

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 1408/2008**

MODGILL HOSIERY EXPORTS P.LTD.

W.P.(C) 1409/2008

MODGILL FASHION EXPORTS

W.P.(C) 1411/2008

MODGILL HOSIERY EXPORTS P.LTD.

..... Petitioners

Through Mr. Alok K. Aggarwal, Adv. with Mr.
Sanjay S. Chhabra, Advocate.

versus

UOI & ORS

..... Respondent

Through Mr. Vineet Malhotra, Advocate for the
respondent Nos. 1 to 3.
Mr. Kuljeet Rawal, Advocate with Mr.
Ankur Sehti, Adv. for the respondent
No.4.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

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02.09.2009

With the consent of the parties, these writ petitions are taken up
for final hearing and disposal.

2. M/s. Modgill Fashion Exports is the petitioner in W.P.(C)
1409/2008 and M/s. Modgill Hosiery Exports Pvt. Ltd. is the petitioner in

W.P.(C) 1408/2008 and 1411/2008. The petitioners have impugned the orders passed by the Apparel Export Promotion Council, the Textile Commissioner and the second Appellate Committee directing the petitioners that they were not entitled to waiver of forfeiture amount for failure to comply with the terms of the quota obligation.

3. Prior to 1st January, 2005, the export of textiles and clothing was governed by the bilateral agreements entered into between the Government of India and United State of America, countries of European Union and Canada. In view of the said international agreements, policies were framed from time to time for allocation of quota amongst exporters to ensure the effective administration of the quota system and for optimizing the export revenue in the interest of the country. Under the Garments and Knitwear Export Entitlement (Quota) Policy 2000-2004, quotas in various categories were allocated in case of exporters wanting to export readymade garments.

4. In order to ensure that the quotas allocated to the exporters do not remain unutilized and lapse and to prevent speculative trading in quotas by unscrupulous elements, the exporter to whom the quota was issued in terms of the policy, was required to submit earnest money in the

form of bank guarantee, fix deposit receipt or demand draft. Sometimes exporters were required to submit legal undertaking or post dated cheque. In case of default by the exporter, the quota administering authority was entitled to forfeit the earnest money deposit in terms of the policy and guidelines issued in this regard.

5. It is admitted case of the petitioners that they were issued first come first serve quotas for export of readymade garments and there was under/non utilization of the said quota and the petitioners did not export readymade garments for the full quantity of quota allocated to them. The Apparel Export Promotion Council, which is the quota administering authority, issued show cause notice to the petitioners for forfeiture of the earnest money etc. on account of under/non utilization of the quota and thereafter forfeiture orders were passed. These orders have been upheld by the first Appellate Committee and the second Appellate Committee with some modifications. Right of forfeiture of the earnest money deposited in cases of under/non-utilization of quota has been upheld in ***Gokaldas Images Ltd. Vs. Union of India***, 2005 (116) DLT 47 and ***Bhuvan Exports Vs. Union of India***, W.P.(C) 1690/1982.

6. Counsel for the petitioners submitted that the petitioners were

unable to fulfill or utilize the quota allocated to them on account of unscheduled and long power cuts in the city of Ludhiana. It is further stated that in view of the directions given by the Electricity Board, the petitioners were compelled not to operate the manufacturing units on one day of the week. It is also pointed out that in respect of quota subject matter in W.P.(C) 1411/2008, the petitioner therein had fulfilled the quota obligation to the extent of 88.94%. It is stated that in case the petitioner had fulfilled or utilized 90% of the quota allocated, no forfeiture would have been attracted in view of the policy.

7. Similar contentions were raised before the respondent authorities and have been rejected, inter alia holding that power cuts in Ludhiana were a normal feature and the petitioner should have taken this aspect in consideration at the time when he had applied for allocation of the said quota. The order passed by the second Appellate Committee specifically records that the Committee was of the unanimous opinion that power cuts were normal business hazards and did not fall in the category of force majeure exception to warrant relief. The aforesaid findings by the authorities cannot be regarded as perverse or one which requires interference while exercising power of judicial review under Article 226 of

the Constitution of India. This Court cannot reexamine merits of the impugned orders as an appellate forum and substitute its opinion to upset the findings. The authorities have taken into account the said contention of the petitioner but rejected the same holding that power cuts were normal and a business hazard that had to be taken into consideration by an exporter when they had applied for quota.

