(2010) 05 GUJ CK 0049

In the Gujarat High Court

Case No : Special Civil Application No. 6308 of 1986

Simac Electricals Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 06-05-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Imports and Exports (Control) Act, 1947 — Section 4I(1)

Citation : (2011) 263 ELT 69

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Vijay Nair for Ms. Anuja S. Nanavati, for the Appellant; R.J. Oza, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—The petitioner, a Private Limited Company, states that it is a 100% export oriented unit manufacturing fiat knitting machines. The petition when originally filed was limited to the following prayers :

15. In the premises aforesaid, the petitioners, therefore, most humbly and respectfully pray that:

A. Your Lordships be pleased to issue a writ of mandamus or any other appropriate writ, order or direction, directing the respondents to forthwith open the seal of the factory premises of the petitioners and to allow the petitioners to start and continue their manufacturing activities without let or hindrance and allow export of the goods manufactured and direct the respondents to allow the clearance of the goods as per the Bills of Entry submitted before the respondent No. 3.

B. Pending the hearing and final disposal of the present petition, Your Lordships be pleased to order the respondents to remove the seals of the factory premises of the petitioners forthwith and to pass the Bills of Entry and to allow the petitioners to start and continue their manufacturing activities and allow the clearance and export of the finish goods manufactured out of the consignments in question.

C. Ad-interim ex-parte relief in terms of prayer (B) above may kindly be treated.

D. Any other and further relief as the nature and circumstances of the case may require, also be granted.

2. Thereafter vide amendments made on various dates following additional prayers were made:

(a-1) that this Hon''ble Court be pleased to issued a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ order or direction under Article 226 of the Constitution of India, calling for the records and proceedings pertaining to the passing of the impugned order dated 7th May 1987 Annexure M-3 hereto and after examining the validity, legality and propriety thereof, be pleased to quash and set aside the same;

(b-1) that pending the hearing and final disposal of the petition, this Hon''ble Court be pleased to stay the operation, impugned order dated 7th May 1987 Annexure M-3 hereto on such terms and conditions as this Hon''ble Court may deem fit to impose;

(c-1) for ad interim relief in terms of the prayer (b-1) above;

(a-2) That this Hon''ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ order or direction quashing and setting aside the impugned order dated 14th December, 1987 at Annexure " M-8."

(b-2) That pending the hearing and final disposal of the present petition this Hon''ble Court will be pleased to stay the operation, implementation and enforcement of the impugned order dated 14th December, 1987 at Annexure "M-8"

(c-2) For ad-interim relief in terms of prayer (b-2) above.

(a-3) In the alternative to the foregoing prayers your Lordships will be pleased to permit the petitioners to file their claim for duty drawback in respect of the goods exported by them to USSR pursuant to the orders of this Hon''ble Court and direct the respondents to allow the same without taking into consideration the delay in lodging the claim for drawback by the petitioners and till such claim is allowed, direct the respondents not to recover the amount of Customs duty levied upon the petitioners by order dt. 14th/16th December 1987 passed by Deputy Collector of Customs, Kandla.

3. In so far as the original prayers are concerned, it is an accepted position that as the petitioner was permitted under orders of the Court to export the goods after manufacture, the said prayers do not survive and no orders are required to

be made.

4. It is the say of the petitioner that on 21-1-1986 the petitioner received a proposed order for 12,000 knitting machines from a Russian buyer at specified price and delivery schedule. Accordingly, as per the say of the petitioner, the petitioner placed order for importing certain machines/spare-parts with a Japanese concern. On 28-1-1986 the petitioner made an application to respondent No. 2 authority, the Development Commissioner, Kandla Free Trade Zone, seeking allotment of a shed and registration on the basis of the project report and a copy of the proposed order of the Russian buyer.

5. On 18-4-1986 a letter of approval was issued by Ministry of Commerce for setting up a new industrial unit in Kandla Free Trade Zone subject to the following three conditions :

1. Entire production shall be exported, of which at least 50% will be to G.C.A. countries.

2. Minimum value addition without inputs will be 47% in first year, 53% in second year, 62% in third year, 71% in fourth year and 81% in fifth year of production. If the value of both imported and indigenous outputs are taken into account, a minimum value addition would be 32% in first year going upto 52% in the 5th year,

3. Clearance should be obtained from the Gujarat Water and Pollution Control board.

The petitioner was asked to confirm written acceptance of the conditions and in fact the petitioner did so vide communication dated 2-5-1986.

