

(2003) 05 DEL CK 0110
In the Delhi High Court
Case No : CW No. 3332 of 2000

Smt. Raj Kumari		APPELLANT
	Vs	
Union of India (UOI)		RESPONDENT

Date of Decision : 01-05-2003

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2003) 05 DEL CK 0110

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : M. Datta, for the Appellant; Joyti Singh, for Respondent Nos. 1, 3 and 4 and Rajesh Rawal, for R. 2, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This petition deals with the forfeiture of earnest money deposit of the petitioner on the ground of non-fulfillment of export obligation by the petitioner who is the sole proprietor of the concern M/s. Janak Trading Company. The petitioner's claim is that no forfeiture could have been made in view of the force-majeure clause. As such, the petitioner has prayed for the quashing of the following orders:-

- 1.) Speaking Order No. AEPC/DZ/BG/SO-93/J-18 dated 10.10.1994 whereby the Respondent No. 2 (Apparel Export Promotion Council) (hereinafter referred to as "AEPC") decided to forfeit an amount of Rs. 4,80,060/- under the Garment Export Entitlement Policy 1991-93 (hereinafter referred to as the "said Garment Policy");
2. Order No. 21/30 (J)/94/EP.II/227 dated 10.10.1997 passed by the Respondent No. 3 (Textile Commissioner, New CGO Complex) whereby the order of forfeiture was confirmed in first appeal;
3. Order No. 14/88/98/LIT/243 dated 23.5.2000 and Order No. 14/78/97/LIT/269 dated 29.5.2000 passed by the second Appellate Committee confirming

the forfeiture.

2. Before setting out the facts leading to the filing of the present writ petition it would be pertinent to note that under the said Garment Policy quotas/export entitlements are issued subject to some conditions such as (1) confirmed order from the foreign buyer, (2) letter of credit and (3) validity of export being within 45 days from the date of allocation of the quota. The persons to whom the quotas/export entitlements are issued are required to make earnest money deposits (EMDs). In the present case I am concerned with the first-cum-first served system (FCFS System). Paragraph 8 (B) of the said Garment Policy prescribes that "in the FCFS System, EMD should be furnished at the rate of 5% of the FOB value of the quantity applied for at the time of applying for allotment, covering the quantity applied for and should be paid by way of Demand Draft/ FDR."

3. Release of the earnest money deposit (EMD) is made in terms of the provisions of paragraph 8 (F) of the said Garment Policy. Where the exporter exports the full amount of the Export Entitlement under the FCFS System, the Respondent No. 2 (AEPC) releases the EMD on fulfillment of, inter-alia, the conditions of (i) proof of shipment; (2) remittance of foreign exchange; and (3) no discrepancy in the export. Where, however, there is a deficiency in the export under the Export Entitlement the procedure for release of EMD is prescribed under paragraph 8(F) of the said Garment Policy. The provisions of paragraph 8 (F) are as under:-

"F) Release of Earnest Money Deposit

i) An exporter who exports not less than 95% of export entitlement under FCFS System or during the revalidated period covered by EMD in any Systems, will not be liable to forfeiture of EMD. An exporter who performs not less than 75% (not less than 50% in case of Slow Moving Items) but less than 95% will be liable to proportionate forfeiture. If utilisation of export entitlement allocation is less than 75% (less than 50% in case of Slow Moving Items), the exporter will be liable to forfeiture of EMD in full. For this purpose, utilisation of 95%/75% (50% in case of Slow Moving Items) of allotment can be computed on the basis of:

a) Allotment on each entitlement certificate or

b) In each country / category combination or

c) On the basis of the total allotment under the particular system of allocation whichever is beneficial to the exporter.

The computation will be done separately for each allotment period, wherever the year has been divided into different allotment periods. Proforma for claim on overall utilisation is at Annexure-XV.

ii) If an exporter surrenders his entitlements under any system either during the validity period or within a period of 3 days of the expiry of the validity, 50%

amount of the EMD or LUT will be released.

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

iv) In cases where importing countries declare an embargo on Indian Exports in any category, non-utilisation or under utilisation of any entitlements held by exporters in the particular country / category in any systems on account of the embargo will not attract any forfeiture. In such cases, the factual position may be ascertained by the Council from the relevant importing country before disposing of the cases."

4. Thus, from the above it is clear that where the exporter exports:-

a) not less than 95% of export entitlement there would be no liability for forfeiture of EMD;

b) not less than 75% of export entitlement but less than 95% there would be proportional forfeiture; and

c) less than 75% of export entitlement then EMD in full would be liable to be forfeited.

