

(2009) 12 BOM CK 0143
In the Bombay High Court
Case No : Writ Petition No. 2723 of 2008

Union of India (UOI)	Vs	APPELLANT
Cus. and C. Ex. Steel. Commission		RESPONDENT

Date of Decision : 03-12-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 56
Customs Act, 1962 — Section 127B

Citation : (2010) 254 ELT 647

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : P.S. Jetly and R.B. Pardeshi, for the Appellant; L.S. Shetty and A.M. Sethna, instructed by L.S. Shetty and Associates, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—Heard the learned Counsel for the Petitioner and learned Counsel for the Respondent. Perused Petition.

2. Introduction:

This Petition is directed against the order passed by the Respondent No. 1, the Settlement Commission, Additional Bench, Kolkata on 9-5-2007 to the extent granting immunity from payment of interest to the Respondent No. 2.

3. The facts:

The factual matrix reveal that the Respondent No. 2 holder of the EPCG licence pursuant to Import Export Policy for 1997-2002 had imported Vermicelli plant having capacity of 750 kg per ton from Italy at "Nil" rate of duty with export obligation condition attached to the licence.

Respondent No. 2 after having imported the said plant (the goods) filed bill of entry on 28-4-1999. The goods were assessed at "Nil" custom duty since import

was against EPCG licence. The Respondent No. 2 had, thus, saved total duty in the sum of Rs. 1,48,79,898/- which was otherwise payable @ 10% under Custom Notification No. 111/95, dated 5-6-1995. The Respondent No. 2 had executed bond and furnished bank guarantee in the sum of Rs. 74,50,000/- to guarantee fulfillment of export obligation, which was fixed at Rs. 17,11,19,499/-. The bond condition prescribed liability to pay duty with interest thereon at the rate of 24% per annum from the date of clearance of goods till the date of payment of duty in the event of failure on the part of the importer (Respondent No. 2) to fulfill the export obligation.

It is not in dispute that the Respondent No. 2 failed to comply with the export obligation, The Customs/Petitioner upon finding the breach of export obligation issued demand notices to Respondent No. 2 calling upon it to pay entire export duty together with interest thereon at 15% per annum. Since there was no response to the repeated reminders to pay customs duty a show cause notice came to be issued demanding customs duty in the sum of Rs. 1,48,79,898/- with interest thereon amounting to Rs. 1,34,36,546/- which was ultimately confirmed against Respondent No. 2.

The Custom department pending consideration of the show cause notice encashed bank guarantee in the sum of Rs. 74,50,000/-. Respondent No. 2, during the pendency of the show cause notice made payments from time to time to the extent of Rs. 1,48,79,898/-. In other words, the Respondent No. 2 paid principle amount guaranteed under the bond, but, did not pay interest component, which it had agreed to pay under the contractual agreement leading to execution of the bond.

Respondent No. 2 instead of contesting the show cause notice chose to file an application under the provision of Section 127B of the Customs Act before the Respondent No. 1, the Settlement Commission for settlement of interest component and praying therein the adjustment of total amount paid by it from time to time towards duty demand and further prayed for waiver of interest on the premise that it had suffered huge financial losses due to super cyclone that had occurred on 29-10-1999 in the state of Orissa, resulting in total deduction of his Small Scale Industrial Unit which made it impossible for it to discharge its export obligation apart from the huge loss suffered by it due to the act of god/nature. That is how Respondent No. 2 claimed immunity from payment of interest liability.

Respondent No. 1 considered peculiar facts and circumstances of the case and was pleased to grant immunity from payment of interest liability to the Respondent No. 2 relying upon Policy Circular No. 25/2004 2009 dated 30-3-2005 issued by the Government of India vide order impugned in this petition.

The Union of India the Petitioner (Custom Department) has invoked jurisdiction of this Court under Article 226 of Constitution of India to challenge the impugned

order to the extent it grants of immunity to the Respondent No. 2 from payment of interest component.

4. Submissions:

Mr. Jetly, learned Counsel for the Petitioner urged that it is an admitted fact that Respondent No. 2 could not fulfill its export obligation. That the Respondent No. 2 imported goods availing exemption from payment of the CIF duty which was payable @ 10% under Custom Notification No. 111/95, dated 5-6-1995, as a result whereof, the Customs duty amounting to Rs. 1,48,79,898/- was saved by it, which otherwise was required to be paid while clearing goods imported by it. He, thus, submits that Respondent No. 2, having executed the bond in terms of notification, and having undertaken to pay duty with interest thereon @ 24% per annum from date of clearance of goods till the date of payment of duty, in the event of non-fulfillment of export obligation, was under legal obligation to pay the interest, which was subsequently reduced from 24% per annum to 15% per annum.

Mr. Jetly further urged that Settlement Commission had no power and/or authority and/or jurisdiction to grant immunity from payment of interest. In support of his submissions he relied upon the judgment of Division Bench of this Court in the case of Rexnord Electronics and Controls Ltd. v. Union of India in Writ Petition No. 6238 of 2006 and Writ Petition No. 6242 of 2006 on 27-9-2006 decided on 27-9-2006 (unreported) whereunder the order of Settlement Commission awarding the interest was upheld. The said Order was confirmed by the Supreme Court in Civil Appeal No. 1730 of 2008 - Rexnord Electronics and Controls Ltd. Vs. Union of India (UOI) and Others, with the observation that the Settlement Commission did not have any jurisdiction to waive interest.

