(2015) 10 KAR CK 0074

In the Karnataka High Court

Case No : Writ Petition No. 10561/2013 (GM-RES)

Saikala Power Private Limited — APPELLANT

Vs

Additional Director, General of Foreign Trade, Directorate General of Foreign Trade and Others — RESPONDENT

Date of Decision : 30-10-2015

Acts Referred:
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2015) 10 KAR CK 0074

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Advocate : Shivadass, Advocate, for the Appellant; Krishna S. Dixit, Assistant Solicitor General of India, for the Respondent

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—Petitioner has sought for quashing of the order dated 18.01.2013 passed by first respondent (Annexure-A1) and communication dated 11.02.2013 (Annexure-A2) issued by third respondent with a prayer for issue of writ of mandamus to respondents-3 and 4 by directing them to issue Export Obligation Discharge Certificate in favour of petitioner and withdrawal of the letter dated 15.03.2015 (Annexure-AF) respectively. Petitioner after having obtained Advance Authorisation from Joint Director General of Foreign Trade, Bangalore (for short ''Jt. DGFT'') as a main contractor for import of goods, had procured goods worth CIF value of Rs. 68,27,31,904/- without payment of customs duty against discharge of export obligation of Rs. 72,70,00,000/- by supplying the same to the Hydel Project and claimed to have fulfilled the export obligation and filed an appeal before third respondent for redemption of advance licence and issuance of Export Obligation Discharge Certificate (for short ''EODC'') which came to be rejected by endorsement dated 28.08.2012 (Annexure-AC) and confirmed in appeal by order dated 18.01.2013 (Annexure-A1).

2. I have heard the arguments of Sri Shivadass, learned Advocate appearing for petitioner and Sri Krishna S Dixit, learned Assistant Solicitor General of India appearing for respondents.

3. It is the contention of Sri Shivadass, learned Advocate appearing for petitioner that goods supplied to a power project under procedure of International Competitive Bidding (ICB) is covered under clause (g) of paragraph 8.2 of Foreign Trade Policy (for short ''FTP''). He would contend that under paragraph 8.2 of the FTP and in order to be covered under the ambit of ''Deemed Export'', three conditions are to be fulfilled namely;

"(i) supply must be by main contractor or by sub-contractors;

(ii) supply must be made by following the procedures of ICB;

(iii) the goods supplied under the contract should be manufactured in India."

Elaborating his submission on the above referred three ingredients, he would contend that undisputedly, petitioner''s claim is not rejected on account of non-satisfying conditions (i) and (ii) referred to supra, but only on the ground it does not satisfy third condition namely, ''imported goods shall be manufactured in India'' and draws the attention of the Court to the definition of paragraph 9.36 of Chapter 9 which relates to the definitions of various words used in the FTP, to contend that the word ''manufacture'' as defined in paragraph 9.36 would prevail over any other definition given in any other statute which is wide and covers within its ambit and includes assembly of various parts, fabrication, reconditioning of machines, testing of machines, calibration of machines, erection and installation of assembled machines including fabrication of foundation and necessary civil work, commissioning of the installed plant and testing of the commissioned plant.

He would contend that goods imported by the petitioner included Turbines and Generators which after importation has been assembled, erected, tested and the work undertaken by the petitioner for the project authority is commissioning of Hydro Electric Power Generation Plant for which imported goods are used and as such, the activities undertaken by the petitioner amounts to manufacture as defined in paragraph 9.36 of FTP. He would submit the respondent-authorities having failed to consider the claim of the petitioner in this perspective has resulted in erroneously rejecting the claim of the petitioner and as such, he prays for quashing of the order passed by the appellate authority and seeks for allowing the writ petition.

4. Per contra, Sri Krishna S Dixit, learned Assistant Solicitor General of India appearing for respondents would support the impugned order and contends that Deemed Export Benefit is available only to goods manufactured in India and supplied to power projects and only such goods manufactured in India by utilization of the imported inputs obtained under the advanced authorisation and such of those goods so manufactured in India which is supplied to the project

covered under the policy would only fulfill the provisions of the policy. He would rely upon the Policy Circular No. 50/2009-2014 to support said contention.

