

(2016) 08 GUJ CK 0040

In the Gujarat High Court

Case No : Special Civil Application No. 5346 of 2016

Shangrila Latex Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-08-2016

Acts Referred:

Citation : (2016) 340 ELT 465

Hon'ble Judges : Akil Kureshi and A.J. Shastri, JJ.

Bench : Division Bench

Advocate : S/Shri Dhaval Shah and S.S. Iyer, Advocates, for the Appellant; Shri Devang Vyas and Ms. Trusha K Patel, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

A.J. Shastri, J. (CAV). - The petitioner, by way of present petition, is challenging the legality and validity of the impugned order dated 21-10-2015 and sought incidental reliefs as follows :

"A. Your Lordships may be pleased to issue a writ of or in the nature of certiorari or mandamus or any other writ, order or direction quashing and setting aside the impugned order dated 21-10-2015 as illegal being not maintainable, unfair, discriminatory, perverse, absurd, harsh, barred by law as well as barred by time;

B. Your Lordships may hold that without disposing of the pending option exercised and representations made by the petitioner seeking revision of value addition percentage and condensation of shortfall through a speaking order, respondents cannot adjudicate the show cause notice abruptly;

C. Your Lordships may hold that once respondents have recognised the impossibility of achieving value addition as per 1987-92 policy through circular of 1993, there is no question of imposing any penalty at all for shortfall in value addition and that too, without considering the value addition in the subsequent period;

D. Your Lordships may hold that option exercised by the petitioner in terms of the 1989 circular cannot be denied on the ground of delay alone and that too, without following the principles of natural justice;

E. Pending admission, hearing and final disposal of this petition, your Lordships be pleased to stay the recovery and/or any other adverse proceedings that may be initiated by Respondents in terms of the impugned order dated 26-10-2015.

F. An ex parte ad interim relief in terms of para (E) above may be granted.

G. Such other and further reliefs as deemed just and expedient in the facts and circumstances of the case be granted."

2. Case of the petitioner is that the petitioner-company has set up an Export Oriented Unit for manufacture and export of rubber hand gloves in terms of letter of permission granted to it vide letter dated 25-8-1988. In response to such letter of permission, the petitioner has also filed an undertaking on 22-6-1989 which was duly accepted by Joint Controller of Imports and Exports under letter dated 27-10-1989. The petitioner set up a 100% Export Oriented Unit at Olpad, District Surat and commenced the production activity on 16-8-1991. Later on, the petitioner had started exports in the month of March, 1992. The letter of permission was issued to the petitioner with a condition to fulfil minimum value addition at the rate of 45.93%. The petitioner, during the course of time, made the exports to the tune of Rs. 13.95 crores for the first five years, (review as of 31-3-1996) the value addition achieved by the petitioner was to the extent of only 19.62% as against the condition of achieving 45.93%. Resultantly, there was a shortfall of 26.31% in the block of first five years period. The case of the petitioner is that in the second block of five years ending on 31-3-2001 they made an export to the extent of Rs. 22.75 crores and has achieved a value addition in excess. During the passage of time, the Exim policy 1992-97 was pronounced wherein the revised value addition formula was made applicable to Export Oriented Units and in furtherance of it, the Ministry of Commerce, Government of India issued a circular on 8-9-1993. By virtue of this, the units were requested to exercise an option within three months from the date of issue either to continue under the old formula or changeover to the revised value addition formula w.e.f. 1993-94.

3. It is the case of the department that despite the said circular having been issued, the petitioner-company did not make any proposal for revised value addition within prescribed time limit. However, case of the petitioner is that on 17-2-1994, the request was already submitted to the authority but authority found the said letter was not on record and thereby since the deadline was only upto 7-12-1993, the petitioner failed to exercise said option as stated.

4. Resultantly, a show cause notice came to be issued by the Development Commissioner, KASEZ, and after granting an opportunity of hearing, the authority imposed a fiscal penalty of Rs. 2,27,40,000/- for failure on the part of the petitioner to achieve the prescribed minimum value addition which was a part

of the condition contained under the letter of permission.

