
(2003) 09 DEL CK 0047
In the Delhi High Court
Case No : CW No. 459 of 2003

Pearl Global Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-09-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 107 DLT 350 : (2003) 70 DRJ 790 : (2004) 91 ECC 15 :
(2004) 112 ECR 336 : (2004) 163 ELT 155

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : A. Maitri, for the Appellant; Kuljit Rawal and Ashok Kashyap, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—Rule. With the consent of the parties the matter is taken up for final disposal.

2. The present writ petition has been filed by the petitioner which is a company engaged in the garment export business. The petitioner seeks an appropriate writ, direction or order quashing the order dated 17.11.1998 passed by the Apparel Export Promotion Council (Respondent No.4 herein), the order-in-appeal dated 16.10.2000 passed by the Textile Commissioner (Respondent No.3) and the order dated 8.10.2002 passed by the Second Appellate Committee (Respondent No.2). The petitioner also seeks a direction to be issued to the respondents to withdraw the entire forfeiture of Rs. 7,98,548/- on account of the submission that the petitioner had fulfilled 96% of the quota obligation during the relevant year.

3. The petitioner's case is of first-cum-first served (FCFS) quota. The relevant year is 1997. Therefore, the Garment Export Entitlement Policy 1997-1999 (hereinafter referred to as the GEE Policy) would apply. By virtue of paragraph 8B

of the said GEE Policy, under the FCFS system, Earnest Money Deposit (EMD) is required to be furnished at the rate of 5% of the FOB value at the time of applying for allotment, covering the total quantity applied for. The earnest money deposit can be given in the form of Bank Guarantees or FDR or demand draft, Legal Undertaking (LUT) or post dated cheques as the case may be.

4. Paragraph 8G of the GEE Policy provides for the release of Bank Guarantee/ EMD/LUT/PDC. Clauses (i) and (iv) of the said paragraph 8G are relevant and are reproduced hereinbelow:-

"G) Release of BG/EMD/LUT/PDC

i) An exporter who exports not less than 90% of the export entitlement under the FCFS System or during the revalidated period covered by BG/EMD in any of the other systems, will not be liable for forfeiture of EMD. An exporter who performs not less than 75% (not less than 50% in case of Slow Moving items) but less than 90% will be liable for proportionate forfeiture. If the utilisation of export entitlement allocation is less than 75% (less than 50% in case of Slow Moving Items), the exporter will be liable for forfeiture of BG/EMD in full. For this purpose, utilisation of 90%/75% (50% in case of Slow Moving Items) of allotment can be computed on the basis of:

- a) Allotment of each Entitlement Certificate or
- b) in each country/category combination or
- c) On the basis of the total allotment under the particular system of allocation.

Whichever is beneficial to the exporter."

x x x x x x x

iv) All provisions relating to forfeiture of BG/EMD will be subject to Force Majeure Conditions which are established with documentary evidence which would be considered by the Appellate Authority."

From the above, it is clear that if export entitlement is not matched up with at least 75% of actual exports under the FCFS system then the exporter would be liable for forfeiture of the BG/EMD in full. If exports are 75% or more of the Quota but less than 90% then the forfeiture of the BG/EMD will be proportionate. However, if the exporter exports 90% and more of the export entitlement then he will not be liable for any forfeiture of the EMD. It is also clear that all provisions relating to forfeiture are subject to Force Majeure Conditions which are to be established by documentary evidence and which would be considered by the Appellate Authority. It is, Therefore, clear that forfeiture whether in entirety or proportionate or not at all is provided for in sub-clause (i) of paragraph 8G. And, the fact that such forfeiture is subject to Force Majeure Conditions is provided in sub-clause (iv) of paragraph 8G.

5. Paragraph 9 of the GEE Policy provides for proof of shipment. Paragraph 9

reads as under:-

9. PROOF OF SHIPMENT

" i) For the purpose of claiming release of BG/EMD/LUT/PDC, exporters will have to furnish proof of shipment in accordance with the various provisions for allotment. Following are the documents to be furnished as proof of shipment:

a) Original Export Promotion Copy of Shipping Bill with customs endorsement Along with a clear photocopy of both sides where AEPC's export certification and the customs endorsement appear clearly. The original will be returned after verification.

b) Bank certified Invoice indicating:

i) FOB value in foreign currency. In case of C&F/CIF contracts, freight and insurance should be shown separately.

ii) GRI Number.

c) A copy of Airway Bill/Bill of Lading. (Not required in the case of FOB contracts)

ii) Proof of Shipment should be furnished to the office of AEPC from where the Entitlement Certificate (Certification) had been obtained, for release of BG/EMD/LUT/PDC.

iii) Application for release of BG/EMD/LUT/PDC (Along with Proof of Shipment) should be submitted as per the proforma at Annex-IX."

From a reading of the above provision it is clear that for claiming release of the EMD, the exporters have to furnish proof of shipment and the documents required to be furnished as proof of shipment are also indicated. In case an exporter fails to fulfill the obligations of the quota then a show cause notice is issued and obviously, the exporter submits proof of shipment whereupon a decision and speaking order is passed by the AEPC. In the present case, the petitioner admittedly exported 88% of the FCFS quota. In such eventuality the AEPC by an order dated 17.11.1998, after issuance of show cause notice dated 15.6.1998 and personal hearing on 25.6.1998 Therefore forfeited an amount of Rs. 7,98,548/- after giving the petitioner benefit of proportionate forfeiture under paragraph 8G(i) of the said GEE Policy.

6. Being aggrieved by this order of forfeiture the petitioner preferred an appeal before the Textile Commissioner. In this appeal the petitioner invoked the Force Majeure clause. The petitioner submitted before the First Appellate Authority that they could not utilise the quota fully due to the following reasons:-

"1) Labour strike. However, from all the papers submitted by the exporter regarding labour strike given at the time of hearing, it is observed that the labour problem started from September" 97 onwards, whereas all the quota certificates had expired by that time.

