Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6338 OF 2014

Afloat Textile (India) Ltd. ...Petitioners
Versus
Union of India, through Secretary, Ministry of Commerce & Anr. ...Respondents

Mr. Prakash Shah a/w Mr. Jas Sanghavi, i/b PDS Legal for the Petitioners.
Mr. Pradeep S. Jetly a/w Mr. M. S. Bhardwaj for the Respondents.

CORAM: S.C. DHARMADHIKARI & G.S. PATEL, JJ.
DATED: 11th January 2016

PC:-

1. The Petitioners have challenged the orders dated 17th June 2008 and 31st July 2008.

2. It is the case of the Petitioners that when all these orders were passed, no opportunity of hearing was given to them.

3. The Petitioners have pointed out that they are merchant exporters, engaged in the import and export of diverse goods including textiles. They were recognised as an export house by the

Licensing Authorities while it is true that they have been importing raw materials without payment of custom duty against advance licence issued under the Duty Exemption Entitlement Certificate Scheme obliging them to discharge an export obligation, they have duly discharged the same. They have not diverted any imported goods and duty free in the domestic market. However, proceedings were initiated by the 2nd Respondent to this Writ Petition under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992 ("**FTDR Act**"). That was in relation to the four advance licences, details of which are at page 6. A specific case of the Petitioners is that these licences were not utilised by them either for import and consequently for export. The Petitioners have set out the details as to how they sought a non-utilisation certificate but state that subsequent developments disabled them from producing the relevant and germane material. The subsequent adverse development being a petition for winding up presented against the Petitioner. A Provisional Liquidator was appointed and the company continued under this Provisional Liquidator from 22nd March 2007 until recently an order passed by this Court, a copy of which is set out at Annexure 8, page 45 of the paper-book.

4. Thus, a Petition/Application to recall the order dated 16th July 2009 winding up the Petitioner and that being recalled recently, it is submitted that the delay in presenting this Petition is satisfactorily and reasonably explained.

5. It is in these circumstances that Mr. Shah appearing for the Petitioners would submit that even now if an opportunity is given to the Petitioners, they would produce the relevant material before the authority. They would be in a position to establish and prove that against the subject advance licence, there were no imports made and consequently no exports. Alternatively and without prejudice even if the obligation was not discharged a penalty cannot be imposed and that too by the authority under the FTDR Act.

6. Mr. Jetly, appearing on behalf of the Respondents on the other hand would submit that the Petition deserves to be dismissed. He submits that the impugned orders are of July 2008. The Petition is presented in June 2014. In law, merely because a Petition for winding up is entertained, admitted and a Provisional Liquidator is appointed does not mean that the management cannot come forward to this Court/Company Court and request that the matter before the Adjudicating Authority be directed to be prosecuted or defended by the Provisional Liquidator. Alternatively, they can seek leave of this Court and commence any proceeding or otherwise defend themselves. The company does not loose its existence and in law merely because a Provisional Liquidator is appointed. For these reasons, it is submitted that the Petition be dismissed.

7. With the assistance of both Advocates we have perused the Petition and all annexures thereto. In the impugned orders, it has been specifically held that the adjudicating authority had called upon the Petitioners to furnish a reply to the show cause notice. A personal hearing was scheduled on 10th March 2008, but in reply to the notice in that behalf on 7th March 2008 the Petitioner informed the authority under the FTDR Act that they are declared sick and a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 was filed before the BIFR. The BIFR recommended a winding order be passed. An Appeal was preferred before the AAIFR and it was at the relevant time pending. Since the factory was closed for four years, no business activities were going on, the letters requested some time for production of papers. Thereafter, there was further correspondence but the authority found that there is no response. It is, in these circumstances, that the Joint Director General of Foreign Trade imposed the penalty. This is the common theme in all the orders and which are impugned in the Petition. In a prior order of 17th August 2008, it is observed that the show cause notice dated 21st April 2008 was served. A personal hearing was scheduled on 7th May 2008. The notice was issued but none appeared. It is in these circumstances that each order recites that an *ex parte* adjudication had to be made.

8. While it is true that the grievance now made of want of reasonable opportunity ordinarily would not have been taken cognizance but in the facts peculiar to this case, we can take note of it. It is not as if a winding up order has presented any handicap. This was not a winding up order in the ordinary and normal mode.

It was because the Petitioner company ran into financial difficulties. For some time its networth had eroded. That compelled it to make a reference to the board set up under the Sick Industrial Companies Act, 1985. The reference was pending. The reference resulted in an adverse opinion by the BIFR recommending the winding up of the Petitioner. That opinion was confirmed in Appeal and such an opinion is entertained as a petition for winding up on behalf of all creditors and then this Court proceeds to treat it as a Petition presented by any creditor or the Petitioner itself. On such a Petition, we find an extensive order made on 22nd March 2007 (Annexure "E", page 43 of the paper-book). The Official Liquidator was appointed as a Provisional Liquidator and this order continued till 2nd May 2014 after which one of us (G.S. Patel, J.) on an application being Company Application 95 of 2014 recalled it. The Petitioner wants an opportunity therefore on such recall of winding up order to trace out all the relevant documents, records and papers and make good its point that there being no import or no utilisation on the subject licences, hence, no penalty is called for.

9. In the peculiar facts and circumstances and which shall not be taken to be a precedent in future case, we set aside all the adjudication orders. Since the Petitioner prays for a fresh opportunity, we direct that the Petitioners either by themselves or through their authorised representative will appear before the Joint Director of Foreign Trade on 21st January 2016. The Petitioner specifically states that this opportunity would be availed of to assert and prove the factual submission that the advance licences were not utilised and therefore there is no obligation to export any goods out of India. Alternatively and without prejudice, the penalty cannot be imposed in law. Both these submissions shall be considered by the Adjudicating Authority afresh and without being influenced by its earlier orders. The Adjudicating Authority shall make a fresh order after complying with the principles of natural justice by 29th February 2016. If the Petitioners fail to appear as directed or at any future dates, their right to then appear before the Adjudicating Authority would stand forfeited.

10. We clarify that we have not expressed any opinion on the contentions raised by Mr. Shah. The Petition is allowed in above terms. There will be no order as to costs.

(G. S. PATEL, J.) **(S. C. DHARMADHIKARI, J.)**