5. Feeling aggrieved by the said order of penalty, the appellant filed an appeal before the appellate authority on 1-4-2014. The appellate authority has granted an opportunity of hearing. The case was put up before the appellate authority by the petitioner by pointing out various circumstances, under which, the value addition could not be achieved by the petitioner. It was inter alia contended that when the petitioner went into commercial production, in initial phase of export, they were unable to capitalize on the boom period as the commencement has taken place only in March, 1992. By the time their commercial production started, the downward trend in the industry of glove had already begun. It was submitted by the petitioner-company that the extreme competitive international market coupled with an extremely low price with inadequate working capital forced the petitioner company to curtail their production. On account of financial crunch, the petitioner unit could not meet with the standard of value addition fixed. It was also submitted that the Indian Latex was more expensive than the international latex and therefore the market scenario was not permitting the petitioner to achieve the target which was stipulated in letter of permission. In the year 1997, the company became a sick unit and the case was registered before BIFR being Case No. 176 of 1997 which has dragged the unit in severe financial constraints. It was also contended that the show cause notice has been issued beyond a reasonable period. The value addition norms which was made the subject-matter of show cause notice was for a block period of 1991 to 1996 whereas notice came to be issued in the month of May, 2013 and therefore, it was submitted that the notice was issued beyond a reasonable period. However, during the course of personal hearing, though the case was put up by raising several contentions, the appellate authority has not considered the appeal and has confirmed the order of Development Commissioner dated 12-2-2014 and the appeal presented by the petitioner was rejected vide order dated 21-10-2015 and justified the penalty which came to be issued. It is in the background of these circumstances, the petitioner has approached this Court by filing present petition by invoking extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution.

6. Learned counsel Mr. S.S. Iyer appearing on behalf of learned advocate Mr. Dhaval Shah for the petitioner contended that the orders passed by the authorities below are not just and proper and not in consonance with the provisions of law and therefore, the same be set aside. It was also contended that it is not a case of the authorities below of any nature that the petitioner-company has mis-utilized the terms of the letter of permission, has also not misrepresented and no mischief is attributable to the petitioner-company and thereby he requested the Court not to allow the penalty to be imposed upon. Learned counsel further submitted that to invoke the provision of penalty, there must be first of all, a mens rea of the petitioner-company be established and looking to the entire record, nowhere the petitioner's mens rea is reflected or even alleged. Therefore, in the absence of this condition precedent, no order of

penalty can be passed by the authority. It was also submitted that the alleged violation or non-fulfilment of the terms of letter of permission is related to a block period of initial five years which is from 1991 to 1996. The authorities have, after unreasonable period of time, sought the powers to be exercised in the year 2013 by issuing notice and consequent issuance of the order impugned in the petition. Therefore, the very initiation against the petitioner is beyond the reasonable period and therefore on that ground alone the learned counsel requested the Court to set aside the order impugned. It was submitted by the counsel for the petitioner that there is a detailed explanation submitted on representing the case and the authority has not dealt with such submissions which have been made. Therefore, the orders passed by the authorities are not only suffers from the vice of non-application of mind but are based upon an irregular exercise of power. It was also brought to the notice of the Court that the authorities have not considered the entire period of ten years for which the unit was allowed to set up. If the authority could have considered the later period of five years and compared the figures then substantially the petitioner-company has achieved the target for which the letter of permission was issued and therefore having not considered orders are based upon misconstruction of the terms of letter of permission. The learned counsel for the petitioner has relied upon several decisions delivered by various Courts as under :

(i) In case of Hanil Era Textiles Limited v. Union of India reported in 2002 (144) E.L.T. 27 (Bom.);

(ii) In case of DKM Cassette P. Ltd. v. Union of India reported in 2010 (260) E.L.T. 404 (Delhi);

(iii) In case of Disco Garments Pvt. Ltd. v. Union of India reported in 2011 (273) E.L.T. 198 (Guj.);

(iv) In case of Suryovonics Ltd. v. Ministry of Commerce reported in 2010 (254) E.L.T. 73 (A.P.);

(v) In case of Neeldhara Weaving Factory v. DGFT, New Delhi reported in 2007 (210) E.L.T. 658 (P&H) : 2007 (5) S.T.R. 404 (P&H);

(vi) In case of Dewan Tyres Ltd. v. Union of India reported in 2014 (307) E.L.T. 496 (All.);

7. Relying upon these decisions, the learned counsel submitted that the orders passed by the authorities are not in consonance with settled principle of law and therefore non-consideration of relevant material adduced before the authority itself is a sufficient ground to hold that orders passed by the authorities are not just and proper.

