

(2016) 05 CAL CK 0073
In the Calcutta High Court
Case No : Writ Petition No. 1714 of 2006

Versatile Wires Ltd.

APPELLANT

Vs

Director General of Foreign Trade

RESPONDENT

Date of Decision : 12-05-2016

Acts Referred:

Citation : (2016) 336 ELT 645

Hon'ble Judges : Debangsu Basak, J.

Bench : Single Bench

Advocate : J.P. Khaitan, Senior Advocate, Ms. R. Kajaria, Ms. A. Banerjee and Uttam Sharma, Advocates, for the Petitioner; P.K. Bhowmick, Kaushik Dey, Shekhar B. Saraf and Subir Kumar Saha, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Debangsu Basak, J.—The petitioner has sought a declaration that, it is entitled to extension of the export licence dated January 2, 1996 in accordance with the Import and Export Policy 2002-2007 and the subsequent policies in view of such extension being approved by the Board for Industrial and Financial Reconstruction (BIFR) in a scheme sanctioned by the BIFR in respect of the petitioner.

2. Learned Senior Advocate for the petitioners has submitted that, the first petitioner was referred to the BIFR. In a reference being BIFR Case No. 336 of 2001, the BIFR had by an Order dated January 19, 2009 sanctioned a scheme for rehabilitation of the first petitioner. Such sanctioned scheme postulates that, the first petitioner would have ten years time to fulfil the export obligations under the concerned licence commencing from the cut-off date being March 31, 2008. In such circumstances, he has submitted that, the petitioner should be allowed the time as sanctioned by the BIFR to fulfil its export obligations.

3. Learned Senior Advocate for the petitioner has referred to the General Exemption No. 56 issued by the authorities in exercise of powers conferred under

Section 25(1) of the Customs Act, 1962 and has submitted that, an importer can execute a bank guarantee to secure the claim of the authorities. He has referred to a Circular Bearing No. 52/95, dated May 25, 1995 and has submitted that, a bank guarantee is sufficient for the purpose of securing the claim of the authorities. He has submitted that, the claim of the authorities had been secured by a bank guarantee and that such bank guarantee had been renewed from time to time. He has also pointed out that, subsequent to the last hearing the petitioner has expended substantial amounts to obtain a fresh bank guarantee incorporating a clause that such bank guarantee shall remain in full force upto March 31, 2019. He has submitted that, such period is sufficient to cover the claim of the authorities.

4. Learned Advocate for the Respondent Nos. 1 to 5 has submitted that, the export licence had expired prior to the policy spoken of by the petitioner in the writ petition. The authorities have also initiated proceedings for recovery of certain claims against the first petitioner.

5. I have considered the rival contentions of the parties and the materials made available on record.

6. A reference before the BIFR being BIFR Case No. 336 of 2001 was made in respect of the first petitioner. In such proceedings, the BIFR by the Order dated January 19, 2009 had sanctioned a scheme for rehabilitation of the first petitioner. The sanctioned scheme provides that, the first petitioner would have ten years from the cut-off date being March 31, 2008 to fulfil its export obligations.

7. Learned Senior Advocate for the petitioner has submitted that, the Export Promotion Capital Goods Licence subsisting was the EPCG Licence dated January 2, 1996. That being the situation, the BIFR had extended the export obligations of the first petitioner for a period of ten years from March 31, 2008. The scheme sanctioned by the BIFR is under implementation. The scheme is, therefore, binding on the Respondent Nos. 1 to 5.

8. In such circumstances, the authorities will look into the performance of the first petitioner in respect of the EPCG Licence subsequent to the expiry of the period sanctioned by the BIFR, i.e., ten years from March 31, 2008. The authorities will be at liberty to take such steps against the petitioners in respect of its obligations under such licence if the petitioners have failed to discharge such obligations.

9. A question of security for the event of default of the petitioner to fulfil the obligations under the licence within the extended time requires consideration. The petitioner has a bank guarantee valid upto March 31, 2019 as security. According to the petitioner, relevant circulars of the department allow the petitioner to furnish security by way of a bank guarantee. The relevant portion of the General Exemption No. 56 issued under Section 25(1) of the Customs Act, 1962 is as follows :-

"Concessional rate of duty for imports under EPCG Scheme. - In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods as specified in the Table annexed hereto from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as is in excess of the amount calculated at the rate of 15% ad valorem and whole of the additional duty leviable thereon under Section 3 of the said Customs Tariff Act, subject to the following conditions, namely :-

.....