Sub-paragraph (iii) is also particularly relevant for the purpose of present case. Essentially, it provides that forfeiture of EMD will be subject to Force Majeure Conditions which are established with documentary evidence, which would be considered by the Appellate Authority.

5. The Garment Policy sets out an elaborate procedure under paragraph 13 for the manner in which EMD is forfeited. Paragraph 13 of the said Garment Policy is set out hereinbelow:-

"13 PROCEDURE FOR APPEAL AGAINST FORFEITURE OF EMD

In cases where AEPC decides to forfeit EMD obtained from an exporter in whole or part appeals will lie against the decision of the Council as per the following procedure:

i) On arriving at a tentative decision to forfeit EMD in a case, AEPC will intimate the exporter and offer him an opportunity for a personal hearing by the officer-in charge or the Officer so nominated by the Director General. After the personal hearing, (if the exporter appears) and if the Council is satisfied that the EMD has to be forfeited a speaking order will be issued to the exporter forfeiting the EMD and informing him that he may appeal against the decision of the AEPC to the Textile Commissioner within a period of 15 days from the date of receipt of the above order from AEPC.

ii) Appeal against decision of the AEPC be addressed to the Office of the Textile Commissioner, Export Promotion Branch, New CGO Complex, New Marine Lines, Bombay 400 020. Appeal should be self contained and should be supported with

all documentary evidence relating to the contention of the exporters including Orders of AEPC. In the appeal, exporters may also request for a stay of the invocation of EMD. The appeal should be preferred in the proforma as at Annexure-XI.

iii) If a stay order received from the Office of the Textile Commissioner within a period of 60 days from the date of issuance of Order by AEPC, AEPC will defer invocation of the EMD for the period for which the stay has been granted. In cases where such stay is not received within this period, the EMD will be invoked by the Council.

iv) The Textile Commissioner, shall, upon receipt of the representation give a ruling as early as possible. While disposing appeals, he may take into consideration the force-majeure condition. He may also take into consideration the promptness in surrendering the unutilised entitlements during the validity of the entitlements. For this purpose the Textile Commissioner shall mean and include such other Officers as designated by him. If the exporter is not satisfied with the decision of the Textile Commissioner, he may prefer an appeal against the decision within 15 days of the receipt of the communication conveying the decision, to the Appellate Committee, Ministry of Textiles, New Delhi."

These provisions make it clear that where the AEPC decides to forfeit EMD, in the first instance the tentative decision to forfeit EMD is to be arrived at. This is followed by a show cause notice issued to the concerned exporter and grant of liberty of personal hearing. Thereafter, the AEPC comes to the final decision by a speaking order regarding the forfeiture of the EMD. Against this order passed by the AEPC the exporter is entitled to file an appeal within fifteen days before the Textile Commissioner and while filing the appeal it is provided that the exporters may also request for a stay of the invocation of the forfeiture of EMD. The appeal is to be in the prescribed proforma. After hearing the parties and upon receipt of representations, the first Appellate Authority, i.e., Textile Commissioner is required to give a decision thereon as early as possible. If the exporter is still dissatisfied and aggrieved he has another opportunity of preferring a second appeal before the Appellate Committee, Ministry of Textiles, New Delhi.

6. The said Garment Policy provides an elaborate machinery and procedure for considering the case of an exporter before an order of forfeiture is confirmed. According to the procedure prescribed, full opportunity is granted to the exporter to agitate his grievance. Thus, if the procedure prescribed is followed in the manner indicated in the said Garment Policy and in particular under Paragraph 13 thereof an exporter could not have any grievance with regard to the violation of the principles of natural justice.

7. The learned counsel appearing for the petitioner made essentially four submissions: (1) Firstly, his submission was that the petitioner had surrendered its entitlement under the FCFS System and, Therefore, it was entitled to the benefit of release of 50% of the amount of EMD; (2) Secondly, and this was his

major plank, the Force Majeure Conditions that prevailed with regard to its exports entailed that there could be no forfeiture at all; (3) Thirdly, it was his contention that, in the facts of this case, proper opportunity of hearing was not granted to the petitioner; (4) Fourthly, the learned counsel for the petitioner contended that the petitioner has been discriminated upon inasmuch as others similarly-situated have been dealt with leniently.