8. Counsel for the petitioner further submitted that while passing impugned order, the authorities below have not considered the doctrine of proportionality while inflicting penalty upon the petitioner-unit. Several circumstances and factors to arrive at a penalty quantum ought to have been considered and

though the same have been put to the notice of the authorities, none of the factors have been dealt with and extreme penalty came to be inflicted upon to a unit which was facing a severe financial crunch. It was also submitted by the counsel for the petitioner that sub-section (2) of Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 is vesting a discretion upon the authority to impose penalty from the range of Rs. 10,000/- to not more than five times the value of the goods in respect of which contravention is alleged and thus, discretion has not been properly exercised by the authorities and therefore, requested the Court that such order of penalty is not sustainable. By submitting ultimately the learned counsel requested the Court to set aside the impugned order passed by the authority below and grant the relief, as prayed for, in the petition.

9. To oppose the petition, learned advocate Ms. Trusha Patel appearing on behalf of Respondent No. 1-authority has contended that the orders passed by the authorities below are just and proper and are passed in exercise of discretion vested in law and also passed after granting full opportunity to the petitioner and therefore prayed to the Court not to exercise discretion in favour of the petitioner. Learned counsel has contended that the petitioner-unit was from the beginning put to the notice about the standard which is required to be maintained at the time when letter of permission initially granted. The learned counsel has drawn attention of the Court to the conditions attached to the letter of permission reflected on Page 40 of the petition compilation onwards and precisely submitted that there is a sheer violation of Condition Nos. 11 and 12. Therefore, undisputedly once the petitioner unit has contravened the condition which are engrafted in letter of permission, the natural consequence is to impose penalty. Therefore, the authorities below have rightly exercised their discretion based upon such circumstance. It was also submitted by the learned counsel that in addition to the terms of letter of permission, an undertaking was also specifically filed by the very petitioner-unit. The petitioner unit undertook the entire letter of permission along with the attached condition and to observe those conditions and fulfil the same, a specific undertaking is given by the petitioner which is reflected in a communication dated 27-10-1989 at Page 57 of the petition compilation. Therefore, the counsel submitted that when the legal undertaking has been specifically breached, the petitioner-unit has rightly visited with the penalty and therefore, orders impugned in the petition do not call for any interference.

10. Counsel for the respondent-authority has further submitted that under Exim Policy, vide circular referred to above, a specific option was given to the petitioner-unit either to continue with the old formula or to changeover the revised value addition formula. But it is the petitioner-unit which did not exercise such option and therefore, counsel submitted that no grievance can be allowed to be raised by the petitioner in that circumstance. The counsel further submitted that each block period has to be considered separately and therefore, when the petitioner-unit has not observed the condition of letter of permission in the initial

block period of five years i.e. from 1991 to 1996, the authority has rightly considered and has passed the order. Learned counsel has also drawn attention of the Court that there was a sizeable shortfall in the initial block period of five years to the extent of 26.31% as against the requirement of minimum value addition of 45.93%, the petitioner-unit achieved only 19.62%. Therefore, the authorities have rightly exercised the discretion and held that petitioner-unit cannot club the subsequent period with initial block period of five years. Counsel further submitted that a detailed order came to be passed by the original authority while passing an order-in-original dated 12-2-2014 wherein, a specific finding came to be arrived at on each of the issues and the authority which passed an order has arrived at a finding that petitioner-unit has failed to achieve the value addition, as prescribed under letter of permission dated 25-8-1988. It was also brought to the notice by the counsel for the respondent-authority that even under the new formula, the petitioner-unit could not have achieved the required value addition looking to the circumstances prevailing and thereby the counsel submitted that when both the authorities have found that unit has failed to achieve the requisite target, the authorities have rightly exercised the due discretion vested in law and imposed a penalty. The learned counsel has in sum and substance contended that there was a clear breach on part of the petitioner-unit to achieve the requisite target which was a part of the condition of letter of permission and therefore, the authority has rightly imposed the quantum of penalty. On the contrary it is submitted that the balance is strike upon by the authority to arrive at a penalty which is reflected in the order-in-original and therefore submitted that no interference be made in extraordinary jurisdiction of this Court.

