

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

Date of decision: 25th January, 2012

+ **LPA No. 356/2011**

% **APPAREL EXPORT PROMOTION COUCIL Appellant**

Through: Mr. Krishan Venugopal, Sr. Adv.
with Mr. Gaurav Ray, Adv.

Versus

**ALL INDIA GARMENT EXPORTERS COMMON
CAUSE GUILD & ORS. Respondents**

Through: Mr. Suhail Dutt, Sr. Adv. with
Mr. Sankalp Goswami, Adv. for R-1&2.
Mr. Saquib, Adv. for R-4.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. This intra-Court appeal impugns the judgment dated 18th January, 2011 allowing W.P.(C) No. 5093/1998 preferred by the respondents no.1 to 3 herein and quashing the “Regulations of Membership” of the appellant to the extent the same were held to be inconsistent with the Exim Policy; the appellant has also been restrained from making any amendments to its Articles of Association creating a classification of exporters into “Member Exporters” and “Registered Exporters”. Notice of this appeal was issued and

vide interim order dated 8th April, 2011 the operation of the judgment of the learned Single Judge stayed. A counter affidavit has been filed by the respondents no.1&2/writ petitioners and by the respondent no.4 Union of India. Additional documents as well as additional affidavit have also been filed by the respondents no.1&2/writ petitioners. The counsels have been heard. Written submissions have also been filed and perused.

2. The crux of the controversy is whether the appellant which is a Company incorporated under Section 25 of the Companies Act, 1956 is entitled to have two kinds of memberships as aforesaid. The only difference in the rights of the two kinds of members is that while the "Member Exporters" have a right to elect and to be elected as office bearers of the appellant, the "Registered Exporters" have no such right.

3. The respondent no.1/writ petitioner is a Body/Association of Exporters, though members of the appellant but having neither voting rights nor right to be elected. They are hereinafter called non-voting members. Their grievance in the writ petition was that they were being deprived of occupying the position of office bearers of the appellant or of electing the office bearers of the appellant and which right was confined to only

approximately 10% of the members of the appellant, who are herein after called the voting members.

4. The Learned Single Judge allowed the writ petition having the effect of removing such classification of membership and vesting the right of voting and hence of being in management in all the members of the appellant. As per the “Regulations of Membership” of the appellant, struck down by the learned Single Judge, to become a voting member of the appellant, the exporter was required to have exports of the minimum value of ₹20 lacs for the previous three years. Needless to state that the respondents/writ petitioners are exporters who do not fulfill the said criteria. Their contention was/is that laying down such a criteria to become a voting member creates a small caucus which has appropriated the management of the affairs of the appellant unto itself.

5. The learned Single Judge has allowed the writ petition holding/on the ground:-

- A. that Clause 5(a) of the Articles of Association (AOA) of the appellant permits any person who is an exporter of garments whether manufacturer exporter or merchant exporter or otherwise interested in the actual export of

garments to become a member of the appellant and thus does not permit classification of members into voting members and non-voting members;

- B. that appellant owes its existence to the Exim Policy which provides for formation of Export Promotion Council (EPC); appellant is recognized by the Government as the EPC for garments; the Exim Policy also requires all exporters to become members of such EPC and the appellant thus has to abide by the Exim Policy and the Rules & Regulations of the appellant have to be in accordance with the Exim Policy; the said Policy does not envisage two kinds of members, voting and non-voting, of EPC;
- C. that para 13.7 of the Exim Policy requires an EPC to ensure democratization of its members and democratic elections of its office bearers. Restriction by the appellant of the right of participation in election to 10% only of its members is not democratic;

- D. Regulations of the appellant creating such classification were thus held *ultra vires* the Exim Policy, unreasonable and violative of Article 19(1)(g) of the Constitution.