8. Taking the first point first, it would be instructive to note that originally, insofar as the petitioner's export entitlement was concerned, the last date of export was 16.3.1993 and this was extended by AEPC up to 17.6.1993. The petitioner, however, on 10.06.1993 and again on 15.06.1993 applied for a further extension. Further extension was not granted by the AEPC and according to the petitioner, he surrendered his entitlement on 21.6.1993. Although, there was some discussion with regard to the expression "during the validity period or within a period of three days of the expiry of the validity" appearing in paragraph 8(F) (ii) of the said Garment Policy, it is amply clear that the extended period expired on 17.6.1993 and three days thereafter, expired on 20.6.1993. The petitioner, admittedly, surrendered his entitlement on 21.6.1993 i.e. beyond the period of three days prescribed under the said provision. As such, the petitioner is clearly not entitled to claim any benefit of surrender under paragraph 8 (F) (ii) of the said Garment Policy.

9. Coming to the second issue of applicability of force-majeure conditions, it is apparent that these have to be established with documentary evidence which is required to be considered by the Appellate Authority, i.e. the first Appellate Authority (Financial Commissioner) and the second Appellate Authority (the Appellate Committee of the Ministry of Textiles). It is pertinent to note that the AEPC is not empowered to examine the Force Majeure question and it is only the aforesaid Appellate Authorities who can examine this aspect of the matter.

10. The petitioner in its appeal before the Financial Commissioner gave the reasons for non-establishment as under:-

"REASONS OF NON-SHIPMENT

THE NON SHIPMENT OCCURED DUE TO FREQUENT ELECTRICITY FAILURE / POWER CUTS IN DELHI DURING THE SUMMER SEASONS IN THE YEAR 1993 (PROOF ATTACHED). SO WE DID NOT GET THE PRINTED FABRICS FROM THE PRINTING MILLS IN TIME DUE TO THE POWER CUTS AND LABOUR SHORTAGE AFTER THE AYODHYA INCIDENT. HENCE THE PRODUCTION HAS DELAYED IN ALL STAGES. KEEPING IN VIEW OF THE DELAY OF PRODUCTION, WE REVALIDATE THE QUOTA WITH ADDITIONAL EMD @ 15% EACH FOR 2 TIMES.

BUT THE SITUATIONS BECAME MORE WORST AND OUR PRODUCTIONS HAS ENTIRELY HELD UP DUE TO ELECTRICITY FAILURE AND LABOUR SHORTAGE AFTER THE AYODHYA INCIDENT. BUT AT THE DATE OF THE EXPIRY OF THE QUOTA, OUR5 GOODS WERE IN THE FINISHING STAGE AND WOULD BE READY FOR dispatch WITHIN 10 DAYS."

11. The reasons cited essentially were power cuts and labour shortage after the Ayodhya incidents. These purported reasons for non-shipment were taken into account by the first Appellate Committee and by their order dated 10.7.1997, it was decided by the First Appellate Committee to confirm the forfeiture amount imposed by the AEPC. At this stage, the petitioner, being aggrieved filed its second appeal on 29.7.1997. In respect of this appeal Memo, File No. 14/78/97-LIT was opened by the Respondent No. 3 . The final order passed on this file by the Second Appellate Committee was of 29.5.2000 whereby the contentions of the petitioner were noted and thereafter it was recorded that "the reasons given by the exporter firm for non-fulfillment of export obligations are the reasons which can not be taken as "force majeure conditions". The Committee Therefore, decided not to interfere with the orders passed by the First Appellate Committee, and rejected the appeal of the exporter firm. Thus, it is clear that on facts no case was made out for invocation of the Force Majeure conditions.

12. It is pertinent to note that, in the meanwhile, after having filed the appeal on 29.7.1997 the petitioner addressed another letter to the Second Appellate Committee making a grievance of the order of the first Appellate Committee. It appears from the original record, which was produced in court and which I have examined, that under bona fide mistake this letter was also treated as an appeal and another file being file No. 14/88/98-LIT was opened. This file being treated as another distinct and separate appeal, was accordingly dealt with by issuance of a notice for hearing to the petitioner on 2.5.2000. However, the petitioner who had already appeared pursuant to a notice in respect of the first file on 25.4.2000 did not, under a bona fide impression, appear on 2.5.2000. The petitioner was not aware at that point of time that in fact, two separate files had been opened and two separate appeals have been registered in respect of the impugned order dated 10.7.1997 passed by the First Appellate Committee. As such, the second file was taken up for hearing on 2.5.2000 and as indicated in the final order dated 23.5.2000, it is mentioned that the appellant firm was given adequate notice to represent their case before the Committee but nobody attended the hearing on behalf of the Appellant firm.

