

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

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Date of decision: 18th May, 2016

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W.P.(C) No.8417/2015 & CM No.18002/2015 (for stay).

ROTOMAC ELECTRICALS LTD.

..... Petitioner

Through: Mr. Biswajit Bhattacharyya, Sr. Adv.
with Mr. Chandrachur Bhattacharyya,
Adv.

Versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Sanjeev Narula, CGSC, Mr. Ajay
Kalra and Mr. Satvir Singh, Advs. for
UOI.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns (i) the adjudication order dated 5th April, 2010 of the Deputy Director General of Foreign Trade in exercise of powers under Section 11(2) read with Section 11(4) of the Foreign Trade (Development and Regulation) (FTDR) Act, 1992 imposing penalty of Rs.3,46,30,500/- on the petitioner and its directors; (ii) order dated 5th January, 2015 of the Additional Director General of Foreign Trade in exercise of powers under Section 15 of the FTDR Act dismissing the appeal preferred by the petitioner; and, (iii) the order dated 21st / 24th August, 2015 of the Reviewing Authority and Director General of Foreign Trade (DGFT) in exercise of powers under Section 16 of the FTDR Act of rejecting the review application filed by the petitioner.

2. Notice of the petition was issued, though no interim relief granted. Counter affidavit has been filed by the respondents. The petitioner did not opt to file rejoinder. Counsels were heard on 2nd December, 2015 and judgment reserved.

3. It is the case of the petitioner (i) that it is engaged in the business *inter alia* of repair and manufacture of traction motors and their spare parts, insulation materials, tapes and mica products; (ii) that it made an application dated 28th January, 1999 to the DGFT for issuance of an advance licence under the Duty Exemption Scheme under the FTDR Act and commenced exporting the goods as the petitioner already had export orders in hand; (iii) that on 22nd December, 1999 the petitioner was issued advance licence for Rs.69,26,100/- under the Duty Exemption Scheme and which licence was subject to the condition that the petitioner shall fulfil an export obligation of Rs.1,07,58,600/- as Free on Board(FOB) value within the stipulated period which was mentioned of “18 months”, meaning, that there was no cut-off date before which export could not have been made; (iv) the petitioner submitted the requisite Bank Guarantee (BG)/Legal Undertaking (LUT) with the Customs Authority *inter alia* providing that in the event of default in meeting the export obligation, the petitioner shall be liable to pay an amount equivalent to the amount of duty

with 15% interest per annum from the date of import of the first consignment till the date of payment; (v) the petitioner fulfilled the export obligation within the stipulated period i.e. by 20th April, 1999; (vi) the petitioner was issued three Bank Certificates of Export and Realisation (BCER) of a total value of more than the export obligation required to be fulfilled by the petitioner; (vii) that the petitioner was also issued shipping bills dated 16th February, 1999, 29th January, 1999 and 20th April, 1999 against the aforesaid BCER; (viii) the petitioner however misplaced the original shipping bills and though requested the Customs Authorities for duplicates thereof but to no avail; (ix) that the petitioner as per para 7.25 of the Handbook of Procedure (1997-2002), as proof of fulfilment of export obligation was required to submit the BCER and the Duty Entitlement Exemption Certificate (DEEC) book containing details of exports and imports; (x) that by mistake the petitioner could not get the entries of the exports aforesaid made / entered in the DEEC book but since the DEEC book is nothing more than a reflection of entries of the relevant shipping bills, the same is not material; (xi) that the petitioner received show cause notice dated 31st April, 2004 for purported non-fulfilment of export obligation under the licence aforesaid; (xii) the petitioner submitted a reply dated 19th May, 2004 to the show cause notice; (xiii) another notice dated 16th December, 2004 was

served on the petitioner and to which a reply dated 31st December, 2004 was submitted; and, (xiv) that yet further show cause notices dated 25th May, 2005, 1st December, 2009 and 1st January, 2010 were served on the petitioner and to which replies dated 14th June, 2005, 8th December, 2009 and 19th January, 2010 were submitted.

4. The respondents have vide adjudication order dated 5th April, 2010 supra imposed penalty of Rs.3,46,30,500/- on the petitioner for the reason of the export obligation period of the petitioner having expired on 21st June, 2001 and the petitioner having not submitted export details in the requisite manner supported with the bank certificate/documents towards fulfillment of export obligation and treating the petitioner as 100% defaulter in the fulfillment of export obligation.

5. The petitioner preferred statutory appeal and in which as aforesaid repeated opportunities were given to the petitioner to submit the documents. The Appellate Authority has vide impugned order dated 5th January, 2015 dismissed the appeal finding/observing/reasoning (i) that Part-II of the DEEC book submitted by the petitioner was not logged and endorsed by the Customs; (ii) copy of the shipping bill does not have file number / authorization number and thus could not be accepted towards fulfillment of export obligation; (iii)

MODVAT non-availment certificate from Central Excise had not been submitted though form A.R.4, Serial Number 3(a) stated that goods had been manufactured availing facility of MODVAT Credit; (iv) only copy of BRC had been submitted and original BRC had not been submitted; (v) the petitioner had been unable to produce shipping bills showing authorization number/file number; (vi) the petitioner had not produced duplicate/bank certificate copy of BRC; (vii) though the petitioner was repeatedly advised to provide documents required as per policy/procedure but had failed to; and, (viii) that it was thus clear that the petitioner did not have the requisite documents required to prove that it had fulfilled the export obligation in respect of the advance licence aforesaid.

