HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

WRIT PETITION No. 11423 of 2004

ORDER:

The present writ petition came to be filed seeking issuance of writ of mandamus to direct the respondents to accept the existence of force majeuro conditions during the year 2000 and release the E.M.D. amount, which was forfeited by the respondent.

The facts in issue are as under:

The Petitioner M/s. Perfect Knitters Limited, which is a public limited company was engaged in the business of manufacture of Knitted Garments. The Government of India, Ministry of Textiles announced a quota policy with respect to export of Yarn, Fabric and made up items to United States of America, Canada and European Countries, vide its notification dated 12.11.1999. In terms of the said notification, the ministry would allot quantum of exports which the manufacturer/exporter has to export to these countries. The said notification prescribes certain guidelines for allocation of the quantities. As per the notification, the manufacturer or exporter has to make an application and on the basis of the said application, the Apparel Export Promotion Council (hereinafter referred to as AEPC) will allocate the quantum of goods to be exported; the value of exports in dollars and the period within which the export is to be made.

The petitioner has a sister concern by name G.T.N.Textiles Limited, which was also registered as a merchant exporter. It is the case of the petitioner that G.T.N.Textiles was also procuring goods manufactured by the petitioner and exporting the goods to several countries. G.T.N.Textiles has also applied to AEPC and obtained FCFS Entitlement Certificate in terms of notification. It is stated that in the year 2000, there were un-precedented floods in Hyderabad on account of Cyclonic conditions. As a result, the manufacturing facility of the petitioner company was partially sub-merged and the entire manufacturing activity stood closed. Hence the petitioner was not in a position to export the quantities for which it had obtained FCFS certificates. Since the petitioner failed to fulfil the terms of the notification, AEPC by its orders dated 17.08.2011 forfeited the E.M.D. to an extent of Rs.13,17,626/-. However AEPC returned the demand drafts in respect of several FCFS certificates and confined forfeiture to an extent of Rs.6,79,940/-.

Aggrieved by the order of AEPC, the petitioner filed an appeal before the Textile Commissioner as contemplated under clause 16 of the notification. Since the plea taken by the petitioner was not established, the Textile Commissioner upheld the order of AEPC. Challenging the same a second appeal came to be filed by the petitioner before the second appellate committee, who by an order, dated 25.10.2012 dismissed the appeal. Questioning the order of the second appellate committee the present writ petition came to be filed.

A counter came to be filed by the respondents denying the averments made in the affidavit filed in support of the writ petition. It is stated in the counter that on a request made by the petitioner, validity of the subject quota was extended upto 9.11.2000 by treating it as a special case. Despite the same, the petitioner failed to utilize the quota. Since the petitioner failed to utilize the subject quota, a show cause notice was issued. After giving due opportunity on all aspects, an order dated 17.08.2001 came to be passed forfeiting a sum of Rs.13,17,626/-. It is stated that the plea, which was raised before the first appellate committee was that there is heavy damage of fabric due to flood in Hyderabad during August, 2000 and as there was variation in shade of the fabrics and garments, goods could not be shipped. After considering all the aspects, the first appellate committee dismissed the appeal. In terms of the provisions of the policy, the petitioner preferred a second appeal before the second appellate committee. The plea that was raised before the second appellate committee was that due to soaking of fabric/finished garments in the flood water for a period of 36 hours, the goods could not be shipped. Thus, it is contended that there was a contradiction in the pleas taken before the first appellate committee and second appellate committee and as such the order under challenge warrants no interference.

Further, it has been stated in the counter that the provisions of force majeuro have been misread and misinterpreted. It is stated that the doctrine of force majeuro is not an empty formality, rather it depends on the facts and circumstances of each case and evidence thereto. Since the petitioner failed to utilize the subject quota, the country sustained huge loss of foreign exchange. It is further stated in the counter that Sri A.V.Raghava Rao is not competent to file the petition on behalf of the petitioner company and there is no resolution or authority in his favour for filing the writ petition. In terms of provisions of import and export policy, each exporter has separate entity. Hence, it is stated that the plea of the petitioner that GTN Textile have been procuring the goods from the petitioner and exporting the same to other countries is denied. The counter also states that there is no material to show that there was any un-precedented floods due to cyclonic conditions on the date of incident and that no evidence has been placed to show that the manufacturing facility was partially sub-merged. Apart from that it is further contended that the petition suffers from delay and latches as the so called representation is made nearly one and half year after the order of the second appellate committee. In view of the above, it is stated that the relief sought for cannot be granted.