4.1 He would contend that capital goods procured by the petitioner are directly shifted to the project site and hence it does not fit into the claim of deemed exports. As per the definition of word "Manufacture" found in paragraph 9.36 of FTP, an applicant has to first manufacture in his factory using the imported inputs claimed under the Advance Authorisation and supply goods so manufactured to project authority and then only third condition envisaged under the Policy Circular 50/2009-2014 is deemed to be satisfied as otherwise not. Hence, he has sought for rejection of the writ petition.

FACTUAL MATRIX

5. Petitioner is a contractor engaged in the commissioning of Hydel Power Plants. It entered into a contract with M/s. S L S Power Corporation Limited to carry out commissioning of a 24 MW Hydro Electric Power Generation Plant including Electro Mechanical and Hydro Mechanical Equipments for Dummugudem Mini Hydel Scheme with six units of 4000 KW rated capacity each on the anicut of Godavari river, Andhra Pradesh after competing in the international bidding. Petitioner obtained Advanced Authorisation No. 0710064907 dated 21.05.2009 from ''Jt. DGFT''. Under the said Authorisation, petitioner imported goods worth CIF value of Rs. 68,27,31,904/- under the advanced authorisation scheme. These goods were imported without payment of basic custom duty and additional custom duty. Petitioner also procured certain inputs after getting the authorisation invalidated for such items. In order to obtain exemption from payment of duty under the Advance Authorisation scheme, petitioner executed a bond with customs authorities and also furnished a bank guarantee dated 26.09.2009 to the customs authorities for an amount of Rs. 2.25 crores.

6. Petitioner filed an application on 07.09.2011 with Jt. DGFT for redemption of Advance Licence and revised application was filed on 21.09.2011. It was stated by the petitioner that goods imported for the purpose of the project have been used for the same and it had undertaken assembling, erection, commissioning and installation of the goods so procured. Hence, petitioner requested Jt. DGFT for issuance of Export Obligation Discharge Certificate. Petitioner also contended that they have completed supplies to the power project by furnishing details relating to technical infrastructure of the project, particulars of the equipment supplied. Same was considered by the second respondent and by order dated 28.08.2012 (Annexure-AC) it was held that goods so imported by the petitioner and supplied to Non-Mega Power Project are not "deemed export" under FTP. Being aggrieved by the same, an appeal came to be filed before the appellate authority - first respondent herein in appeal No. 40040/2012 along with an application for stay. A communication dated 07.03.2012 came to be issued by Assistant Commissioner of Customs, Chennai directing the Bankers to remit the proceeds of Bank Guarantee furnished by the petitioner. Hence, petitioner herein filed W.P. No. 37506/2012 seeking for withdrawal of the letter dated 07.03.2012

and for a writ of mandamus to the Banker not to encash the Bank Guarantee during the pendency of appeal proceedings along with other reliefs. Said writ petition came to be disposed of by this Court by order dated 22.01.2013 by reiterating the order dated 09.10.2012 whereunder the appellate authority had been directed to dispose of the appeal filed by the petitioner within three months. Thereafter, the appellate authority adjudicated the appeal on merits and by order dated 18.01.2013 (Annexure-A1) rejected the same by upholding the order dated 28.08.2012. Thereafter, third respondent has issued a communication to the petitioner on 11.02.2013 (Annexure-A2) directing the petitioner to pay customs duty with interest on the imported goods. It is this order and communication which is questioned in the present writ petition.

7. Respondents on being notified have appeared and filed detailed statement of objections supporting the impugned order and contending that petitioner cannot claim duty exemption benefit under Advance Authorisation as the goods under supply to non-Mega Power Project have been supplied ''as such'' to the project site without goods being manufactured in India and as such, no benefit of duty exemption under Deemed Exports Scheme for the said Advance Authorisation can be extended. Respondents have also relied upon the Policy Circular No. 50/2009-2014 dated 28.12.2011 to contend that capital goods which have been imported by contractors or sub-contractors and supplied as such to the project authority, customs duty paid on such imports cannot be refunded as per paragraph 8.2 of Chapter 8 which relates to Deemed Exports under FTP. Hence, they have sought for dismissal of the writ petition.

STATUTORY BACKGROUND

8. In exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 the Central Government has notified the Foreign Trade Policy from time to time. In exercise of said power FTP for 2009-2014 came to be notified by publishing the same by issuance of Gazette notification dated 23.08.2010.