11. Having heard learned counsel appearing for the respective sides, following facts are emerging from the record :

(i) When the petitioner-unit commenced the production and entered into the export transaction, by that time, the market scenario has changed, as cogently explained by the petitioner. The situation was changed to that extent that the Indian Latex was more expensive as compared to international latex and therefore, a time had come that petitioner had to import latex from South-East Asian countries and sale them initially to try to meet with the target.

(ii) It was also brought to the notice and reflecting from record that in the year 1997 and around, the company became sick unit and came under the purview of BIFR and even the case was registered being Case No. 176 of 1997.

(iii) It is also reflected from the record that when pursuant to the circular dated 8-9-1993 the petitioner has made an attempt to exercise option and the request letter dated 17-2-1994 appears to have received by the authorities on 7-3-1994 as is appearing from Page 67 of petition compilation and therefore non-receipt of the same by the authority is appearing very doubtful.

(iv) It is also emerging from the record that petitioner-company has made

serious attempt to fulfil the conditions contained under the letter of permission as is reflected from the figures. However, when the company failed to achieve the requisite target in the first block period of five years but then it appears to have substantially increased the business in the later block of five years.

(v) It is also appearing from the record that during the course of personal hearing, the entire circumstance is put-forth before the authority and has requested to take a reasonable view.

(vi) The main material aspect which is emerging from the record is that the appellate authority, while dealing with an order-in-original has practically paid no attention to the quantum of penalty whether penalty is imposed upon by the original authority is reasonable, just and proper or not. There appears to be a complete non-consideration and therefore, the conclusion arrived at is based on no reasoning.

12. In the background of this bare perusal of the relevant provision of the Foreign Trade (Development and Regulation) Act, 1992 ["the Act" for short] is very much needed. Section 11 deals with the Contravention of provision of this Act, rules, orders and foreign trade policy, relevant portion which reads as under :

"11. Contravention of provision of this Act, rules, orders and foreign trade policy.
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(1) No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the foreign trade policy for the time being in force.

(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy, he shall be liable to a penalty of not less than ten thousand rupees and not more than five times the value of the goods or services or technology in respect of which any contravention is made or attempted to be made, whichever is more.

(3) Where any person signs or uses, or causes to be made, signed or used, any declaration, statement or document submitted to the Director-General or any officer authorised by him under this Act, knowing or having reason to believe that such declaration, statement or document is forged or tampered with or false in any material particular, he shall be liable to a penalty of not less than ten thousand rupees or more than five times the value of the goods or services or technology in respect of which such declaration, statement or document had been submitted, whichever is more.

(4) Where any person, on a notice to him by the Adjudicating Authority, admits any contravention, the Adjudicating Authority may, in such class or classes of cases and in such manner as may be prescribed, determine, by way of settlement, an amount to be paid by that person.

(5) A penalty imposed under this Act may, if it is not paid by any person, be recovered by any one or more of the following modes, namely :

(a) the Director-General may deduct or require any officer subordinate to him to deduct the amount payable under this Act from any money owing to such person which may be under the control of such officer; or

(b) the Director-General may require any officer of customs to deduct the amount payable under this Act from any money owing to such person which may be under the control of such officer of customs, as if the said amount is payable under the Customs Act, 1962 (52 of 1962); or

(c) the Director-General may require the Assistant Commissioner of Customs or Deputy Commissioner of Customs or any other officer of Customs to recover the amount so payable by detaining or selling any goods (including the goods connected with services or technology) belonging to such person which are under the control of the Assistant Commissioner of Customs or Deputy Commissioner of Customs or any other officer of Customs, as if the said amount is payable under the Customs Act, 1962 (52 of 1962); or

(d) if the amount cannot be recovered from such person in the manner provided in clauses (a), (b) and (c),

(i) the Director-General or any officer authorised by him may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the District in which such person owns any property or resides or carries on business and the said Collector on receipt of such certificate shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue; or

(ii) the Director-General or any officer authorised by him (including an officer of Customs who shall then exercise his powers under the Customs Act, 1962 (52 of 1962) and in accordance with the rules made in this behalf, detain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid, as if the said amount is payable under the Customs Act, 1962 (52 of 1962); and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and costs including cost of sale remaining unpaid and shall render the surplus, if any to such person.

(6) Where the terms of any bond or other instrument executed under this Act or any rules made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (5), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.

