

(2009) 05 DEL CK 0243

In the Delhi High Court

Case No : Writ Petition (C) No. 123 of 1996

Sawhney Brothers

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-05-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 14

Citation : (2009) 05 DEL CK 0243

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Gajender Giri, for the Appellant; Sanjay Katyal, for the Respondent

Judgement

Sanjiv Khanna, J.—In 1996, the petitioner, M/s. Sawhney Brothers had filed the present Petition for the following reliefs:

- a) Issue a writ in the nature of mandamus (sic) or any other appropriate writ directing the respondent to disburse 45% premium in lieu of Licences (Additional/Rep) and to release C.C.S. against export documents received by the respondent as per detail given in the petition.
- b) Issue a writ in the nature of mandamus (sic) or any other appropriate writ directing the respondent to pay the compensation/damages on account of non-release of incentives in terms of Import & Export Policy with the result the petitioner could not enlarge the sphere of export and could not earn more foreign exchange as well as profit.
- c) Cost and expenses of the writ petition and refund of cost imposed by the Hon'ble National Commission if claimed by the respondent.
- d) Any other and further orders may also be passed by Hon'ble Court in the facts and circumstances of the case to meet the ends of justice.

2. As far as prayer (c) is concerned, the said prayer cannot be granted by this

Court under Article 226 of the Constitution of India unless the petitioner specifically challenges and questions the Order dated 26th September, 1993 passed by the National Commission. The petitioner had approached the National Commission under the Consumer Protection Act making claim of Rs. 1.27 crores on various accounts. The National Commission rejected the said claim Petition on the ground that the petitioner was not "consumer" as the respondent therein were not providing any services for consideration and there was no deficiency in service on the part of the Controller of Exports and Imports. It was also noticed that the petitioner had filed appeals against rejection of the claims for grant of licences. In these circumstances, cost of Rs. 10,000/- was imposed on the petitioner. I do not think this is a fit case in which the Court should interfere and grant any relief to the petitioner in respect of prayer (c).

3. In the prayer clauses, petitioner has not claimed any relief in form of Certiorari or Mandamus to the respondents to grant Export House Eligibility Certificate. However, pleading in the Writ Petition refers to applications dated 24th September, 1988 and 27th June, 1991 under the relevant Export and Import Policies (EXIM Policy, for short) for grant of Export House Eligibility Certificate. It is stated that the petitioner was issued the said certificate in 1986 and applications were made for renewal. It is further stated that the petitioner would become entitled to additional licences on issue of the said certificate @ 10% of Net Foreign Earnings.

4. In support of the contention that the petitioner was entitled to Export House Eligibility Certificate, learned Counsel for the petitioner has drawn my attention to two letters dated 10th June, 1991 and 17th July, 1991 written by Federation of Indian Export Organisations. The first letter refers to the hearings before the Grievance Committee to decide the issue regarding issuance of Export House Eligibility Certificate to the petitioner and states that the said issue was taken up in the tenth meeting of the Grievance Committee and the Federation was pleased to inform the petitioner that the Grievance Committee had decided to issue Export House Certificate w.e.f. 1986. The second letter dated 17th July, 1991, was written by the Federation to Chief Controller of Imports and Exports requesting the Grievance Committee to intimate their decision to the concerned authority for expediting issuance of Export House Eligibility Certificate. The stand taken by the respondents in their counter affidavit is that there was no such assurance and no such decision was taken. Moreover, the Grievance Committee did not have any authority to issue such directions.

5. Learned Counsel for the petitioner was asked to satisfy this Court whether the petitioner was in fact entitled to Export House Certificate and that he fulfilled the eligibility criteria. Learned Counsel for the petitioner in this regard has referred to extracts of EXIM Policies between the period April 1985 to March, 1988 and from April, 1988 to March, 1991. The relevant portions of the EXIM Policies as reproduced in the Writ Petition are as under:

Import and Export Policy April 1985- March 1988

Eligibility

189(1) x x x x x

248(1). x x x x x

(2) Application will be considered subject to the following conditions:

(a) The annual average f.o.b. value of exports in the prescribed base period of Select Products, should not be less than Rs. three crores of those of Non-Select Products Rs. seven crores.

(b) The prescribed minimum set down above shall be only Rs. 75 lakhs and Rs. 3 crores respectively in case of Small Scale Unit holding permanent registration Certificate issued before 1st April of the licensing year by the sponsoring authority concerned as given in Appendix V-A of the Hand Book. Atleast 50% of own export should be direct export of its own manufacture.

