
(2002) 10 DEL CK 0102
In the Delhi High Court
Case No : CW No. 857 of 1999

Supercom India Ltd.

APPELLANT

Vs

Directorate General Foreign Trade, Ministry of Commerce

RESPONDENT

Date of Decision : 24-10-2002

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 20(2)
Imports and Exports (Control) Act, 1947 — Section 4(1)

Citation : (2003) 66 DRJ 294 : (2003) 87 ECC 577 : (2003) 160 ELT 69

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : Anil Sharma, for the Appellant; Jayant Bhushan, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Sarin, J.—Petitioner seeks quashing of order dated August 4, 1998, passed by respondent No. 2 i.e. the Appellate Committee, Ministry of Commerce, Government of India, maintaining the penalty of Rs. 5 lacs on the petitioner for non fulfillment of the export obligations. Petitioner also seeks a restraint on the respondents from recovering the penalty amount of Rs. 5 lacs.

2. The facts, in brief, culminating in the present petition are as under:

Petitioner M/s. Supercom India Ltd. obtained a letter of approval from the Government of India to set up an industrial unit in the Noida Export Processing Zone inter alias for the manufacture of carbon film resistors. The approval was given vide letter dated 1.1.1988, and as supplemented by the letter dated 27.1.1992, by which the net average value addition was reduced from 31% to 20.32%. Petitioner was required to export its entire production and the net average value addition was put at 20.32% as noted above. The other terms and conditions for grant of approval were specified and set out in the two letters, which required the petitioner to take possession of the allotted plot as also to obtain clearances from the Pollution Control Board prior to commencement of

production.

3. The respondents on 27.2.1996, issued a show cause notice calling upon the petitioner to show cause within 30 days as to why action should not be taken against the petitioners by imposition of penalty u/s 4(1) of the Imports and Exports (Control) Act, 1947 read with Section 20(2) of the Foreign Trade (Development and Regulation) Act, 1992. The case of the respondents was that though the petitioner commenced production in April, 1989 and had imported raw material valued at Rs. 196.56 lacs during the period 1989-90 to 1994-95 and also imported capital goods valued at Rs. 24.56 lacs during 1989-90 to 1990-91. It exported goods only to the value of Rs. 215.55 lacs as against the required export obligation of Rs. 414.58 lacs. It was claimed that the value addition achieved was only 9.5% as against the stipulated 20.32%. The show cause notice also proceeded on the basis that it was implied that petitioner had misutilised the goods imported under the letter of approval/permission.

4. The petitioner claims that the copy of the show cause notice was received in January, 1997, on account of change of address. Petitioner appeared for a personal hearing on 14.2.1997, when the case was adjourned to 14.5.1997, when again it was adjourned to 25.6.1997. The case was again adjourned to 17.7.1997, when the petitioner sought extension on account of illness of its Director. It is the case of the petitioner that though it had prepared reply to the show cause notice, it was under bona fide impression that the same was to be handed over during personal hearing and, as such, had not handed over the same. In the event, the Additional Director General Foreign Trade, passed an ex parte order dated 27.1.1998, holding the petitioner company guilty of contravention of Section 4(1) of the Imports and Exports (Control) Act, 1947 and Clause 8(I) of the Imports (Control Order, 1955 read with Section 20(2) of the Foreign Trade (Development and Regulation) Act, 1992. The order imposed a penalty of Rs. 20 lacs and also debarred the petitioner from importing and receiving import licenses etc.

5. Petitioner preferred an appeal before the appellate committee of Ministry of Commerce, wherein it prayed for setting aside the order of Additional Director General of Foreign Trade imposing penalty of Rs. 20 lacs imposed. The appellate committee after hearing the petitioner and taking into account the grounds of appeal, reduced the penalty from Rs. 20 lacs to Rs. 5 lacs and also set aside the order of debarment.

The case of the petitioner is that the impugned order does not give or indicate any reason as to why the penalty of Rs. 5 lacs should have been maintained. The petitioner, in these circumstances, has filed the present petition assailing the impugned order in so far as it maintains the penalty of Rs. 5 lacs.

6. Mr. Anil Sharma, in support of the petitioner, urged that while the appellate committee reduced the penalty from Rs. 20 lacs to Rs. 5 lacs it gives no reason as to why penalty of Rs. 5 lacs should be retained.