(3) The importer executes a bond in such form and for such sum and with such surety or security as may be specified by the Assistant Commissioner of Customs or Deputy Commissioner of Customs binding himself to fulfil export obligation equivalent to four times the CIF value of the goods imported, or for such higher sum as may be fixed by the Licensing Authority, within a period of five years from the date of issue of the said licence in the following proportions :-

S. No.

Period from the date of issue of licence.

Proportion of total export obligation.

1

1st year

NIL

2

2nd year

10.00%

3

3rd year

20.00%

4

4th year

30.00%

5

5th year

40.00%

10. The relevant portion of the Circular No. 52/95, dated May 25, 1995 is as follows :-

"4.1 Under E.P.C.G. Scheme also bond should be insisted upon for the difference between the duty leviable on goods on merits and the duty actually paid on importation. However, the Bank Guarantee to the extent of 50% of the duty saved should, normally be sufficient. Star Trading House, Super Star Trading House, Trading Houses & Public Sector Undertaking may be exempted from Bank Guarantee. The bond and Bank Guarantee should be kept alive for the full period of the export obligation plus one year i.e. for a total six years for import at 15 % under E.P.C.G. Scheme and for a period of 9 years for import at zero duty. ??????????????????...."

11. Learned Senior Advocate for the petitioner has submitted that, since the bank guarantee in question has been renewed on May 3, 2016 and is in terms of the General Exemption No. 56 and the Circular No. 52/95, the same should be allowed to be accepted. Moreover, the petitioner being a sick company it would be harsh and burdensome if the petitioner is directed to put in cash security.

12. In course of hearing I had expressed a view that, the bank guarantee would be sufficient. However, subsequent developments have compelled me to revisit my view expressed in the Court and take a contrary view. I have come across more than one writ petitions in which the petitioner has obtained interim orders from the High Court on the plea that, in the event goods are allowed to be released and dealt with on furnishing a bank guarantee, such bank guarantee would be sufficient security in the event of the writ petition ultimately not succeeding. Such writ petitioner had furnished the bank guarantee, taken delivery of the goods from the authorities and subsequently failed to renew the bank guarantee. In one matter, in spite of directions for the petitioners to be present in Court and in spite of police being directed to produce them, the petitioners did not volunteer to appear nor have the police been able to locate them. The amounts involved in those matters are substantial. In any event, the State Exchequer is involved. This loss to the State Exchequer has to be prevented.

13. The General Exemption No. 56 cannot be read to mean that the bank guarantee is the sole manner of security for the performance of the obligation of a licensee. Similarly Circular No. 52/95 cannot be read to be so. Both allow the authorities to require such form and manner of security as it deemed necessary. Bank guarantee is one of them. That does not mean that other forms of security such as cash cannot be asked for or directed to be furnished.

14. The plea that since the petitioner is before the BIFR therefore the direction to put in cash security instead of bank guarantee would be harsh and burdensome upon the petitioner is misplaced. A reference to the BIFR in respect of a company is in relation to the liabilities accruing up to the end of the financial year for which such reference has been made. Moreover, a commercial bank usually

requires full security in cash in terms of the relevant guidelines of the Reserve Bank of India for it to issue a bank guarantee. The petitioner has obtained the bank guarantee by furnishing cash security to the bank issuing the bank guarantee. Therefore, the petitioner is in a position to put in a cash security with the bank concerned to obtain the bank guarantee. The plea of undue hardship is not available to the petitioner in such circumstances. Moreover, the present bank guarantee is valid upto March 31, 2019. In the event of the authorities not making any demand within such period of time, the petitioner will be entitled to take the plea that the bank guarantee is no longer valid. In such eventuality, the State Exchequer ultimately suffers. Conversely, if money is allowed to be deposited with the authorities, the same will enure to the benefit of all the parties. The petitioner will receive refund of the money deposited in the event it is found to be refundable. However, in the event the petitioner is found to be a debtor to the authorities then the money lying with the authorities, can be adjusted against such claim without any further action. Invoking the bank guarantee and receiving the payment, entails further proceedings and allows a party furnishing the bank guarantee to indulge in further litigation.

15. There is one more aspect which weighs in favour of an order not granting permission to furnish security by way of a bank guarantee. If a banker issues a bank guarantee without taking 100% cash security in respect thereof, then such banker is extending a credit facility out of public money. If such a bank guarantee is invoked, then the public money stands to be jeopardized. Such a scenario is not healthy. A private party should not be allowed to do its business on the strength of public money.

16. In such circumstances, the petitioner will deposit a cash security of Rs. 38,18,206/- with the authorities as security for the subject licence. The petitioner is granted four weeks time to do so. The petitioners shall deposit cash security for any other amount as may be required by the authorities.

17. W.P. No. 1714 of 2006 is disposed of. No order as to costs.