Import & Export Policy April 1988 - March 1991

165(1). x x x x x x

212 (1) xxxxxxxxx

(2) The eligibility will be considered subject to the following conditions:

(a) The annual average NFE earnings in the prescribed base period should not be less than Rs. 2 crores in the case of

(d) In determining the eligibility of the applicant, the "NFE earnings. from the export of the products manufactured by Small Scale and Cottage Sector Industries will be reckoned at twice the actual "NFE Earnings.

6. The relevant portions of the EXIM Policy 1988-91 as reproduced in the Writ Petition is incomplete.

7. Learned Counsel for the petitioner has submitted that the petitioner had made an application for grant of Export House Eligibility Certificate on 24th September, 1988 vide receipt No. 53942 dated 27th September, 1988. Photocopy of the said letter/receipt is not placed on record. As to what happened to the said application is also not stated and the orders passed by the respondents in this regard are not placed on record. The present Writ Petition as already stated above, was filed in 1996. It is not understood why the petitioner had waited from 1988 till 1996. EXIM Policy was for three years and the benefits as a recognised export house were for specific period till the new policy was enforced.

8. The petitioner also has not set out in detail the export turnover or the net foreign exchange earning for the prescribed base period for the purpose of alleged application dated 24th September, 1988. In the year 2009 or even in 1996, it is difficult for this Court to go into these aspects relating to what happened to the alleged application dated 24th September, 1988 filed by the

petitioner for grant of Export House Eligibility Certificate. I may note here that the requirements as per the EXIM Policy for the period April 1985 to March 1988 were much more stringent and different from the eligibility conditions prescribed in the subsequent EXIM Policy for the period from April 1988 to March 1991.

9. The petitioner had applied for Export House Eligibility Certificate under the EXIM Policy for the period from April 1988 to March 1991, on 26th March, 1991. The said application was rejected vide letter dated 31st July, 1991 on the ground that petitioner's annual average net realization during the prescribed base period was less than Rs. 4 crores. The petitioner had filed an appeal against the said order which was rejected vide letter/order dated 24th March, 1992. The petitioner remained quite thereafter for four long years, till he filed the present Petition in 1996. The EXIM policy had expired by then. Though the aforesaid Orders have been enclosed with the Petition, they have not been specifically challenged. Further Ld. Counsel for the petitioner inspite of being repeatedly asked, could not answer how and on what basis the petitioner fulfilled the requisite norms of average turnover in the base period.

10. Prayers (a) and (b) as quoted above are inter-related. The petitioner seeks issue of Writ of Mandamus to the respondent-Union of India to disburse/pay 45% premium in lieu of replenishment licences and release of Cash Compensatory Support (CCS, for short) benefits against export documents. Petitioner has also claimed compensation/damages for non-release of incentives in terms of EXIM Policy.

11. Replenishment licences, CCS, Additional CCS or CCS under SPS Scheme are payable as per the relevant EXIM Policy and as per other policies/guidelines prevalent from time to time. In para 7(b) of the Writ Petition, the petitioner has mentioned 36 applications made by them for issue of replenishment licences. The petitioner has, however, admitted that they had received 20 licences against the said 36 applications. The respondents in the counter affidavit have stated that in respect of some applications, licences have been issued, albeit for a lower amount, in some cases applications have been rejected due to non-removal of deficiencies, in others requisite licences were not collected by surrendering tokens and in some cases applications were rejected and the appeals filed by the petitioner were also rejected. The petitioner has not pleaded or made specific averments why the said rejections or part approvals or failure to collect the licences after surrendering tokens was unjustified and could be made subject matter of judicial review in a writ petition. There is no rejoinder affidavit on record to controvert or deny the said averments.

12. Regarding balance 5 applications, the respondent in their affidavit filed on 16th May, 1997 have stated that the petitioner's second appeal in one case has been allowed and the premium would be released. In respect of applications at serial Nos. 4, 6, 10 and 27 it is stated that inspite of best efforts the relevant files were/are not traceable. These applications pertain to the period April-June, 1990, January-March, 1991, April-June, 1991. The present Writ Petition, as