13. In any event, the Second Appellate Committee after considering the written submissions for the non-utilisation of the quota submitted by the petitioner came to the following conclusion:-

"The reasons given by the exporter firm for non-fulfillment of the export obligations are the reasons which can be taken as "force-majeure" conditions."

It is apparent that the expression "can be taken" was apparently inconsistent with the purport and conclusion of the order. Accordingly, by a corrigendum dated 3.7.2000, it was indicated that the word "can" be corrected and read as "cannot". The sum and substance being that both the orders of the second Appellate Committee under the two files were identical and the second Appellate Committee had consistently held that force-majeure conditions as a question of fact did not apply. Without going into the issue, which will be dealt with

hereinbelow, as regards the two separate decisions in respect of the same impugned order of the First Appellate Committee, it is clear that insofar as the first Appellate and the second Appellate Committee were concerned they had both decided that, in point of fact, the force-majeure conditions did not apply in the case of the petitioner. This Court cannot interfere with these findings of facts and under Article 226 does not sit as a Court of Appeal. Judicial review is limited to the question of the decision making process of the inferior tribunal or quasi-judicial authority and does not normally include the review of the decision as such.

14. Coming to the third submission of the Learned Counsel for the petitioner, I find that it is his contention that the order dated 23.5.2000 passed by the second Appellate Committee records that nobody attended on behalf of the appellant firm on 2.5.2000 when, according to the petitioner, he was not required to attend such hearing as he had already been heard on 25.4.2000. It is the petitioner's grievance that, as such, the order dated 23.5.2000 proceeded on a wrong basis and, inasmuch as it records that it was passed passed ex parte, the petitioner was admittedly denied an opportunity of hearing. Secondly, he contended that there could not be two orders in respect of the same matter. This, according to him, displayed a complete absence of application of mind on the part of the respondents. Prima facie, this argument may appear to be attractive. However, when one sees the facts in the correct perspective it becomes apparent that insofar as the first file, which was opened on 29.7.1997 being file No. 14/78/97-LIT, is concerned, full opportunity of hearing was given to the petitioner. In fact, the petitioner did appear before the Second Appellate Committee on 25.4.2000 and it is only thereafter that the Second Appellate Committee passed its order dated 29.5.2000. Insofar as the proceedings in this file are concerned, there is no error and there is no denial of opportunity for hearing to the petitioner. The petitioner could, if at all, have a grouse insofar as the proceedings under the second file i.e. the file opened pursuant to the petitioner's letter of 1.11.1997. But that would have no bearing on the case inasmuch as there is no infirmity in the decision making process in respect of the order dated 29.05.2000 passed by the Second Appellate Committee and that would start. Moreover, the opening of the file was a bona fide mistake on the part of the Respondent No. 3. This mistake was contributed to in fair measure by the petitioner itself. This is so because the petitioner, without disclosing that it had already filed an appeal sent another letter dated 1.11.1997 making a grievance of the same order dated 10.07.1997 of the first Appellate Committee. The respondent No. 3, under these circumstances, was fully justified in opening up another file treating the same as an appeal. As per procedure prescribed it was incumbent on the Respondent No. 3 to issue notices for hearing in respect of both files as both were appeals. This it did. The petitioner appeared in respect of the notice in the first file and did not appear in respect of the notice in the second file. The Respondent No. 3 cannot be faulted on this ground inasmuch as there is a huge volume of such matters which come up for hearing and it is not possible to remember the cause title of

each matter. It was also incumbent on the petitioner to point out that it had already filed an appeal on 29.7.1997 and that the second file be disbanded or at least the notice for hearing on 2.5.2000 be done away with. The petitioner did not do so and as such it cannot take advantage of it now. Lastly, even if we treat the proceedings under the second file i.e. file started pursuant to the letter dated 1.11.1997 as non-est, the order dated 29.5.2000 passed by the second Appellate Committee in respect of the first file still holds good and in respect of that order there has been no infirmity in the decision making process or the procedure followed or the provision of opportunity of hearing to the petitioner.

15. The learned counsel for the petitioner has drawn my attention to a decision of the Supreme Court in the case of Achutananda Baidya Vs. Prafulla Kumar Gayen and others, and in particular paragraphs 9,10 and 11 thereof which are set out hereunder in support of his contention that under Article 227 this Court can interfere even with findings of fact of inferior court or tribunal.

"9. We are, however, unable to accept such contention of Mr. Bhattacharyya. In this case, the High Court has rightly held that the appellate authority came to the finding of non-existence of oral agreement of reconveyance without considering the evidence on record. If the appellate authority does not consider the materials on record having a bearing on a finding of fact and makes the finding of fact, such finding of fact arrived without consideration of relevant materials on record cannot be sustained in law. The High Court, in such circumstances, will be competent to consider the validity of the finding of fact assailed before it with reference to materials on record.