(7) Without prejudice to the provisions contained in this section, the Importer-

Exporter Code Number of any person who fails to pay any penalty imposed under this Act, may be suspended by the Adjudicating Authority till the penalty is paid or recovered, as the case may be.

(8) Where any contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy has been, is being, or is attempted to be, made, the goods (including the goods connected with services or technology) together with any package, covering or receptacle and any conveyances shall, subject to such conditions and requirements as may be prescribed, be liable to confiscation by the Adjudicating Authority.

(9) The goods (including the goods connected with services or technology) or the conveyance confiscated under sub-section (8) may be released by the Adjudicating Authority, in such manner and subject to such conditions as may be prescribed, on payment by the person concerned of the redemption charges equivalent to the market value of the goods or conveyance, as the case may be."

13. The relevant clause of the aforesaid statutory provision is sub-section (2). In the said sub-section, a power is vested by the statute to inflict penalty upon a person who makes or abets or attempts to make any export or import in contravention, and wide range of discretion is vested with the authority ranging from Rs. 10,000/- to five times the value of goods or services which are effected in contravention. Therefore, the statute has invested in the authority a discretion to be exercised from this peripheral limit as contained in sub-section (2) of Section 11 and therefore, looking to this provision what is to be considered is whether discretion exercised by the authority is just and proper? To deal with the aforesaid aspect of penalty, the circumstances stated herein above appears to have been not gone into by the authorities in the right spirit. It appears from the record that there is no deliberate attempt on part of the petitioner-unit to flout the terms of the letter of permission. On the contrary, situation prevailing in the market has compelled the petitioner-unit to face severe financial crunch and therefore, there was no deliberate act on part of the petitioner-unit not to obey the terms of the letter of permission upon which the unit was set up. Therefore, it appears that the learned counsel for the petitioner rightly contended that there is no mens rea upon which penalty can be imposed and that too of such magnitude. This Court having gone through in detail order-in-original as well as the appellate order and found that ultimately, while exercising the discretion qua Section 11(2) on the issue of penalty authority, appears to have no proper justification. If we look at the observation of the authority who pass an order-in-original on the contrary there is categorical finding as contained in Para 27 which is based upon the material on record as well as representation of the petitioner-unit. The authority has specifically come to the conclusion "thus I am of the view that a lenient view may be taken while imposition of penalty upon them for non achieving of required value addition." Now, if the observation is to be seen in the context of the circumstances prevailing on record, the quantum of penalty which has been inflicted upon to the extent of Rs. 2,27,40,000/- is of far consequences

harsh and cannot be said to be a reasonable penalty.

14. So far as the contentions of the learned counsel for the petitioner with respect to clubbing of a period of first block of five years with second block of five years appears to be impermissible in view of the fact that there is a specific provision contained under the letter of permission wherein in separate block period of initial five years and second block of five years" target, as stipulated, is to be achieved. Therefore, when petitioner is a signatory to such letter of permission, it is not open on part of the petitioner to contend the clubbing of the said period. So far as another contention with regard to mens rea being missing on the part of the petitioner is concerned, the Court is not impressed upon such aspect in view of the fact that there are conditions contained under letter of permission specifically based upon which the permission to set up a unit is granted and therefore, it was obligatory on part of the petitioner to achieve the said target which was already fixed under letter of permission. Therefore, undisputedly when the target fixed under the letter of permission is not achieved by the petitioner whether mens rea is there or not it is of no significance. The fact remains that the criteria fixed under letter of permission has not been able to be fulfilled by the petitioner. Insofar as the question of delay aspect is concerned, the same is not to be considered so as to set side the entire action. The only point which has impressed the Court is that while inflicting penalty, the well recognised doctrine of proportionality is not being considered by the authorities below. More particularly, the second appellate authority has not even touched that aspect which warrants this Court to consider the case on the issue of proportionality. In that view of the matter, the contentions, as stated above, being meritless, the only course left open for the Court is to consider and examine the issue with regard to proportionality while inflicting penalty.

