

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

+ W.P.(C) 6389/2008

DUFLON POLYMERS P.LTD. & ORS Petitioner
Through : Mr. Syed Naqvi, Advocate

versus

THE ADDITIONAL DIRECTOR GENERAL OF FOREIGN
TRADE & ANR Respondent
Through : Mr. Sandeep Aggarwal, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

S.RAVINDRA BHAT, J. (ORAL)

1. Issue Rule. Mr. Sandeep Aggarwal, learned counsel for the respondents waives notice of rule. Learned counsel for the parties agree for final disposal of this writ petition.

2. The petitioners obtained an advance license for a total CIF Value of Rs.8,87,000/- for import of a quantity of PTFE RESIN-TEFLON with the corresponding obligation to export finished products for a total FOB value of Rs.12,31,854/-, on 13.10.2000. The Licensing authority, on 06.03.2004, issued a show cause notice demanding that the first petitioner should submit

and provide documentary evidence, showing discharge of its export obligation. Subsequently the petitioner, in terms of the scheme evolved under the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as "the Act"), was declared as a defaulter and a refusal order was made on 19.07.2005 against it. The petitioner was issued a show cause notice on 28.12.2005 by the second respondent, under Section 13 of the Act, asking it to disclose why action by way of imposition of fiscal penalty should not be taken against it as well as petitioners 3 and 4. It is contended that the first petitioner became a victim of floods which occurred in Mumbai in July 2006 and destroyed all its assets, goods, equipments, raw material and documents. It claims that due to this force majeure event, it could not file the original documents and convince the authorities about fulfillment of the export obligations. The petitioner contends that its financial reports for the year 1996 onwards till 2005-2006 demonstrated that the exports ran into several crores of rupees clearly indicating that it was fulfilling its obligations in terms of the licence.

3. On 16.11.2007, the second respondent issued an order holding that the documents furnished by the petitioners in the form of copies of shipping bills and bank realization service, were unconvincing and the license was not utilized for the purpose for which importation was permitted. The second respondent also held that the license was secured on misrepresentation of facts. Accordingly a fiscal penalty of Rs.8,87,400/- due to default in fulfillment of export obligation and additional fiscal penalty of Rs.7,41,200/-

on account of export duty and interest for a period of 85 months was imposed. The total amount payable thus was Rs.16,28,600/-.

4. It is contended that an appeal was preferred on 25.01.2008 against the order of the second respondent with an application for condonation of delay, under Section 15(1) which also was accompanied by an application for waiver of pre-deposit, in terms of the third proviso to that section. By the impugned order dated 04.03.2008, the appellate authority i.e. Additional Director General of Foreign Trade rejected the appeal and the applications.

The appellate authority in the said order stated as follows :

“3. Aggrieved by the above mentioned Order dated 16.11.2007, M/s Duflon Polymers Pvt. Ltd. Mumbai filed an appeal dated nil received in this office on 30.01.2008 which was delayed by 25 days and they had requested to set aside the said Adjudication order. It is concluded that the appeal was not filed within stipulated period of 45 days and the appellant has also not submitted the proof of depositing of pre-deposit of penalty amount of Rs.16,28,600/- along with their appeal. In terms of provisions of Section 15 of the Foreign Trade (Development & Regulation), Act, 1992, any person aggrieved by any decision or order can file an appeal within a period of 45 days from the date on which the decision or order is served on such person. It is further provided in the Section 15(1)(b) that in case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of penalty or redemption charges has been deposited by the appellant. However, in this case, it has been observed that the appellants have not filed the appeal in time and no submitted the proof of deposit of pre-deposit of the penalty amount along with the appeal. Appellant has not submitted any proof of fulfillment of the export obligation against the Advance license referred to above in terms of Para 7.25 of Handbook. Keeping in view the facts explained above, I do not find any merit in this appeal. The firm is bringing frivolous information like flood in Mumbai

which has destroyed their office and the documents were lost in the flood. These factors cannot be the ground for appeal. The true fact is that the firm has failed to fulfill the export obligation against the advance Licence mentioned above and that the material imported therein-duty free has been misutilized and in exercise of powers vested in me in terms of the provisions of section 13 read with Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 the following order is made::

Order

No.11/168/07-08/ECA.1/1469

Dated 04-03-2008

The appeal is dismissed for (i) delay in filing of appeal; and (ii) non-submission of proof of depositing of pre-deposit of penalty amount (iii) non submission of prescribed documents in support of fulfillment of export obligation in terms of para 7.25 of Hand Book of Procedure Vol.1.

Sd/-

(M.Balagangdharan)

Addl. Director General of Foreign Trade

5. It is contended on behalf of the petitioner that approach of the appellate authority was needlessly technical. Counsel also contended that although the statute has fixed a time limit for the filing of an appeal, the authority was empowered to condone the delay if the reasons adduced were sound and credulous. It was further contended that the appellate authority did not furnish any reason why the application for pre-deposit was also rejected. Mr. Naqvi, learned counsel submitted that the concerned amount would be deposited in any event and that the Court may in these circumstances consider and make appropriate orders directing the appellate authority to dispose of the appeal on merits.

6. Mr. Sandeep Aggarwal, learned counsel on behalf of the respondents

submitted that the petitioner cannot fault the Tribunal for rejecting the appeal particularly when the requirement of having to pre-deposit the penalty is peremptory: having chosen to sleep over its rights, and not take effective steps in the prosecution of its appeal the petitioner cannot now seek equitable remedies under Article 226 of the Constitution.

7. The above discussion would show that this Court has to decide an extremely narrow dispute, as to the correctness of the appellate authority's order rejecting the petitioner's appeal. The extracted portion of the order which is the rationale for the appellate authority's findings merely discloses its opinion that the appeal had not been preferred in time and that the petitioner had not submitted the proof of pre-deposit of penalty. The said authority was further guided to take the view it did on the merits, in the background of the petitioner's omission to make the pre-deposit. In view of the statement made, this Court is of the opinion that the interests of justice would lie in relegating the parties for re-consideration of the petitioner's appeal subject to full pre-deposit as required in law being made by it.

8. In the circumstances, the impugned order dated 04.03.2008 of the Additional Director General of Foreign in appeal No.11/168/07-08/ECA.1/1469 is hereby quashed. The petitioner shall deposit the total adjudicated penalty amounts of Rs.16,28,600/- within four weeks. After verifying the same, the appellate authority shall consider and decide the appeal on its merits, and not on the ground of delay. The petitioner shall be granted a reasonable opportunity of hearing before the appellate authority, after which the said

authority shall proceed to issue its order, in accordance with law. The entire process shall be completed within a period of four months after the initial period of four weeks granted to the petitioner. The writ petition is allowed in the above terms. No costs.

S. RAVINDRA BHAT, J.

JANUARY 14, 2009
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