10. The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High Court can interfere under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding at a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior court, the High Court should not quash the judgment of the subordinate court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse.

11. If the evidence on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is

arrived at by inferior court or tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be competent to quash such perverse finding of fact.

16. Clearly, interference with findings of facts are permissible only where the evidence on record is not at all taken into consideration or where, without reference to such evidence, the finding is arrived at by the inferior court or tribunal. In other words, interference is permissible only when the finding is held to be perverse or lacking in any factual basis. These are well settled principles. However, no perversity in the findings of fact arrived at by the First Appellate and Second Appellate Committee has been pointed out nor have any of the other conditions for interference under Article 227 of the Constitution of India been made out.

17. The Fourth and last submission of the learned counsel for the petitioner was that the petitioner was subjected to discriminatory treatment inasmuch as the petitioner's sister concern M/s. Bright International under similar circumstances was inflicted only a penalty of 10% by way of forfeiture and the balance amount of the EMD was released to the said exporter. The answer to this, first of all, is that I do not have the facts and circumstances of the other case before me. So, it is not possible to determine as to whether there was any discrimination at all. Secondly, each case is to be decided on its own factual matrix. Thirdly, I am satisfied by the answer given by the respondents in their counter-affidavit which is as under:-

"In the case of M/s Bright International the plea taken by the exporter at the time of filing the appeal as well as during the personal hearing before the senior officer's Appellate Committee was labour problem and power problem and based on merit, force-majeure benefit was considered in that case of petitioner's unit, 10% penalty was imposed, whereas in the case of petitioner's unit, the plea taken for short shipment in 1993 at the time of personal hearing before the Senior Officer's Appellate Committee was labour problem after Ayodhya issue in 1992 and, Therefore, it may be seen that the plea taken before the Senior Officer's Appellate Committee at the time of personal hearing in both the cases were completely different. Moreover, on the same day, i.e., on 25.04.97, when the petitioner's appeal was heard by the Senior Officer's Appellate Committee, other three appeals of petitioner's sister concerns, namely, M/s Gugnani Export Import, M/s Gugnani Sewing Co. and M/s Deepak Creations & Collections were also heard by the Senior Officer's Appellate Committee and Shri C.P. Paul only had attended the hearing before the Senior Officer's Appellate committee on behalf of all the sister concerns as well as the petitioner's unit and he had taken the same plea for short shipment in all the cases, i.e., the labour problem after Ayodhya issue. In view of the position explained at para 43 & 44, i.e., since the Ayodhya incident had taken place in 1992 and the quota certificates in all the above cases including petitioner's unit were applied for and obtained in 1993

after taking into consideration the labour problem factor, no force-majeure benefit was considered by the Senior Officers" Appellate Committee in all the appeals of the above mentioned sister concerns of the petitioner including the petitioner"s unit. However, the petitioner had not disclosed the said fact to this Hon"ble High Court, i.e., the Senior Officers" Appellate Committee had not considered any force majeure benefit in respect of other sister of the petitioner where the same plea for short shipment was taken, as was taken in the case of the unit of the petitioner. On the contrary, the petitioner had tried to mislead this Hon"ble Court by citing the case M/s Bright International where some other plea for short shipment was taken at the time of hearing before the Senior Officers" Appellate Committee, as stated under para 43 & 44 above. The Hon"ble High Court may, Therefore, take appropriate action against the petitioner for concealing this fact that in respect of other sister concerns of the petitioner where the same plea for short shipment was taken, as was taken in the case of petitioner"s unit, i.e., labour problem after Ayodhya issue, the Senior Officers" Appellate Committee has taken uniform decision and no force-majeure benefit was considered in any of the cases, as may please be seen from the copies of Orders-In-Appeal in respect of the above mentioned cases-I, II, III & IV. The Order-in-Appeal No. 21/30(j)/94/EP-II/227 dated 10.07.97 was passed by the Senior Officers" Appellate Committee of the Textile Commissioner, Mumbai after due consideration of all aspects of the appeal made before the first Appellate Committee."

In view of the foregoing statements in the counter-affidavit which have been reiterated by the learned counsel for the respondents, the petitioner"s contention of discrimination is not made out.

18. In view of the aforesaid discussion the writ petition is dismissed. The interim order passed on 30.6.2000 is vacated. Parties are left to bear their own costs.