15. In addition to this, the appellate authority which is couched with a specific power to examine the validity of an order has surprisingly not even dealt with this proportionality of the penalty in any manner. The appellate authority has arrived at a conclusion in Para 5 of the order reflected on Page 25 of the petition compilation practically has not taken up the issue nor even dealt with the issue of proportionality of penalty which is the center of controversy of present proceedings. Therefore, there appears to be complete non-application of mind on the part of the authorities below to exercise discretion as invested in Section 11(2) of the Act. Additional feature of the present proceedings is that, there is no allegation of either misrepresentation or mis-utilization of the terms of letter of permission nor any mischief is alleged of any nature and therefore, the bona fides of the petitioner-unit have not been questioned by the authority. The only fault appears to be of the petitioner-unit is that it has not met with the condition of letter of permission and has failed to achieve the target and as such authorities ought to have considered well recognised doctrine of proportionality which passing impugned orders.

16. In view of the above position prevailing on record if the authorities which are

cited by the counsel for the petitioner are taken into consideration, the same would assist the Court to arrive at a just decision to deal with the same. First authority which has been cited is in case of Hanil Era Textiles Limited v. Union of India (supra).

17. In the context of this learned counsel further relied upon the decision delivered by this Court in case of Disco Garments Pvt. Ltd. v. Union of India (supra) wherein in a similar situation when the unit of that case was not in a position to fulfil the export obligation, the Court has observed and dealt with the issue as reflected in relevant paras which are quoted hereunder :

"20. In view of the aforesaid discussion and factual background of the case, we find that there is no allegation whatsoever to the effect that the petitioner-Company have misapplied the goods imported under the letter of approval nor there is any allegation against the petitioner-Company that the goods manufactured out of the goods so imported have been diverted elsewhere. It is also an admitted position that neither the show cause notice nor the orders impugned in the present petition mention, which clause of section 4-I of the Act, 1947 is attracted and as aforesaid the only ground for initiation of action under section 4-I of the Act, 1947 is non-fulfilment of export obligation.

25. In view of the foregoing discussion, in the instant case the only allegation against the petitioners is that there is non-fulfilment of export obligation and breach of condition of value addition to the tune of 40%, which, as per the show cause notice dated 8-8-1995 is construed as misutilization of goods imported. Considering the facts of the present case and the ratio laid down by the above referred judgments, we are of the opinion that mere non-fulfilment of export obligation and not achieving value addition to the tune of 40% as per the conditions of the letter of approval would not fall under any of the clauses of section 4-I of the Act 1947. It is also worthwhile to note that there are no other allegations whatsoever as regards breach of any conditions of grant of approval, except what is stated in clause 3 of the impugned show cause notice and even the appellate authority, taking into consideration the genuine problems of the petitioners, has been pleased to reduce the fiscal penalty from Rs. 10 lac to Rs. 5 lac. It cannot be concluded that there is any misutilization or mis-declaration on the part of the petitioners. The respondents cannot be permitted to substitute the reasons in order to attract the provision of Section 4-I of the Act 1947. We therefore find that the impugned orders dated 9-9-1996 and 3-4-1998 are unsustainable in the eyes of law and in the facts of the present case the provisions of section 4-I of the Act 1947 are not attracted and, therefore, the petitioners are not liable to pay penalty. It is however, made clear that it would be open for the respondent authorities to take any other action for non-fulfilment of export obligation and non-achieving of value addition as per letter of approval against the petitioners under any other Acts, Rules and Regulations in force."

18. In another decision relied upon by the counsel for the petitioner is in case of Suryovonics Ltd. v. Ministry of Commerce (supra) wherein also the Court was

dealing with the circumstances of non-fulfilment of export obligation corresponding to penal provision contained under the relevant Act. In Para 13 of the judgment, the Court observed which is worth to be taken note of, hence quoted hereafter :

"13. It is well established that while interpreting any provision contemplating imposition of penalty, is on the face of it a penal nature, cannot be lightly invoked exercised without giving due adherence to the core facts and circumstances of the case. It cannot be said as an open and shut case of clear violation of the petitioner. There are ample reasons which had led to present imbroglio. The respondents are well within the knowledge of these circumstances, and they themselves, did act on the application of the petitioner for de-bonding and allowing domestic sale and authorities without the knowledge of the authorities, used or misdirected the materials. Unless an act of violation is directly attributable to the person, penal liability cannot be extended. Each case has to be considered on its own merits and circumstances. Therefore, we are of the view that the entire impugned action since inception by invocation of provisions of Section 4-I of the Act by the authorities is totally arbitrary and illegal, apart from being unsustainable in the facts and circumstances of the case."