In reply, learned Counsel for the Respondent No. 2 urged that the payment of interest under the bond was contractual obligation incurred by the Respondent No. 2. He, thus, submits that the liability to pay interest is not governed by any statute rather it is governed by contract which according to him stood frustrated since it's performance became impossible due to super cyclone amounting to act of God on which he had no control. The act of God occurred on 29-9-1999 has prevented the Respondent No. 2 from discharging its export obligation.

He further submits that the Respondent No. 2 due to super cyclone storm suffered huge financial losses is not in dispute. Thus he urged that the contract in the nature of bond having been frustrated, the bond stands determined automatically. It came to an end or ceased to exist and that injured party thereby stood absolved from future performance or obligation incurred under the contract, as such specific performance of it cannot be asked for.

In other words submission is that, for want of existence of the contract or rather frustration thereof, the liability to pay interest cannot be allowed to be enforced by any authority much less the Settlement Commission as such no useful purpose would be served by setting aside the impugned order and remitting the

matter back to the Settlement Commission for consideration afresh.

The submission advanced by the Respondent No. 2 is: assuming that the settlement commission has no power to grant immunity from payment of interest even then the Settlement Commission certainly has no power to enforce the contract which stood frustrated. At any rate, the submission is that this Court can certainly take into account this factor an admitted facts before remitting the matter to the Settlement Commission for consideration a fresh. That if this Court comes to the conclusion that the contract still survives, then this Court would be justified setting aside, the order and remanding the same for consideration afresh on it's own merits. In short, the submission is that it will be futile to restore the matter back to the Settlement Commission for consideration afresh.

5. Consideration:

Having heard rival parties and having taken the survey of the factual matrix, it is not in dispute that due to super cyclonic storm on 29-10-1999 the Small Scale Industrial Unit of the Respondent No. 2 had suffered heavy damage and huge financial losses. This aspect appears to have been taken into consideration by the Settlement Commission while granting immunity from payment of interest liability though it is not very clear from the impugned order. At any rate, this Court can certainly take into account this factor before remitting the matter to the Settlement Commission for consideration a fresh. If this Court comes to the conclusion that the contract did not frustrate, then this Court would be justified in setting aside the impugned order and remanding the same to the Settlement Commission for consideration afresh on it's own merits. Judicial notice of the super cyclone that had occurred in the state of Orissa on 29-9-1999 can always be taken by this Court. The submission advanced by the Respondent No. 2 that even if the settlement commission has no power to grant immunity from payment of interest even then the Settlement Commission has no power to enforce the contract which stood frustrated deserves to be accepted.

The law of frustration of contract is well settled. Section 56 of the Indian Contract deals with the Doctrine of frustration of contract. It lays down that the contract becomes void upon the act being (i) unlawful or (ii) impossible, though there is no condition to that effect in the contract. A contract is discharged where its performance becomes impossible. The contract automatically stands determined and cannot be enforced through the legal process.

A contract is also discharged if a specific thing which is essential to the performance of the contract is destroyed. For example, the destruction of Music hall, where the performance was to be given. In the case of *Taylor v. Caldwell* 1863 3 B. & S. 826 the defendant being the owners of a Music Hall, agreed to lend the use of the hall to the plaintiffs for the purpose of giving concerts therein. Before the time came for the delivery of the hall, it was destroyed by fire, so that the contract had to be abandoned after the plaintiffs had incurred considerable expenditure for its preparation. The plaintiffs sued the defendants for damages

for the breach of the contract. It was held that the defendants were not liable. In delivering the judgment, Blackburn, J. observed: "The principle seems to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or of the thing shall excuse the performance.

The performance of the contract became impossible in the case of *Appelby v. Myers* (1861) All ER 452 since factory premises in which machinery was installed was destroyed by fire. In the case of *Howell v. Coupland* (1876) 1 QBD 258, performance of contract became impossible because a crop of potatoes to be grown on a particular field fails. In the case of *WJ Tatem Ltd. v. Gamboa* (1938) 3 All ER 135, performance of contract became impossible because a ship under charter party is seized by the enemy. In all these cases contracts were discharged.

The contract may also be discharged because the subject matter had greatly deteriorated. A cargo of dates was sunk and affected by water and sewage. The dates were saleable for some other purposes; but their merchantable character had been destroyed. Though the cargo was sold, the cargo owners' liability to pay freight was discharged in the case of *Asfar and Co. v. Blundell* [1896] 1QB 123.

In the case of *V.L. Narasu carrying on business under the name and style of Narasu Pictures Circuit Vs. P.S.V. Iyer and Others*, , a cinema owner, agreed to exhibit a film produced by, P, as long as the weekly net collections did not fall down below a certain figure. After a few weeks, part of the rear wall of the cinema collapsed following heavy rain, and the police authorities condemned the building. Cinema owner pleaded Section 56 of the Contract Act with success.

As party is excused of non-performance, if it proves that nonperformance was due to an impediment beyond its control, and it could not have reasonably been foreseen by it at the time of making of the contract, nor could it have avoided or overcome it or its consequences. In other words due to act of god or act of nature, if the contract is frustrated party cannot be asked to perform the contract. The contract automatically stands determined and cannot be enforced through the legal process.

Assuming Mr. Jetly is right in his submission that Settlement Commission has no power to grant immunity from the payment of interest but in the facts and circumstances of the case, the Settlement Commission has no power to enforce the contract which is already frustrated or which does not exist in the eye of law. Had there been a dispute on a factual aspect we would have remanded the matter for investigation of the fact. But on admitted facts, the frustration of contract stands proved and if that be so, no useful purpose will be served by setting aside the order and restoring the Petition to the file of the Settlement Commission for consideration of the case.

6. In the result, for the reasons stated above, the Petition is liable to be dismissed, with no order as to costs. Order accordingly.