2) Truck strike, in support of which the exporter was advised to submit a certificate from the local RTO or other concerned state Government authorities. However, the exporter has expressed their inability to submit the same. On the contrary, it has been intimated that because of truck strike, the Government had accorded general extension up to 30.04.97 in respect of the quota certificates expired on 31.03.97.

3) Income tax raid."

The factum of overall utilisation of 88.8% was admitted by the AEPC as well as the petitioner. The finding of the Textile Commissioner was that the Force Majeure Conditions were not applicable and accordingly, upheld the forfeiture imposed by the AEPC by its order-in-appeal dated 16.10.2000.

7. Being aggrieved by this order-in-appeal the petitioner preferred a second appeal before the Second Appellate Committee, Government of India, Ministry of Textiles (Exports-III Section). The said second appeal was disposed of by an order dated 8.10.2003 in the following manner:-

" The 2nd Appellate committee has heard the Firm and has also gone through the papers present on the file. It also noted that the amount of forfeiture has to go to the Consolidated Fund of India and Therefore relief can be given only if there exist very valid grounds for the same. Shri Dawar stated that due to strike in one of the factories, production was below par. On verification, it was found that the firm had another 5 factories. Strike started on 6th Sept 1997 and ended on 27th Dec 1997. Committee considered the case and decided that relief needs to be given for the production held up in the factory which faced strike. Appellant produced evidence for the same, value of which has been put at Rs. 4,02,000. Committee thereafter disposed of the appeal with a direction to AEPC to recover Rs. 3,96,548 expeditiously."

From the above order of the Second Appellate Committee, it appears that part of the grievance of the petitioner has been accepted by the Second Appellate Committee, and, Therefore, it is clear that to a certain extent the petitioner was prevented from meeting export obligations by Force Majeure Conditions. The Second Appellate Committee on the basis of the evidence produced by the petitioner held that out of the forfeiture amount of Rs. 7,98,548.00 a sum of Rs. 4,02,000/- was on account of Force Majeure Conditions and, accordingly, the forfeiture amount be reduced by this amount. The Second Appellate Committee, Therefore, disposed of the appeal with a direction to AEPC to recover only Rs. 3,96,548 (Rs. 7,98,548 - Rs. 4,02,000).

8. In the present petition the petitioner has raised two issues. The first issue is that the Second Appellate Committee ought to have granted full relief for forfeiture and ought not to have limited the relief as it did in the impugned order dated 8.10.2000. The second issue is that the petitioner had admittedly exported 88.80% of its export entitlement. The relief of Rs. 4,02,000/- on account of Force Majeure Conditions represented 8% of the quota entitlement. Thus, the

petitioner submitted that the 8% ought to be added to his actual export of 88.80% which would then indicate that he had exported 96.8% of the quota entitlement. This would be in excess of 90% and, Therefore, would qualify as a case where no forfeiture at all can be made.

9. Taking up the first issue, it is more than clear that while exercising writ jurisdiction under Article 226 this Court does not sit as a Court of Appeal nor does it interfere with findings of facts. The Second Appellate Committee has considered all the facts and circumstances and has come to a particular conclusion. In fact, it has given the petitioner relief which was not allowed to it by the First Appellate Committee. No perversity in the findings have been pointed out. No infirmity has been indicated nor has the decision making process been faulted. As such, I decline from interfering with the findings of the Second Appellate Committee on the question of there being a partial Explanation of non-export attributable to Force Majeure Conditions.

10. Coming now to the second issue, I find that the submission of the learned counsel for the petitioner in this regard is not quite tenable. As submitted by the learned counsel for respondent No.4 the concept of release of EMD on the basis of submission of proof of shipment is distinct from the benefit being extended on the basis of force majeure clause. The forfeiture and proportionate forfeiture provided in paragraph 8G(i) of the GEE Policy deal with the situation of actual shipment/actual exports based on proof of shipment as per paragraph 9 of the said Policy. It does not deal with deemed exports. What the petitioner is asking is that the extent of the force majeure conditions be translated into a deemed export and added to the actual export and, thereafter, give the benefit under the forfeiture scheme. Thus, on the one hand the petitioner would be liable to forfeiture on the basis of actual export while on the other than if deemed exports are to be taken into account, he would not be liable at all. This would lead to an anomalous situation. All that Clause (iv) of paragraph 8G provides is that all provisions relating to forfeiture of Bank Guarantee/EMD would be subject to Force Majeure Conditions. In *The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another*, the Supreme Court held that:- "the expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject." In *Black's Law Dictionary* (5th Edition) "Subject to" has been defined as - "Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for." Thus any forfeiture under clause (i) of paragraph 8G would be "affected by" or "yield to" force majeure conditions. That is all. Force Majeure Conditions would not give a right to the exporter to have the forfeiture re-computed in terms of clause (i) of paragraph 8G. The forfeiture under clause (i) would be limited by or affected by or yield to the extent of relief, if any, granted under the force majeure clause. And, it is to that extent the Second Appellate Committee has implemented this requirement. This is clear from the fact that the AEPC had decided to forfeit a sum of Rs. 7,98,548/- which has been reduced to Rs. 3,98,548/- on account of relief of Rs. 4,02,000/- attributable to

Force Majeure Conditions. Clearly, in point of the fact, forfeiture has been made subject to the Force Majeure Conditions and there is no contravention on violation of the policy.

11. In these circumstances, I find that no interference with the order of the Second Appellate Committee is called for and, accordingly, the writ petition is dismissed with no order as to costs. Rule is discharged.