Accordingly this writ petition deserves to be dismissed on the ground of delay

and laches above. However, since the arguments were heard in detail, I proceed to deal with the matter on merits as well.

6. The petitioner has primarily raised three grounds to challenge the impugned orders:

(i) The petitioner firm has not been granted opportunity of hearing to present its case which amounts to violation of principles of natural justice.

(ii) The respondents are not entitled to impose penalty u/s 11(2) of the Act for violation of the EXIM Policy after invoking the Bank guarantees.

(iii) That order in appeal is vitiated since the same has not been considered/ passed by all the four members, Constituting the Appellate Committee.

7. In so far as first argument is concerned, I do not see any substance therein. As far as proceedings before the adjudicating authority are concerned, show case notice dated 25th August, 1995 was served upon the petitioner to which it submitted its reply also. Thereafter, it was granted personal hearing on 27th December, 1995. As per the averments made in the counter affidavit, case was fixed for hearing on 9th February and 18th April, 1996. On these two dates also the petitioner failed to appear and in these circumstances the adjudicating authority was forced to proceed ex-parte and passed the impugned order dated 5th February, 1998.

8. In so far as proceedings before the Appellate Committee are concerned, as per petitioner's own showing, it could not comply with the order of furnishing bank guarantee of Rs.2 lacs inspire of giving two opportunities for this purpose. If petitioner was aggrieved against that interim order, it could challenge the same at that stage which it failed to do. Instead the petitioner waited for the fateful day, i.e., 11th June, 1999 when the appeal was dismissed for non-compliance with the interim order. Not only this, as already pointed out above, even after receiving this order, the petitioner did not approach the court immediately. In these circumstances, it cannot be said that there is violation of principles of natural justice.

9. In so far as argument of the petitioner to the effect that no action could be initiated u/s 11(2) of the Act for violation of EXIM Policy after invoking the bank guarantees, the same also is without any substance. Admittedly two bank guarantees cover only the cost of the gold which was supplied to the petitioner. As far as penalty proceedings are concerned, they are of different nature and respondents were authorised to initiate the same by virtue of powers contained in Section 11(2) of the Act for failure on the part of the petitioner to fulfill its export obligation. Therefore, petitioner is not correct in its submission that merely because the bank guarantees are invoked which cover the cost of gold, no penalty could be imposed.

10. In so far as third contention of the petitioner is concerned, argument raised was that since order in appeal was not passed by the four members Constituting

the Appellate Committee, the same is vitiated as not passed by proper quorum. In order to appreciate this contention, we will have to first examine the Notification dated 31st December, 1993 Constituting the Appellate Committee. This Notification reads as under:

"S. No. 1059 (E), In exercise of the powers conferred by clause (b) of sub-section (1) of Section 15 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), the Central Government hereby authorises the officers specified in column 3 of the Table below to function as Appellate Authority against the orders passed by the Adjudicating Authorities authorised by the Central Government u/s 13 of the said Act and specified in column 2 of the said Table.

TABLE ----- S.	No.	Designation	of	Adjudicating
				1.
		Controller of Imports & Exports		2. Assistant Director General of Foreign Trade
		Additional Director General of Foreign Trade		3. Deputy Director General of Foreign Trade
		4. Joint Director General of Foreign Trade		5. Addl. Director General of Additional Secretary in the Foreign Trade Ministry of Commerce aided by two Joint Secretaries and a Director of that Ministry.

11. As per the aforesaid Notification in those cases where the adjudicating authority is the Additional Director General of Foreign Trade (which is the case herein), the Appellate Authority would be:

"Additional Secretary in the Ministry of Commerce aided by two Joint Secretaries and a Director of that Ministry". It was submitted by learned counsel for the respondents that the Appellate Authority is the Additional Secretary in the Ministry of Commerce. This Authority is simply aided by the two Joint Secretaries and a Director of that Ministry. Therefore, according to the learned counsel, the Appellate Authority consists of the Additional Secretary in the Ministry of Commerce who is to be aided by three other designated officials and thus it cannot be said that the Appellate Authority consisted of four officers.

12. There appears to be force in the contention of the respondents. As per the aforesaid Notification, it is the Additional Secretary in the Ministry of Commerce whose compulsory presence is required. Even if all other three officials who have to aid him are not present and one or the other officials is missing, it cannot be said that the Appellate Authority is not properly constituted. The word "Aid" has been defined in Black's Law Dictionary to mean "to support, help, assist or strengthen". The New Webster's Dictionary also defines "Aid" to mean "support, assistance, the person or thing that aids or yields assistance, and auxiliary". It is evident from the said definition that the words "aided by" in the aforesaid Notification do not imply that the presence of the other three officials whom the Additional Secretary is aided by is mandatory at the time of hearing of the

appeal.

13. We have to bear in mind the word "Aided" in contra distinction to the words 'consists' of/comprise of". To understand this distinction, one may refer to provisions of certain other enactments. Section 20 of the Consumer Protection Act provides for composition of the National Commission which is in the following words:

"20. Composition of the National Commission - (1) The National Commission shall consist of:-

(a) a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President;

(Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of India;)

(b) four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration one of whom shall be a woman....."

14. Similarly, Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 provides for establishment and constitution of the Commission reading as under:

"5. Establishment and Constitution of the Commission (1) For the purposes of this Act, the Central Government shall establish a Commission to be known as the Monopolies and Restrictive Trade Practices Commission which shall consist of a Chairman and not less than two and not more than eight other members to be appointed by the Central Government."

15. Section 129 of the Customs Act, 1962 provides for the constitution of the Appellate Tribunal which is the following words:

"129: Appellate Tribunal- (1) The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Gold (Control) Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act."

16. By using the words 'shall consist of', the intention of the legislature is evident regarding composition of the various tribunals in the aforesaid provisions. This further strengthens the contentions of the respondents that the intention and purport of Notification in this case is clearly evident from the use of the words 'aided by' instead of 'shall consist of' and hence there is no mandatory requirement for consideration of the appeal by the other three members who were only to aid/support the Additional Secretary/Additional Director General, Foreign Trade.

17. The result of the aforesaid discussion is that all the arguments advanced by learned counsel for petitioner fail.

18. Before parting with, it may be mentioned that during the pendency of this writ petition, petitioner was given an opportunity to furnish a bank guarantee and to make some cash deposit to show his bona fides. However, the petitioner refused to avail even this indulgence.

19. This writ petition is thus being devoid of any merit which is accordingly dismissed.

20. No costs.