6. The senior counsel for the appellant has contended:-

- a. that the appellant does not owe its existence to the Exim Policy and is not a creature of the Exim Policy. The appellant was incorporated on 22nd February, 1978 by leading garment exporters associations while the Foreign Trade (Development & Regulation) Act came into force much thereafter in the year 1992 and the Exim Policy 1997-2002 issued for the first time in the year 1997. The Government though had encouraged the formation of the appellant, was not involved in the same;
- b. that the doctrine of *ultra vires* cannot apply to the Memorandum or Articles of Association of the appellant which are only required to comply with the Companies Act;
- c. that there is no compulsion on the appellant to function as an EPC and the appellant is required to comply with

the Exim Policy only so long as wanting to function as an EPC thereunder but not otherwise;

- d. that even as per the Exim Policy as amended in March, 2000, all EPCs are required to conform to the Model Bye-Laws which were prescribed and which Model Bye-Laws permit classification into voting and non-voting members and of fulfillment of minimum prescribed exports to be eligible to become a voting member of an EPC;
- e. that the appellant is not a monopolistic body as perceived by the Learned Single Judge as the quota regime ended in the year 2005 and the appellant no longer grants export entitlement/quotas to various exporters of garments. The appellant is now performing the function mainly of promoting export of readymade garments by giving inputs to the Government in framing and implementing the Policies and in implementing the Exim Policy to enable exporters of garments to avail benefits thereof;

- f. that the functioning of the appellant is otherwise autonomous and as per its Memorandum and Articles of Association. The amended Exim Policy in para 13.5 requires the EPCs to be autonomous and regulate their own affairs;
- g. that the Exim Policy though prior to the amendment in March, 2000, made financial assistance from the Government to EPC dependent on democratization of the membership and democratic elections of office bearers on a regular basis but post amendment on 31st March, 2000 had done away with the requirement of democratization of membership and holding of democratic elections by the EPC. Rather the Model Bye-Laws themselves provided for two classes of members i.e. voting members and non-voting members and prescribed achievement of export performance during the previous three years of ₹25 lacs, since amended to ₹1 crore;

- h. that the appellant had framed its Membership Regulations (which have been struck down by the Learned Single Judge) in accordance with the Model Bye-Laws prescribed under the amended Exim Policy;
- i. that the Government itself had with effect from 31st March, 2000 deliberately repealed the requirement of democratization in the EPCs from the Exim Policy and which shows that it was not the requirement of the Exim Policy;
- j. that the learned Single Judge erred in deciding the matter on the basis of the affairs as prevailing at the time of filing of the writ petition in the year 1998 and not noticing the amendments aforesaid of the year 2000;
- k. that the respondents/writ petitioners had not challenged the amendments of the year 2000 to the Exim Policy or the Model Bye-Laws for EPCs prescribed thereunder; that the membership regulations of the appellant in-sync with the said Model Bye Laws could thus not be quashed;

- l. that under para 2.64 of the Handbook of Procedures, 2009-14 even a prospective/potential exporter with no exports at all is entitled to become a member of an EPC and if such a member were to be also given voting rights, it has the potential of the management of the appellant vesting in the hands of those who have neither any experience nor knowledge of the garment exports industry and which is neither feasible nor could be the purport of the Government or the Exim Policy;
- m. that a Constitution Bench of the Supreme Court in ***P.V. Sivarajan v. Union of India*** AIR 1959 SC 556 has upheld the criteria of minimum export performance even for the right to export as a reasonable classification for deciding who are to be permitted to export a particular product;
- n. that the other EPCs are having the same terms;
- o. that the classification of members is a reasonable one having reasonable and rational nexus to the object of ensuring that EPCs provide the necessary support to the

Central Government in framing and implementing the Exim Policy in their respective sectors or industries;

- p. that the appellant over the years has acquired huge assets including valuable immovable properties and the same cannot be vested in non-serious exporters who may, upon removal of classification of membership and which classification has been quashed, come into control thereof;
- q. that the appellant otherwise does not discriminate in any manner between voting and non-voting members and in any case functions under the watchful eye of Director General Foreign Trade, Government of India. Thus there is no question of violation of the Fundamental Right under Section 19(1)(g) of the Constitution;
- r. that else the functioning of the appellant is democratic and exclusion of exporters not achieving the prescribed targets from management does not make it any less democratic;
- s. that the appellant is neither owned nor controlled or

substantially financed by the Government and its entire income and expenditure is borne out of membership subscription and the Council fee received from its members and the surplus amounts are re-utilized in improvement and development of garment industry.