By an order, dated 23.12.2013, this Court permitted the petitioner to amend the cause title by substituting Perfect Knitters Limited with GTN Engineering India Limited in view of the amalgamation of the company.

Learned counsel for the petitioner submits that in view of floods due to cyclone, which took place in the year 2000, M/s. Perfect Knitters could not utilize the subject quota and the order of the second appellate committee in refusing to accept the existing force majeuro and return the demand draft is illegal and arbitrary. He contended that due to floods, the manufacturing unit of the petitioner company at Balanagar, was partially sub-merged, which prevented them from exporting the fabric. He further submits that the very same second appellate committee in case of an appeal preferred by the sister concern of the petitioner ie. G.T.N.Textile, accepted the plea of flood and heavy rain in Hyderabad which damaged the goods in the factory of their sister concern ie. Petitioner herein and vide its order No.14/1140/2002/Exports.III/2944, dated 29.07.2003 held that the appellant therein has made out a case for applicability of the force majeuro condition. In view of the above, she submits that the petitioner is entitled for the same relief which was already been granted to GTN Textiles Limited, Hyderabad.

Per contra, learned Standing Counsel for the respondent reiterated the averments made in the counter and stated that the petitioner is not entitled for return of the balance E.M.D.

In order to appreciate the rival contentions, it may be useful to refer to the orders passed by the authorities.

As stated earlier, a notification was issued by the Government of India, Ministry of Textiles, announcing quota policy for export of Yarn, Fabrics and other Made-up export entitlement. Pursuant thereto, the petitioner made an application for allocation of quantities for export of yarn. The respondent issued FCFS entitlement certificate in favour of the petitioner fixing the quantity of yarn to be exported. It is the case of the petitioner that due to floods in the year 2000, the Perfect Knitters could not utilize the subject quota as their manufacturing unit at Balanagar was partially submerged. Since the petitioner failed to utilize the subject quota, the respondent has forfeited the E.M.D.amount by way of speaking order dated 17.08.2011. It would be relevant to refer to the order which is as under:

> "Since the reasons given by the exporter is not within the purview of force majeuro conditions of quota policy, the forfeiture amount of Rs.13,17,626.00 stands confirmed."

Challenging the same, the petitioner herein preferred an appeal before the Textile Commissioner, Mumbai. By an order, dated 30.07.2002, the first appellate authority after referring to the pleas taken passed the following order.

> "It is to be noted that in the appeal there is a reference to copy of Meteorological Department Rain report. As per the report, heavy rainfall means an amount of rainfall of

> 65 mm and above in a period of 24 hours. From the report, it appears that a maximum of 95 mm rain were received over a period of 48 hours on 23/24.08.2000, which is below the category of heavy rains. Similarly, as 22 QCs were valid between 12.07.2000 to 09.11.2000, even if it is considered that there was some disturbance due to rains, the exporter had sufficient time i.e. almost one and half month before the expiry of QCs to complete the export obligation. The request of the exporter with regard to extension of 45 days was also granted for completing the quota, even then the exporter could not complete the same. The copy of the insurance form filled by the exporter has no relevance, as it cannot be considered as an insurance certificate.
>
> We have carefully gone through the records of the case and it is clear that the exporter could not substantiate their claim that their performance was affected due to force majeuro condition as spelt out under Para-16 of Ministry of Textiles, Government of India's notification No.1/128/99/EP(T&J)-I, dated 12.11.1999.
>
> On perusal of the records and examination of the circumstances as stated by the exporter in his appeal, the committee is satisfied that the circumstances as stated in the appeal are not the force majeuro conditions. Therefore, the committee hereby upholds the speaking order passed by the AEPC, dated 17.08.2001."