9. Chapter 4 deals with Duty Exemption and Remission Schemes envisaged under the said Policy. Chapter 5 relates to Export Promotion Capital Goods (EPCG) Scheme. Chapter 8 deals with Deemed Exports and Chapter 9 deals with the definitions of the words and expression for the purpose of the FTP to have the meanings attached to them as defined thereunder namely, as defined in Chapter 9.

Under paragraph 4.1 of Chapter 4 the Duty Exemption Schemes enables duty free import of inputs required for export production and such Duty Exemption schemes consists of;

"(a) Advance Authorisation Scheme;

(b) Duty Free Import Authorisation (DFIA) scheme."

10. Since in this writ petition the issue would relate to only Advance

Authorisation Scheme, Duty Remission Scheme envisaged under paragraph 4.1 is not being delved upon in this writ petition since it relates to post Export Replenishment/Remission of Duty on inputs used in export products, which again consists of (a) Duty Entitlement Pass Book - DEPB Scheme and, (b) Duty Draw Back Scheme - DBK. Paragraph 4.1.1 of FTP would indicate that goods exported under Advance Authorisation or Duty Free Import Authorisation Scheme or DEPB Scheme may be re-imported in same form or substantially the same form subject to DoR Specified Conditions. Under clause 4.1.3 Advance Authorisation is issued to allow Duty Free Import of inputs, which are physically incorporated in export product and it can be issued either to a manufacturer, exporter or merchant exporter tied to supporting manufacturer(s) for:

"(i) Physical exports (including exports to SEZ); and/or

(ii) Intermediate supplies; and/or

(iii) Supply of goods to the categories mentioned in paragraph 8.2(b), (c), (d), (e), (f), (g), (i) and (j) of FTP;

(iv) Supply of ''stores'' on board of foreign going vessel/aircraft subject to condition that there is specific SION in respect of item(s) supplied."

11. The petitioner in the instant case is claiming the benefit of deemed export by contending that paragraph 8.2 of Chapter 8 is to be understood in terms of definition of manufacture occurring in paragraph 9.36 of Chapter 9 of FTP. As such, this Court is of the considered view that paragraphs 8.1, 8.2, 8.3 of Chapter 8 and paragraphs 9.1, 9.4, 9.5, 9.12, 9.14 and 9.36 are required to be examined and as such, they are extracted herein below:

CHAPTER 8

DEEMED EXPORTS

"Deemed Exports 8.1 "Deemed Exports" refer to those transactions in which goods supplied to not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange.

Categories of supply 8.2 Following categories of supply of goods by main/ subcontractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:

(a) Supply of goods against Advance Authorisation/Advance Authorisation for annual requirement/DFIA;

(b) Supply of goods to EOU/STP/EHTP/BTP;

(c) Supply of capital goods to EPCG Authorisation holders;

(d) Supply of goods to projects financed by multilateral or bilateral Agencies/ Funds as notified by Department of Economic Affairs (DEA), MoF under International Competitive Bidding (ICB) in accordance with procedures of those

Agencies/Funds, where legal agreements provide for tender evaluation without including customs duty;

Supply and installation of goods and equipment (single responsibility of turnkey contracts) to projects financed by multilateral or bilateral Agencies/Funds as notified by DEA, MoF under ICB, in accordance with procedures of those Agencies/Funds, which bids may have been invited and evaluated on the basis of Delivered Duty Paid (DDP) prices for goods manufactured abroad;

(e) Supply of capital goods, including in unassembled/disassembled condition as well as plants, machinery, accessories, tools, dies and such goods which are used for installation purposes till stage of commercial production, and spares to extent of 10% of FOR value to fertilizer plants;

(f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;

(g) Supply of goods to power projects and refineries not covered in (f) above;

(h) Supply of marine freight containers by 100% EOU (Domestic freight containers-manufacturers) provided said containers are exported out of India within 6 months or such further period as permitted by customs;

(i) Supply to projects funded by UN Agencies; and

(j) Supply of goods to nuclear power projects through competitive bidding as opposed to ICB.

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB.

However, in regard to mega power projects, the requirement of ICB would not be mandatory, if the requisite quantum of power has been tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding.