7. The respondent no.4 Union of India in its counter affidavit supports the case of the appellant in entirety. It has also pleaded that with the end of the quota regime in the year 2005 the requirement for an exporter to register with the EPC in order to avail export benefits has also ended and it is not even compulsory for garment exporter to register with the appellant to export garments and get benefits under the Exim Policy and the judgment of the learned Single Judge on the situation which though existed at the time of filing of the writ petition in the year 1998 but has since changed is not correct. Union of India has supported the dual membership as aforesaid of EPCs.

8. The senior counsel for the respondents/writ petitioners besides supporting the judgment of the Learned Single Judge contended:-

- i. that once an exporter is registered as a member of EPC he cannot be denied participation in management or in

- electing the management;
- ii. though the prerogative of restricting membership may be available to a Company incorporated under Section 25 of the Companies Act but upon the appellant being recognized as an EPC, it cannot so restrict its membership;
 - iii. reference is made to paragraphs of Exim Policy and Handbook of Procedures to claim a right of membership which it is contended has to be full membership and not a non-voting membership. There cannot be two criteria for membership, one under the Companies Act and another under the Exim Policy;
 - iv. that the appellant before the Learned Single Judge had not relied on the amendments of the year 2000 or on the Model Bye-Laws or the amendment in its Regulations in terms thereof;
 - v. that the Model Bye-Laws are also subject to the Exim Policy notified from time to time and which also entitles the exporters to full membership of EPC irrespective of

their export performance. Reference is made to *Pramod Chopra v. Apparels Export Promotion Council* ILR (1984) I Delhi 717 holding such a classification to be in violation of Article 14 of the Constitution of India;

- vi. that the expression “Associate Member” in the Articles of Association refers to prospective exporters who have not yet started exporting and does not relate to exporters who are already exporting;
- vii. *P.V. Sivarajan* (supra) relied upon by the appellant is distinguished by contending that such a classification therein was upheld for being in public interest; it is contended that the classification made by the appellant is against the public interest in as much as it creates a caucus.

9. The senior counsel for the appellant in rejoinder has controverted that the amendments of the year 2000 were not argued before the Learned Single Judge. Reliance is placed on the order dated 8th May, 2002 on the file of the Learned Single Judge permitting amendment to the Articles of Association of the appellant to bring the same in conformity with the Model Bye-Laws,

subject to the outcome of the writ petition. It is also contended that the judgment in ***Pramod Chopra*** (supra) is in a Suit and thus cannot be said to be a judgment *in rem*.

10. As would be obvious from aforesaid, the judgment of the Learned Single Judge impugned before us is in the context of the situation as prevailing at the time of filing of the writ petition i.e. the year 1998. Suffice it is to state that the subsequent changes of the year 2000 knock off the basis laid in the writ petition for the relief claimed and granted by the learned Single Judge. No purpose however would be served in our pronouncing on the correctness or otherwise of the judgment of the Learned Single Judge on the situation prevailing at the time of filing of the writ petition and which now no longer prevails.

11. What stares one in the face is that notwithstanding the amendment of the year 2000 knocking off the basis of the relief claimed by the respondents/writ petitioners and expressly providing for classification of voting and non-voting members, the respondents/writ petitioners did not take any steps whatsoever for challenging the said amendment of Exim Policy. We are unable to agree with the contention of the senior counsel for the respondents that the said amendments are of no avail. The amendments

to the Exim Policy, doing away with the requirement of democratization and holding of democratic elections on a regular basis in the EPCs and providing for Model Bye-Laws of EPCs creating classification of voting and non-voting members have to be read along with Exim Policy providing for an exporter to become a member of EPC. Once the Model Bye- Laws provide for two kinds of membership, a right to membership can be read only as a right to non-voting membership till the member qualifies to become a voting member. The Exim Policy has to be read as a whole. The challenge by the respondents/writ petitioners at the time of filing of the writ petition to such classification, even if maintainable when the writ petition was filed, in the light of the amendments, does not survive.