Mr. Sharma submitted that the only obligation on the petitioner was to export its entire production. The letter of approval as issued, namely, letters dated 1.11.1988 and 27.1.1992, did not mention or stipulate any figure or the quantum to be exported. He submits that in the absence of this, no inference or conclusion could be reached that the petitioner had failed to fulfil the export obligation warranting imposition of penalty. He submits that the value addition required to be achieved was to be reckoned separately from the obligation of exporting the entire production.

7. The next submission of Mr. Sharma is that the show cause notice issued by the respondents was wholly vague and could not be acted upon inasmuch as it failed to mention the provision of the Imports and Exports (Control) Act, 1947 or of other statutes which are alleged to have been contravened.

8. Learned counsel also dwelled upon the fact that the it was on account of factors beyond the control of the petitioner that it was prevented from achieving the export targets. Counsel submitted that there was an accidental fire in March, 1992, which resulted in extensive damage to the factory as also in the death of two workers. This led to labour unrest resulting in closure of the unit for nearly two months at a stretch. Counsel also submitted that the petitioner's company faced stiff competition in view of the changing scenario in the international market, with China emerging as a major competitor, having the advantage of economics of scale. This resulted in the petitioner's suffering losses leaving it with no option, but to apply for debonding of its units. Learned counsel submitted that once the appellate committee found merit in the case of the petitioner on account of which it reduced the penalty from Rs. 20 lacs to Rs. 5 lacs, no justification existed for retaining and maintaining the penalty of Rs. 5 lacs, without disclosing any reason for the same.

9. Counsel for the petitioner cited and relied on the following judgments:

(I) Pratibha Processors and others Vs. Union of India and others, Pratibha Processors and others Vs. Union of India and others, . Reference was invited to para 13 of the judgment, wherein it was observed "Penalty is ordinarily levied on an assessed for some contumacious conduct or for a deliberate violation of the provisions of a particular statute. Interest is compensatory in character and is imposed on an assessed who has withheld payment of any tax as and when it was due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty which is penal in character."

Counsel urges that the petitioner's conduct was wholly bona fide and there was no deliberate or contumacious violation of any provisions of the statute. Hence, no penalty was impossible.

(II). Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay,

In the cited case, the Court held that even if it is assumed that the stone slabs imported for home consumption are "marble", still in view of the finding arrived at by the Appellate Tribunal that the product was imported on a bona fide belief that it was not marble, the imposition of heavy fine was not at all warranted justifiable. The Court set aside the penalty and fine in lieu of confiscation. The Court observed that the penalty and fine in lieu of confiscation were extremely harsh and excessive and unreasonable bearing in mind the petitioner had acted bona fide. The court also relied on the observations in *Hindustan Steel Ltd. v. State of Orissa* 1978 E.L.T. (159), wherein it was held:

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

Counsel submitted in the instant case that there was no contumacious or dishonest conduct and hence penalty was not leviable.

10. Mr. Jayant Bhushan, appearing on behalf of the respondents, has opposed the writ petition and submitted that the Appellate Committee acting on sound legal principles had exercised its discretion and reduced the penalty from Rs. 20 lacs to Rs. 5 lacs. The petitioner, in these circumstances, should not have any grievance. Learned counsel also refuted the petitioner's claim of having made and fulfilled the export obligation. As regards the authorities relied on, learned counsel distinguished the said cases and the present case. In the case at hand, penalty had been prescribed by the statute for failure to meet the export obligation as undertaken. He justified the imposition of penalty, of only Rs. 5 lacs as against the maximum livable i.e. Rs. one crores. He submits that the cited decisions would not be applicable as in the present case, the petitioner had availed of the benefits under the scheme and was thus also bound by all the terms of the scheme including that of penalty.

11. I have heard counsel for the parties. There is merit in the submissions of Mr. Jayant Bhushan. The petitioner has been allotted land in the export processing zone under the provisions of the scheme. The petitioner has obtained benefits of concessional allotment and other concessions of duty free import of capital goods

as well as raw materials to be utilized for manufacture, inter alia, of the carbon film resistors as a part of the concessions given under the scheme.