19. In another decision in case of Neeldhara Weaving Factory v. DGFT, New Delhi (supra) wherein also the act of the authority was after 14 years from the date of default and while dealing with said circumstances, the Punjab and Haryana High Court has considered various decisions of the Supreme Court and has observed like this :

"(9) The petitioner having committed the default way back in 1988-89 in not fulfilling his export obligation in to, the authorities could initiate penalty proceedings against the petitioner only within a reasonable time. It is not in dispute that a show cause notice for levy of penalty was issued for the first time on 9-8-2000. Still the matter remained pending and the penalty was imposed, nearly 3 years after the show cause notice, on 30-6-2003. The judgments referred to above as cited by the petitioner to support the proposition that the exercise of power has to be within a reasonable time, where no time limit prescribed under the statute for exercise thereof. Respondents could not justify the period of delay in issuing show cause notice to the petitioner for levy of penalty.

(13) In State of HP and ors. v. Rajkumar Brijender Singh and others, AIR 2004 SC 3218 referring to Section 20 of the HP Ceiling on Land Holdings Act, 1973, conferring suo motu power on Financial Commissioner, interpreting the words "at any time", it was held that such power had to be exercised within reasonable time. The relevant observations are :-

"6. ..It is true that sub-section (3) provides that such a power may be exercised at any time but this expression does not mean there would be no time limit or it

is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fix period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power suo motu action could be exercised. For example in this case, as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in exercise of his suo motu power, well it could be open for the State to submit that the facts and circumstances were such that it would be within reasonable time but as we have already noted the order of the Collector which has been interfered with has passed in January, 1976. The learned counsel for the appellant was not able to point out such other special facts and circumstances by the reason of which it could be said that exercise of suo motu power after 15 years of the order interfered with was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo motu in a suitable case even though an appeal preferred before lower appellate authority is withdrawn may be by the State. Thus, the view taken by the High Court is not sustainable."

(17) Accordingly, we do not find any justification for levy of penalty after 14 years of default. The contention of the counsel for the Revenue to the effect that the petitioner having committed default cannot be permitted to raise these technical pleas is to be noticed and rejected, being without any merit."

20. Even in another case of *Dewan Tyres Ltd. v. Union of India* reported in 2014 (307) E.L.T. 496, the Allahabad High Court had analysed all the provisions relevant to the issue in question has also dealt with the aspect of penalty and held that the powers are to be exercised within a reasonable period. Even if the statute is not stipulating the specific period to exercise the powers but, still the powers are required to be exercised within a reasonable period and after considering series of decisions and after observing the action of the department was set at naught and therefore, considering overall circumstances stated herein above, we are of the opinion that the background of present facts and circumstances also to be dealt with in the aforesaid line. The relevant paragraphs of the said decision are 36 onwards. But since the issue is not debatable, the same are not quoted hereinafter.

21. Therefore, in the background of that case, the action of penalty was dealt with and set aside.

22. Now in the background of aforesaid fact reverting back to the facts of the case on hand as said earlier, it is quite visible that the original authority has not kept in mind the concept of proportionality while inflicting penalty, and has also not considered that the alleged violation of first five years block period and action is initiated after an unreasonable period. A bare perusal of the order passed by the appellate authority clearly indicates that there is no consideration

of whatsoever nature with regard to the aspect of penalty and the quantum thereof. Factor stated above clearly attracts well recognised doctrine of proportionality and therefore, this Court is of the opinion that there appears to be a clear error in exercising power by the appellate authority and therefore in the background of this fact, we deem it proper to set aside the order passed by the appellate authority with a consequential direction remanding the matter back to the appellate authority to consider afresh and pass a reasoned order. In the context aforesaid, the appellate authority i.e. Respondent No. 3 herein is directed to re-consider the case of the petitioner-unit afresh, re-examine an issue of proportionality of penalty after giving proper opportunity to the petitioner and pass a reasoned order keeping in mind the aforesaid circumstances.

23. With these directions, we set aside the impugned order dated 21-10-2015 and direct the Respondent No. 3 authority to pass suitable order afresh by assigning appropriate reasons as expeditiously as possible in accordance with law.

24. In view of above the petition is disposed of. Notice is discharged.

25. At this stage, learned counsel appearing for the department requests to suspend the order for some reasonable period so as to enable them to approach the higher forum but, looking to the peculiar circumstances, we are not inclined to grant the time. Hence, the request is rejected.