Aggrieved by the same, M/s. Perfect Knitters preferred second appeal before the second appellate committee, who, by its order dated 25.10.2002 held as under:

> "That the amount of forfeiture has to go to the consolidated fund of India and therefore relief can be given only if there exist very valid grounds for the same. Shri J.L.Bhandari appearing for the appellant stated that due to floods in Hyderabad, the finished goods were spoiled and they had to restart the process of manufacturing denovo. Considering the problem of the exporter, another 45 days time was given by the Ministry of Textiles, Even within this time limit he could not fulfil the obligation. Committee felt that sufficient opportunity

> has been given to the exporter which he should have utilized. The time asked for shipment was given to the firm. The same excuse cannot be now taken to justify non-shipment. Committee therefore came to a conclusion that appellant is not eligible for any further relief. While dismissing the appeal, committee directed AEPC to give benefit in case of short realization, if any."

A revision was also preferred to review the said order, but the same was rejected since there is no provision for reviewing the order.

It is an admitted fact that M/s. Perfect Knitters got merged with its sister concern by name GTN Engineering India Limited which lead to amendment of the cause title by this Court vide order dated 23.12.2013. It is also an admitted fact that GTN Textiles was also a registered merchant exporter and had FCFS entitlement certificate in terms of the notification. Since GTN textiles could not fulfil the export obligation, the EMD deposited by it was forfeited. When the request of the GTN Textitle was rejected by the respondent, they preferred an appeal before the second appellate committee raising the very same grounds which are raised by the petitioner. Relying upon the certificates issued by the Meteorological Department, documents issued by the insurance company, the second appellate committee found that the exporter i.e. GTN Textiles Limited has made out a case of applicability of force majeure conditions and consequently allowed the appeal on 29.07.2003.

It is to be noted that G.T.N. textiles pleaded the same grounds before the present respondent, which were rejected by an order dated 16.08.2011. The petitioner also raised the very same plea before the respondent, which were negatived on 17.08.2011. The first appellate committee also confirmed the speaking orders passed by the respondent in both the cases. It is also to be noted that the plea taken by the G.T.N. Textiles that the export obligation could not be fulfilled due to floods in the sister concern ie. Perfect Knitters was accepted by the second appellate committee, but the plea of the petitioner that it could not fulfil the obligation due to floods and damage caused to the goods was rejected by the second appellate committee. In both the cases, the documents issued by the insurance company and also the certificates given by the Meteorological Department were placed before the authority. But for the reasons best known the same were accepted in the case of G.T.N.Textiles limited and rejected in case of the petitioner though the claim was for the same time, date and period.

It is also to be noted that 45 days time was given to G.T.N. Textiles to fulfil their obligation. In spite of non-fulfilment of obligation within the extended time, the second appellate committee returned the E.M.D, but such a request was rejected in case of petitioner. Though the counsel for the respondent tried to contend that the plea taken before the first appellate committee and second appellate committee are inconsistent, I do not find any such difference in the pleadings. Even assuming that the time of 45 days has been extended to fulfil the obligation, but the reason given by them that the shade of fabric got affected due to submergence in the water cannot be lost sight of. It is further worth to note that an amount of Rs.51,30,800/- was paid by the National Insurance Company towards full and final settlement of flood loss claim 2/2000 under policy Nos. 3100024, 3100025 and 3100052 after reinstatement of value, was not disputed by the respondent. Therefore, the fact there were floods and there was some damage to the manufacturing unit of M/s. Perfect Knitters cannot be disputed. The Meteorological Report states that heavy rainfall means 65 mm and above in a period of 24 hours. But the report states that there was maximum of 95 mm rainfaull over a period of 48 hours ie. between 23 and 24.08.2000, which was just below the category of heavy rains. The said report was based on the weather indications at Hyderabad Airport. Even accepting the said report, the quantum of rain during the 48 hours period was very near to heavy rainfall. The said report relates to an average ranfall in Hyderabad by taking into condition the extent of rain at a particular place. Therefore, accepting the plea that there was rainfull and having extended the benefit to G.T.N.Textiles, the appellate authority erred in holding that the rainfall was not maximum during that period. Hence, the authorities erred in accepting the plea of force maejuro in one case and rejecting the same in another though the claim is for same time, date and period.

For the aforesaid reasons and having regard to the findings given by the second appellate committee on 29.07.2003 wherein it was found that there was floods in Hyderabad and due to which G.T.N.Textiles Limited could not fulfil the export obligation, this Court is of the opinion that the petitioner is entitled for the relief sought for. Hence, the writ petition is allowed directing the respondent to return the balance E.M.D. amount at the earliest. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

JUSTICE C. PRAVEEN KUMAR

09.12.2015

gkv

_