Benefits for Deemed Exports

8.3 Deemed exports shall be eligible for any/all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v 1:-

(a) Advance Authorisation/Advance Authorisation for annual requirement/DFIA.

(b) Deemed Export Drawback.

(c) Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an Advance Authorisation holder to a manufacturer holding another Advance Authorisation if such manufacturer, in turn, supplies the product(s) to an ultimate exporter."

CHAPTER 9

DEFINITIONS

9.1. "For purpose of FTP, unless context otherwise requires, following words and expressions shall have he following meanings attached to them.

9.4 "Actual User" means an actual user who may be either industrial or non-industrial.

9.5. "Actual User (Industrial)" means a person who utilizes imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit.

9.12 "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernization, technological upgradation or expansion. It also includes packaging machinery and equipment, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.

9.14 "Component" means one of the parts of a sub-assembly or assembly of which a manufactured product is made up and into which it may be resolved. A component includes an accessory or attachment to another component.

9.36 "Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labeling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering. Manufacture, for the purpose of FTP, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining."

12. There is no dispute to the fact that in terms of paragraph 4.1.3 of Chapter 4 and paragraph 8.2(g) of Chapter 8 of FTP petitioner was entitled to issuance of Advance Authorisation for supplies to be made to a Non-Mega Power Project, subject to applicant being eligible and such supplies amounted to Deemed Exports as per Chapter 8 of the FTP.

13. A bare reading of paragraph 8.1 and 8.2 of Chapter 8 would clearly indicate that in order that transaction is qualified as Deemed Export, they must necessarily fulfill the following criteria or conditions namely,

"(i) Deemed Exports are those transactions in which goods supplied do not leave the country;

(ii) Goods are necessarily to be manufactured in India in respect of categories envisaged in clauses (a) to (j) of paragraph 8.2 of Chapter 8 of FTP;

(iii) Goods are supplied by main/sub-contractor."

The words used in clause (g) of paragraph 8.2 are "supply of goods to power projects and refineries...". These words have to be read in conjunction with the words "provided goods are manufactured in India" found in clause 8.2 of Chapter 8.

14. Petitioner is attempting to justify its claim for obtaining EODC on the ground that after direct import of procurements, it has undertaken the activity of assembly of various parts, fabrication, reconditioning, erection, installation etc. and as such its claim would fall within the word ''manufacture'' as specifically defined in paragraph 9.36 of Chapter 9 of FTP.

15. At this juncture itself, it would be appropriate to notice that a circular bearing No. 50/2009-2014 (RE 2010) dated 28.12.2011 came to be issued by the Department of Commerce, Directorate General of Foreign Trade, New Delhi to All Regional Authorities (RAs), CBEC, All Commissioners of Customs and Exporting Community clarifying as to the claims relating to Deemed Export benefits and it was clarified thereunder as follows:

"(1) Policy Interpretation Committee in its meeting held on 15.03.2011 had inter-alia clarified as under:

"Issue of claiming Deemed Export benefits in cases of import made by the project authority was discussed. After detailed deliberation, it was decided that if the Bill of Entry is in the name of project authority deemed export benefits would not be available (such cases will be ineligible for grant of Deemed Export benefits)" (2) Deemed exports benefits are admissible in terms of paragraph of 8.2 of FTP, if goods are manufactured in India. In the case of non mega power projects, for instance, if capital goods such as boilers, turbines, generators (BTGs) are being supplied to project authorities, then deemed export benefits are admissible only if such BTGs are manufactured in India. If these are imported and supplied as such, then such supplies do not amount to deemed exports, and hence deemed export benefits will not be admissible."

(3) xxx

(4) xxx"

16. Though above said circular has been assailed by the petitioner before the authorities on the ground that it is only prospective in nature, same was not accepted and rightly so, since said notification is only clarificatory in nature whereunder it has been clarified that in case of capital goods having been imported by the contractors or sub-contractors and supplied as such to project authorities, then custom duties paid on such imports cannot be refunded back as deemed export duty draw back under paragraph 8.3(b). Thus, said circular does

not impose any new condition. It would also clarify that Deemed Export benefits are admissible in terms of paragraph 8.2 of FTP, if goods are "manufactured in India". It also further clarifies that if capital goods such as Boilers, Turbines, Generators (BTGs) are supplied to project authorities, then deemed export benefits would be admissible if only such BTGs are manufactured in India. It would also clarify that if they are imported and supplied as such, then such supplies do not amount to deemed exports, and hence deemed export benefits will not be admissible.