8. Similarly, the contention the petitioner in W.P.(C) 1411/2008 that they had utilized the quota allocated to the extent of 88.94% and therefore no forfeiture should have been enforced, has no merit. Short fall or under-utilization of the quota is accepted. Forfeiture is imposed in view of the under-utilization or short-fall of the quota. The question whether any forfeiture should be imposed, even when the short-fall is marginal or slightly less than 90% is not for this Court to determine or decide. As per policy decision taken by the respondents, no forfeiture is to be affected in case of under utilization by 10% or less. However, forfeiture is to be affected where there is under/non utilization of quota above 10%. If the petitioner had made exports and utilize the quota to the extent of 90 %, they would have not suffered forfeiture. Whenever cut of point/line is fixed, there can be marginal cases but this alone does not result in

discrimination or arbitrariness. It may be noted that in cases of under/non quota utilization from 75 to 90%, forfeiture is proportionate. The petitioner has been given benefit of the said proportionate forfeiture.

9. In W.P.(C) 1411/2008 filed by the Modgill Hosiery Exports Pvt. Ltd., the first appellate authority, the Textile Commissioner by order dated 4th December, 2006 had reduced the forfeiture amount to Rs. 1,75,826/- from Rs.4,68,761/- directed to be forfeited by the Apparel Export Promotion Council. The petitioner filed an appeal against this order dated 4th December, 2006 before the second Appellate Committee, Government of India, Ministry of Textile. The second Appellate Committee vide order dated 11th April, 2007 on an appeal filed by the petitioner has enhanced the penalty from Rs. 1,75,826/- to Rs. 3,01,441/- on the basis of a report submitted by the Apparel Export Promotion Council. The enhancement of forfeiture by the second Appellate Committee cannot be sustained in view of clause 16 of the Garment Export Entitlement Policy 2000-2004, which stipulates that only an exporter was entitled to file an appeal before the second Appellate Committee. Paragraph (vii) of the Clause 16 of the said policy reads as under:-

“16. APPEAL AGAINST FORFEITURE OF EMD/BG/POST

DATED CHEQUE

- (i) xxxxxxxxxxxxxxxxxxxx
- (ii) xxxxxxxxxxxxxxxxxxxx
- (iii) xxxxxxxxxxxxxxxxxxxx
- (iv) xxxxxxxxxxxxxxxxxxxx
- (v) xxxxxxxxxxxxxxxxxxxx
- (vi) xxxxxxxxxxxxxxxxxxxx
- (vii) An exporter who is not satisfied with the decision of the Textile commissioner in the matter of a stay application or an appeal, may prefer an appeal against such decision within 45 days of the dispatch of the order of the 1st appellate authority to the 2nd appellate authority for a decision thereon.”

10. The aforesaid clause did not give any power to the second Appellate Committee to enhance the quantum of forfeiture and increase the same. Clause 16(vii) quoted above gives right only to one party i.e. the exporter to file an appeal in case he was not satisfied with the decision of the first Appellate Committee. No right to appeal was given to Apparel Export Promotion Council or any third person to file an appeal before the second Appellate Committee. In fact, in the present case no appeal was preferred by the Apparel Export Promotion Council or any third person for enhancement of forfeiture amount.

11. In these circumstances, the order of the second Appellate Committee to enhance the forfeiture amount from Rs.1,75,826/- to Rs. 3,01,441/- is liable to be set aside. Ordered accordingly. It is clarified that it will be open to the

respondents to take remedial steps, if required, by filing appropriate proceedings. The W.P.(C) Nos.1408/2008 & 1409/2008 are accordingly dismissed and W.P.(C) 1411/2008 is partly allowed to the extent indicated above. There will be no order as to costs.

SANJIV KHANNA, J.

SEPTEMBER 02, 2009
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