6. Before the petitioner was granted registration by respondent No. 2 authority, the petitioner was called upon to confirm as to whether the petitioner would be in a position to comply with the conditions stipulated in the letter of approval in light of the past history of a sister concern of the petitioner. The petitioner having replied in the affirmative registration was granted. The registration was granted on 7-10-1986 and immediately on the next day, namely 8-10-1986 the petitioner approached respondent No. 2 authority seeking reduction in the stipulated minimum value addition as per Condition No. 2 of letter of approval dated 18-4-1986.

7. Subsequent thereto respondent No. 2 sealed the factory premises of the petitioner and the petitioner approached this Court. Suffice it to state that the petitioner had entered into correspondence with various authorities and also approached this Court by way of different proceedings at different stages. Ultimately, at the end of the entire exercise admittedly the petitioner could not achieve the minimum value addition even though the petitioner was permitted to export manufactured goods under directions of this Court. As a consequence respondent No. 2 made an order on 7/8-5-1987 (Annexure-M3) levying a penalty of Rs. 25,00,000/- for mis-utilizing the imported components and violating

provisions of Section 4-I(1)(a) of the Imports and Exports (Control) Act, 1947.

8. This was followed by an order made by respondent No. 3 authority on 14/16-12-1987 under the provisions of the Customs Act, 1962. A demand of Rs. 3,14,84,373.10 was confirmed by the said order. Both the orders made by respondent No. 2 authority and respondent No. 3 authority respectively are under challenge.

9. Learned advocate for the petitioners assailed the impugned orders principally on the ground that as per the Export Import (EXIM) policy applicable at the relevant point of time there was no compulsion to achieve value addition and such a condition could not have been incorporated in a letter of approval; that even if such a condition had been incorporated in the letter of approval, the petitioner could not be bound by the same as while granting approval the authority cannot impose a condition contrary to the policy. Alternatively, it was submitted that the policy cannot be treated as a statute and in absence of any statutory provision providing for such a contingency no such condition could be imposed upon the petitioner, and hence, the petitioner was not legally obliged to fulfill such a condition. A further alternative contention was that the authorities failed to consider the circumstances in which the petitioner was put by virtue of sudden fluctuation in the import rate making it impossible to achieve the limit specified in the condition and, therefore, the petitioner could not have been called upon to achieve what was not possible. Lastly, it was contended that the proceedings had been initiated even before the period of one year was over as stipulated in the condition and, therefore, also the respondent authorities could not have either levied the penalty or confirmed the demand in hands of the petitioner. In support of the submission made, attention was invited to Appendix 15 (Chapter XX) and Paragraph No. 4 thereof as appearing in the EXIM Policy at the relevant point of time as well as Customs Notification No. 77-Cus., dated 17-4-1980 to submit that the notification nowhere provided for value addition and in absence of such direct provision, any condition imposed in a letter of approval cannot be insisted upon. In support of the submission, reliance was placed on judgment in case of Choksi Tube Company Ltd. Vs. Union of India (UOI) and Others, to submit that in that case similarly situated persons were not called upon to either pay penalty or demand despite similar default and hence, the impugned orders were required to be quashed and set aside as persons whose cases were similar were not called upon to either pay duty or penalty. Judgment in case of M/s. Baliga Exports (Private) Limited, Udupi Vs. The Additional Chief Controller of Imports and Exports/Additional Director General of Foreign Trade, New Delhi and others, rendered by Karnataka High Court was pressed into service in support of the submission that till the permitted period was not over no action could have been initiated as stated in Paragraph Nos. 13 and 14 of the said judgment.

10. Paragraph No. 4 of the EXIM Policy prevalent at the relevant point of time reads as under:

4. A copy of the Open General Licence is given in this Appendix. The importers are advised to regulate their imports under the Open General Licence in such a way that they adhere to the value added criterion on the basis of which their project was approved. The development Commissioner of the Zone shall examine that the value added criterion is being observed.

A plain reading of the said paragraph of the EXIM Policy makes it clear that the importers have been advised to ensure that the imports are so regulated under the Open General Licence that the importers ultimately are in a position to adhere to the value added criterion on the basis of which the project is approved. The Development Commissioner of the respective zone is obliged to examine that the value added criterion is being observed. Therefore, the contention that the policy only envisages a directory or advisory achievement of the value addition stipulated by the letter of approval cannot be accepted. The paragraph in question has been couched in clear and unambiguous language. An importer has been called upon to regulate the imports to ensure that the importer complies with the value addition criterion. Therefore, submission that the policy document does not oblige an importer/exporter to fulfill the condition of value addition does not merit acceptance.