12. We otherwise also find merit in the creation of such a classification. It has been observed in the recent past that attempt is made to snatch the management and control of bodies having considerable sway over professions, industries, businesses, away from the serious practitioners thereof and in the hands of those not really interested in the betterment of the persons for whose benefits such Bodies have been created. In the present case, the appellant as also stated by the respondents/writ petitioners themselves, is not only flush with funds but also in ownership of valuable

immovable properties. The danger of some persons not really interested in developing export of garments hijacking the management and control of the appellant to get hold of its funds and properties is a real one and not imaginary. The modus operandi of such hijackers is well known. They gain control of management though through democratic process of election but by securing memberships to such bodies of those only interested in voting. It is not disputed before us that even an intending exporter is eligible to become a member of the appellant. If the voting rights and the management of the appellant is open to all those who may not actually be exporting garments but may claim to be intending to export garments and/or who may have done minimal exports only for the sake of becoming members, the possibility of the management of the appellant passing on to the hands of such persons cannot be ruled out.

13. The professional bodies as the Bar Associations which though not rich, exercise considerable control over the affairs of Advocates have also in the recent past witnessed such a trend and which led to the Supreme Court Bar Association imposing a condition of members exercising voting rights in other Bar Associations being not entitled to exercise such rights in the Supreme Court Bar Association and which condition has withstood the legal

challenge in *Supreme Court Bar Association v. B.D. Kaushik* MANU/SC/1116/2011. It was held that enrolment of Advocates not practicing regularly in the Supreme Court was inconsistent with the aim and object of the Association. It was further held that the right to vote is neither absolute right nor a Fundamental Right nor a common law right but is purely statutory right governed by the statute, rules & regulations; the right to contest an election and to vote can always be restricted and/or abridged if statute/ rules & regulations prescribe so. It was yet further held that limitations /restrictions on exercise of right to vote and contest the election do not amount to changing the aims and objects of an Association. The concepts of “Associate Member” without voting rights and of placing restrictions on the right to vote were upheld. It was yet further held that restriction on the right to vote provided with the avowed object of better welfare and convenience of regular practitioners directly concerned with the day-to-day affairs is Constitutional and valid. Reference was made to *Damyanti Naranga v. Union of India* (1971) 1 SCC 678 and *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban)* (2005) 5 SCC 632 to reiterate that the right to form an association necessarily implies that persons forming associations have also the right to

continue to be associated with only those whom they voluntarily admit in the association and to exclude others. The doctrine of internal management and of a member of an association having no rights except those given to him by the Rules and Regulations and/or by the Bye-Laws of the Association was also invoked.

14. Even prior thereto, in *Sudha v. President, Advocates' Association, Chennai* MANU/SC/1138/2010, the Supreme Court had upheld prescription of eligibility conditions for exercise of voting rights and to contest the election notwithstanding being a member of the Association.

15. In view of the judgements supra, the restriction of voting rights and right to participate in election, in the Rules and Regulations of the appellant have to be necessarily upheld and the judgement of learned Single Judge cannot be sustained. We are of the opinion that if no such restrictions were to be placed or were to be held to be bad, the possibility of a rival industry/trade snatching away the management of an EPC to destroy the same also cannot be ruled out.

16. The appeal accordingly succeeds and is allowed. The judgment of the Learned Single Judge is set aside and the writ petition of the

respondents/writ petitioners is dismissed. However, since it appears that the appellant at the time of arguments before the Learned Single Judge did not highlight the amendments of the year 2000 which have gone unnoticed, no order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

JANUARY 25, 2012

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