(2015) 07 BOM CK 0400

In the Bombay High Court

Case No : Writ Petition No. 7109 of 2015

Vijaydeep Hotels Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 27-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Foreign Trade (Development and Regulation) Act, 1992 — Section 11(2), 15, 9(4)

Citation : (2015) 325 ELT 711

Hon'ble Judges : S.C. Dharmadhikari and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Prakash Shah, Zohra Shaikh and Niyati Hakani i/b PDS Legal, for the Appellant; Pradeep S. Jetly and Anjane Kumar Singh, for the Respondent

Final Decision : Allowed

Judgement

1. This petition under Article 226 of the Constitution of India challenges an order dated 9th/10th June, 1995, passed by the Additional Director General of Foreign Trade, dismissing the petitioner''s appeal for nonpayment of penal amount in terms of Section 25(1)(b) of the Foreign Trade (Development and Regulation) Act, 1992. The precise submission of Mr. Shah appearing in support of this writ petition is that the petitioner had obtained an EPCG authorisation from the Office of the Additional Director General of Foreign Trade, Ministry of Commerce and Industry, Government of India and that is in pursuance of a Foreign Trade Policy of 2004-2009. The authorisation enabled, according to the Department, the petitioner to save certain duty amount. However, an order-in-original dated 27th February, 2013, was issued by the Deputy Director General of Foreign Trade cancelling this EPCG authorisation and subsequent documents in pursuance thereof and imposing fiscal penalty of Rs. 10 lakhs under Sections 9(4) and 11(2) of the said Act. The appellant filed an appeal against this order under Section 15 of the said Act. Mr. Shah submits that the Appellate Authority has erred in dismissing the appeal for want of compliance with the requirement of deposit of penal amount simply because the appellate authority lost sight of the

fact that the law enables the petitioner to seek a waiver of the condition of pre-deposit.

2. Such waiver was expressly sought by filing an application styled as stay application. That was received in the Office of the Director General of Foreign Trade, Udyog Bhavan, New Delhi, on 7th October, 2014, and the acknowledgement copy of which is at page 82 evidences the same.

3. Later on it was conveyed that the appeal would be heard by the Additional Director General of Foreign Trade having his/her office here at Mumbai. That is how the file was made over and at Mumbai the appeal of the petitioner has been dismissed without applying mind to the fact that a waiver has been sought from the pre-condition and an application of stay was on file. Some order was required to be passed according to Mr. Shah on this application for want of compliance of which only the substantive appeal could have been dismissed and by an order of the Appellate Authority. Now, the Appellate Authority having dismissed the petitioner''s appeal without any adjudication on merits, the petitioner is aggrieved and seriously prejudiced, either way.

4. Mr. Jetly on the other hand submits that it was open for the petitioner to have appeared before the Appellate Authority and pointed out that there is a stay application indeed pending. The petitioner was informed by the Department''s letter of 1st December, 2014, that they have not paid the penalty amount and, therefore, must remit the same. During the personal hearing, no proof of any payment having been made is produced and, therefore, the appeal is rightly dismissed.

5. After having heard both sides, we find that during personal hearing, the appellant-petitioner''s representative has not informed the Appellate Authority about the correct factual position. The files may have been despatched from Delhi to Mumbai and surely the records must be containing a proof or a document such as the acknowledgement copy, which is at page 82. In the face of the stay application, the petitioner could not have been visited with the extreme consequences of a dismissal of the appeal without adjudication on merits. That could have been done provided any conditional order was made on the stay application. The stay application having not been taken up but kept as it is, the dismissal of the appeal has caused serious prejudice and we agree with the petitioner''s counsel to that extent.

6. However, the petitioner must be blamed for not having brought the correct factual position to the Additional Director General''s notice nor seeking any order in terms of the stay application from October, 2014 till June, 2015.

7. In the circumstances, restoring the stay application will further delay the proceedings. With the consent of the petitioner''s advocate we have taken up the application for stay filed by the petitioner forthwith. Mr. Jetly also has not objected to this course. After hearing both sides on the point of waiver of penalty, we are of the view that interest of justice would be served if a

conditional order is passed thereon. To balance the rights and equities, we direct the petitioner to deposit a sum of Rs. 2 lakhs in the office of the Additional Director General of Foreign Trade and the amount should be deposited within a period of four weeks from today. If the amount is deposited and proof thereof is produced, then the order passed on 9/10th June, 2015, Annexure-X page 102 to the petition to stand quashed and set aside. The appeal shall be decided then on merits and in accordance with law without being influenced by any observations in the impugned order. All contentions on both sides are kept open. The writ petition is allowed in these terms. No order as to costs.