12. The petitioner had undertaken obligations to meet the stipulated export obligations as per the projection and policy. The export obligations were based on the projections as given by the petitioner himself in accordance with the policy. Reference may be made to Section 4(I) of the Imports and Exports (Control) Act, 1947 appearing at page 73 of the paper book. The said provision is as under:

"4(1). Liability to Penalty: (1) Any person who-

(a) in relation to any goods or materials which have been imposed under any license or letter of authority, uses or utilises such goods or materials otherwise than in accordance with the conditions of such license or letter of authority; or

(b) being a person to whom any imported goods or materials have been delivered by recognized agency, uses or utilises such goods or materials or causes them to be used or utilized, for any purpose other than the purpose for which they are delivered to him or

(c) having made a declaration for the purpose of obtaining-

(i) a license or letter of authority to import any goods or materials, or

(ii) any amendment of such license or letter of authority, or

(iii) allotment of any imported goods or materials, is found to have made in such declaration, any statement which is incorrect or false in material particulars; or

(d) acquires, sells or otherwise parts with, or agrees to acquire, sell or otherwise part with, any imported goods or materials in contravention of the conditions of any license or letter of authority in pursuance of which such goods or materials had been imported; or

(e) acquires, sells or otherwise parts with or agrees to acquire, sell or otherwise part with, any imported goods or materials in contravention of the terms of any allotment made by any recognized agency; or

(f) contravenes any direction given under a control order with regard to the sale of goods or materials which have been imported under any license or letter of authority or which have been received from, or through, a recognized agency,

shall be liable to a penalty not exceeding five times the value of the goods or materials or one thousand rupees, whichever is more, whether or not such goods or materials have been confiscated or are available for confiscation."

13. From the foregoing provisions, it would be seen that a statutory penalty had been prescribed. In case the provision was applied in its full rigour, the extent of penalty could be up to Rs. 1 crore. The petitioner himself before the appellate committee had admitted the failure to meet the export obligations and set out

the extenuating circumstances, upon consideration of which the penalty was reduced from Rs. 20 lacs to Rs. 5 lacs. There is also no merit in the submission of Mr. Sharma that since the exact provision of the statute and sub-sections which are alleged to have been violated, were not mentioned in the show cause notice, it could not be acted upon. The show cause notice clearly reveals and brings out the substance of the allegations and the omissions and breaches of the petitioner. The non-mentioning of a provisions or mention of a wrong provision are not fatal to the show cause notice and cannot render the same otiose.

14. The petitioner's contention that the domestic tariff area sale ought to have been taken into account as deemed exports while calculating the "value addition" achieved does not appear to be correct. In terms of para 102 of the Exim policy of 1992-1997, the petitioner can make sales in the domestic tariff area only after it has achieved the "minimum value addition". Reference is invited to para 102B of the Imports and Exports policy appearing at page 21 of the paper book. In any case, the petitioner had achieved only 8.5% as value addition as against 20.32 and was way behind. I am of the view that the petitioner cannot take any advantage of the observations made in Ambar Badruddin Jiwani (supra) and Pratibha Processors (supra) cases. The ratio of these cases wherein it was held that if the party had acted bona fide and its conduct was not contumacious, penalty was not livable would not be extended to a case of the present nature where the party has been given benefits of concessional allotment of land, import of capital goods, raw materials and other benefits under a scheme. Having availed of the benefits under the scheme, the penalty provision of the scheme would also be attracted and it would be no answer to say that penalty cannot be imposed in the absence of contumacious conduct. In such cases, it is the failure to meet the export obligation which attracts the penalty. The ends of justice have been met by reducing the penalty, keeping in mind the extenuating circumstances set out. In the present case, the petitioner who enjoys the benefits but fails to fulfill the corresponding export obligation cannot be heard to say that unless the conduct was contumacious or in the absence of deliberate breach, the prescribed penalty for non-fulfilment will not apply. The case of Pratibha Processors (supra) does not really concern the imposition of penalty but is with regard to payment of interest on warehousing charges.

15. I am of the view that the appellate committee has taken into account the extenuating circumstances, as recorded in the impugned order dated 4.8.1998, namely, the accidental fire at the factory, death of workers and closure of the unit for a period of two months and accordingly reduced the penalty from Rs. 20 lacs to Rs. 5 lacs. The petitioner had also brought out the factors such as emergence of China as a main competitor, the committee considering all these factors had permitted debonding and lifted the order of debarment on imports as imposed by the adjudicating officer. In these circumstances, the petitioner has failed to make out any case for interference in exercise of writ jurisdiction.

The petition has no merit and is dismissed. There will be no order as to costs.