11. In so far as Customs Notification No. 77-Cus. dated 17-4-1980 is concerned, Condition No. 4 which appears immediately after preamble reads as under:

(4) the importer agrees to execute a bond in such form and for such sum as has been prescribed by the Development Commissioner of the Zone binding himself to fulfill the export obligations, and to fulfill, inter alia the conditions stipulated in this notification.

The said condition stipulates that an importer agrees to execute a bond in the prescribed form and for such sum specified by the Development Commissioner so as to bind the importer to fulfill the export obligation and fulfill other conditions stipulated in the notification. Thus, on a plain reading it emerges that once an importer has executed a bond in the prescribed form for a prescribed sum he is under a legal obligation to fulfill the export obligation. When one talks of fulfillment of an export obligation it goes without saying that the same would also include the aspect of value addition in so far as the exports are concerned. In the facts of the present case it is an accepted position that the petitioner did execute such a bond. The petitioner was, therefore, duty bound to fulfill the export obligation, including achieving the stipulated limit of value addition. In the circumstances, it is not possible to state that the letter of approval has gone beyond either the policy document or the customs notification.

12. In so far as the submission that the petitioner was called upon to pay the demand and penalty was levied even before the stipulated period of one year was over, suffice it to state that the petitioner was not in a position to comply with the stipulated limit of value addition even if the authorities had granted further time to the petitioner as the facts on record reveal. As per the letter of

approval the petitioner was required to attain minimum value addition to the tune of 47% in the first year without taking into account indigenous inputs. Letter of approval is dated 18-8-1986. The period of one year, namely, the first year for achieving 47% value addition would expire on 17-6-1987. The petitioner imported two consignments of components for flat knitting machines having total GIF value of Rs. 2.30 crores and filed bills of entry dated 7-10-1986 and 11-11-1986 seeking benefit of exemption under Customs Notification No. 77-Cus., dated 17-4-1980. However, the petitioner manufactured and exported only 4,000 pieces of flat knitting machines by March 1987 as against 12,000 knitting machines which were required to be exported latest by 17-6-1987. Admittedly, for exporting 4,000 pieces of flat knitting machines the petitioner had exhausted the entire imported components, the petitioner had not imported any further components, and was not in a position to import any further components so as to manufacture shortfall of 8,000 flat knitting machines between March, 1987 and 17-6-1987.

13. In the circumstances, as noted by the authority, against stipulated value addition of 47% the petitioner had been able to achieve only 21.3% value addition (at one place stated to be 17.15% / 16.26%). The shortfall was thus to the extent of more than 50% of the stipulated limit as the petitioner was not in a position to complete manufacture and achieve export of almost 26% within the period of remaining three months. Hence, even if the authorities had initiated action after 17-6-1987 the result would not have changed and, therefore, merely because the authorities have taken action within the period of one year no prejudice has been caused to the petitioner in the facts of the case, and in fact no prejudice is shown to have been actually caused to the petitioner.

14. In so far as the plea based on the Apex Court decision in the case of Choksi Tube Company Limited (supra) is concerned, suffice it to state that the principle of unjust discrimination cannot be converted into a principle of negative discrimination and assuming that some other person appears to have violated law that would not entitle the petitioner to violate the law.

15. In the circumstances, the petitioner cannot succeed on any of the grounds pleaded and urged at the time of hearing. In relation to the prayer clause 15(a-3), suffice it to state that respondent No. 3 authority has already recorded that it will be open to the petitioner to make a claim for duty drawback and, therefore, the said prayer cannot be granted. The petitioner has in the first instance, to make an application in accordance with law and only after the petitioner is in a position to show that the petitioner is entitled to, the authority would be in a position to consider such a claim.

16. Hence, none of the prayers made in the petition, even after various amendments, can be granted. The petition is accordingly rejected. RULE discharged. There shall be no order as to costs.

17. At this stage, learned advocate for the petitioners seeks stay of operation of

this judgment for a period of four weeks. Considering the facts on record and the fact that the orders impugned were made in 1987, the request is rejected.