stated above, was filed in 1996. The petitioner has not filed any letter/ correspondence on record in respect of the said applications. Replenishment licences are no longer being issued. Presently, most of the goods are under open category for which no licences are required. Moreover, the petitioners claim for damages that if the licenses had been issued, they would have earned 45 % premium in the open market and their claim for interest @ 24% p.a. with quarterly rests, are presumptuous and is not based on material evidence on record. No material has been enclosed with the pleadings to justify the said statement and claim for damages/compensation. Petitioner has claimed damages from Union of India for failure to issue replenishment licences. As a writ court it is not possible to adjudicate the petitioners. claim for damages/compensation. Even if it is presumed that in some cases the applications were not processed and appeals were not decided and adjudicated upon. In these circumstances no finding or order can be passed in the present Writ Petition awarding damages and compensation. However, it is open to the petitioner to file a civil suit or other proceedings to claim damages, if advised. If required, the petitioner can move an application u/s 14 of the Limitation Act, 1963 for exclusion of period during which the writ petition has remained pending.

13. Petitioner in the writ petition has referred to 9 applications made by him for CCS benefits under the normal scheme and 3 applications for Additional CCS and 37 applications for CCS under SPS Scheme. A general statement has been made in the Writ Petition challenging Orders passed by the authorities rejecting the claim of the petitioner for CCS, which read as under:

The respondent has not disbursed inspite of writing numerous letters and has been intentionally and deliberately delaying the disbursement though it has been issuing the cheques everyday to other exporters. The respondent rejected the C.C.S Claims with appeal clause in some cases on flimsy grounds for which appeals were filed since long, no hearing granted and claims have not been paid. The petitioners are entitled to claim hard earned C.C.S incentives which are reimbursement of the indirect taxes Collected by the respondent on the raw material used in the export of garments. It has no right to withhold the claim of C.C.S made on the basis of export. The respondent issued tokens towards receipt of C.C.S Claims without mentioning the amount or any reference of our claim on the token. Photocopies of the circulars of the respondent dt. 05-09-08, 08-06-90 & 12-06-90 and the tokens are marked and annexed as Annexure F Collectively (page No. 43-45A)

14. The said averments in the Writ Petition do not justify issue of Writs of Mandamus or Certiorari in respect of CCS applications. The respondent in their counter affidavit and affidavit filed on 16th May, 1997 have stated that the application at serial No. 3 was rejected and the first appeal has also been dismissed. In respect of application at serial No. 4, CCS has been issued. Applications at serial Nos. 7 and 8 were rejected and in case of application at serial No. 7, second appeal also stands rejected. In the case of application at

serial No. 8, no second appeal was filed. In respect of the applications at serial Nos. 1, 2, 5,6, and 9, it is stated that the files in question which relate to the period 1987-88 being old records cannot be traced out.

15. As stated above, the present Writ Petition was filed in 1996 and there is no correspondence filed by the petitioner in respect of the applications at serial Nos. 1,2,5,6 and 9 to support the claim that CCS has not been paid or no orders were passed. Normally, a person would write a letter in case his application or appeal is not considered. Protest is normal.

16. With regard to the claim for Additional CCS again the respondents have stated that these claims pertain to the period 1989-90 and the respondents inspite of their best efforts have not been able to trace out the records. With regard to 37 applications for CCS benefit under SPS Scheme, it is stated in the affidavit filed on 16th May, 1997 that applications at serial Nos. 7,13, 17, 25, 26,27, 28, 31, 33 and 37, CCS benefits under the SPS Scheme have already been allowed and cheques have been issued. Details of cheques are also mentioned. These cheques were issued during the period 1992-93. It is not understood why the petitioner has not mentioned these facts in the writ petition and concealed the said facts. With regard to the other applications, it is stated that the files cannot be traced out merely on the basis of the invoice number provided in the petition. Further, the petitioner is required to surrender the token as per the prescribed procedure. It is stated that the petitioner be put to strict proof that they had achieved the average net realization during the prescribed period.

17. It is not possible for this Court to go into these factual aspects in view of the inability of the petitioner and the respondents to furnish full details and particulars. In these circumstances, it is left open to the petitioner to approach the office of Director General of Foreign Trade along with relevant documents in support of his claim with a representation/letter for payment and disposal of applications for CCS claimed under SPS Scheme where files or details are not available. Respondents will examine the claim of the petitioner and pass a speaking order within six months after representation is made. All pleas and contentions including question of delay and laches, failure to rectify and remove defects, etc. will be examined and are available to the respondents. It is clarified that this direction is in respect of CCS benefits under SPS Scheme, where files are not traceable. In case the petitioner is aggrieved by the Order passed by the respondents, they will be entitled to ventilate their grievance in accordance with law. Writ Petition is accordingly disposed of.