17. Deemed Export Policy is basically for import substitution and in the event of the Project Authority is importing the same, then consequently, no import substitution takes place. It is because of this precise reason the appellate authority has rightly observed that, import of capital goods by non mega power projects is subjected to 5% of Basic Customs Duty if supplied as such to the project site and 5% duty to be paid get exempted by taking Advance Authorisation, then, it defeats the very purpose of imposition of 5% Basic Customs duty which observation and conclusion is just and proper and in consonance with the extant FTP.

18. Now turning my attention back to the core issue, namely, the contention of the petitioner that activity undertaken by it is in terms of the contract entered into with the project authority when examined in the background of the definition of the word "manufacture" as defined under paragraph 9.36, this Court is of the considered view that same will have to be read along with clause 8.2 of FTP.

19. There cannot be any dispute to the fact that the Hydel power plant which is being installed and commissioned by the petitioner is an immovable item which is fastened to the earth and as such, project by itself cannot be construed as deemed export. An item which comes into existence after manufacture by use of the inputs procured under the duty exemption and such goods which come into being for being supplied to the project authority would be covered under the category of Deemed Exports. Thus, claim of the petitioner that it has procured the Capital Goods and same was within the knowledge of the authorities and as such, it had shifted the goods so procured (imported) and shifted to the project site would not satisfy the ingredient of Deemed Exports. In the instant case, petitioner has imported Capital Goods like Turbines, Generators, Oil Tanks, UPS for computer system etc. as could be seen from the Advance Authorisation dated 19.05.2009 & 21.05.2009 (Annexures-D & E) and supplied to the power project. Had the petitioner procured the parts of these goods and manufactured at its site and thereafter shifted the same to the project site, then, it would have had the right to claim the benefit of Deemed Export or to put it differently, if the petitioner had used the goods procured by carrying out the manufacturing activity for the purposes of commissioning and installing the power project, it would have been entitled to claim the benefit. Such situation had not arisen inasmuch as, the petitioner having imported the goods had shifted the goods "as such" and thereby not meeting the criteria prescribed under clause 8.2 of FTP

namely, "goods are manufactured in India".

20. Yet another contention of Mr. Shivadass relating to that Jt. DGFT authorities being aware of the nature of goods being imported and Advance Authorisation licence being issued itself precludes them from taking a stand contrary is also without any force inasmuch as, there cannot be estoppel against statute. That apart, petitioner being conscious of the fact that if Advance Authorisation is taken under the Deemed Exports Scheme for Non Mega Power Project, then such Capital Goods to be supplied to the project are required to be manufactured in India and in the instant case, the goods having not been manufactured in India would not be entitled to claim that such goods procured/imported would still fall within the four corners of "Deemed Exports".

''Deemed Exports'' benefit for non-mega power project would be available for supply of capital goods if the categories of supply of goods by main/ subcontractors as mentioned in para 8.2(a) to 8.2(g), provided goods are manufactured in India''. In the case on hand, capital goods like Turbine, Generators, etc., have been imported and as such, they have been installed in the power project. If the petitioner had undertaken manufacture of such goods procured namely, Turbines and Generators by importing inputs required for manufacture of these goods. Since export policy having been brought for import substitution and if the project authorities were to import the same, then said project authority cannot be heard to contend that imports substitution has taken place. From facts on hand, it is explicitly clear that the goods imported under advance authorisation licence have been supplied as such to the project and they have not been manufactured in India and as such, these goods as ''capital goods'' would not be entitled for exemption under advance authorisation.

For the reasons indicated herein above, this Court is of the considered view that there is no merit in the contentions raised by learned Advocate appearing for petitioner and as such, they stand rejected.

21. Hence, I proceed to pass the following:

"(a) Writ Petition is hereby dismissed.

(b) Order dated 18.01.2013 (Annexure-A1) passed by first respondent is hereby affirmed.

(c) Costs made easy."

Ordered accordingly.