6. The petitioner as aforesaid availed of the statutory review but which has been rejected vide impugned order dated 21st / 24th August, 2015 on the grounds of inadmissibility observing (i) that the petitioner before the Review Authority also, inspite of dismissal of the statutory appeal for non-submission of documents had only produced copy of MODVAT non-availment certificate; and, (ii) no ground for review was made out.

7. It is the contention of the petitioner before this Court in the petition (i) that the three BCER submitted by the petitioner established export of goods of the value more than for which export obligation was imposed under the advance licence aforesaid; (ii) that all the said Bank Certificates bear the same advance licence number and that export proceeds were received by the Bank and thus the question of non-fulfillment of the export obligation did not arise; that the exports were also established by the copies of the shipping bills; (iii) that the insistence of the respondents on the documents mentioned in the appellate order is not reasonable and inexplicable; (iv) that there was thus no basis for the conclusion that the petitioner has misutilised the licence; (v) that the petitioner ought not to be penalised for technicality; (vi) reliance in the petition itself is placed on *Mohan Machines Ltd. Vs. Union of India* 2008 (100) DRJ 239 holding that non-production of DEEC book with relevant entries could not be a ground to impose penalty for non-fulfillment of export obligation if there are sufficient documents available to substantiate the claim of fulfillment of export obligation; (vii) *Directorate of Enforcement Vs. Deepak Mahajan* AIR 1994 SC 1775 to contend that penalty cannot be imposed on technicality; (viii) *Gokaldas Images Ltd. Vs. Union of India* (2005) 116 DLT 47 holding that what is imposed for non-fulfilment of export

obligation is penalty and thus if the export obligation is shown to have been fulfilled, no question of penalty arises; and, (ix) ***Hindustan Steel Limited Vs. State of Orissa*** AIR 1970 SC 253 to contend that the proceedings are in the nature of *quasi* criminal proceedings and penalty will not ordinarily be imposed unless there is deliberate defiance of law or dishonest conduct.

8. The respondents in their counter affidavit have pleaded (i) that the petitioner having approached this Court in exercise of its power of judicial review, the power of judicial review can extend only to the decision making process and not to the decision; reliance in this regard is placed on ***Tata Cellular Vs. Union of India*** AIR 1996 SC 11 and on judgment dated 15th September, 2014 of this Court in W.P.(C) No.4007/2014 titled ***Guru Premsukh Memorial College Engineering Vs. All India Council For Technical Education***; (ii) that without the petitioner fulfilling the mandatory requirement of DEEC book (Part-II) logged for exports and signed by the Customs showing fulfillment of export obligation in quantities terms with FOB value and original BRCs showing that foreign exchange has been realized, it is not possible to ascertain how much import and export in terms of quantity wise has been made by the petitioner; (iii) export obligation has to be fulfilled both in terms of quantity wise and value wise as per condition no.5 of the Advance Licence; the

petitioner did not submit the original DEEC book (Part-II) of exports, it proves that the petitioner has not fulfilled the export obligation in terms of quantity; (iv) it is also to be ascertained whether the money earned in the BRCs is for that quantity of exports which are allowed in the Advance Licence; (v) without fulfillment of export obligation in terms of quantity, the petitioner might have realised foreign exchange but the export has to be fulfilled in terms of the quantity; (vi) copies of the shipping bills submitted do not contain the Advance Licence number and thus the quantity wise export obligation has not been proved; (vii) the DEEC book containing the details of exports and imports duly attested by the Customs Authority is the primary / major document to prove the fulfillment of actual Export Obligation in terms of quantity; and, (viii) that ample opportunities were given to the petitioner.

9. The senior counsel for the petitioner argued (i) that the show cause notice dated 31st March, 2004 did not contain any proposal for levying penalty; (ii) all that the petitioner was required to establish was of having fulfilled export obligation, be that from whatsoever documents; and, (iii) that the matter is squarely covered by ***Dencap Electronics (P) Ltd. Vs. Addl. Dir. General of Foreign Trade*** 2006 (194) E.L.T. 389 (Del.) (DB) laying down that since

penalty is levied for non-fulfillment of export obligation, if there is a reasonable interpretation which will avoid the penalty, that must be adopted.

10. Per contra, the counsel for the respondents contended (a) that ***Dencap Electronics (P) Ltd.*** supra was a case of no export; here the petitioner is claiming to have exported but has no proof of having paid customs duty thereon; (b) that the export even if effected is in contravention of law; (c) that as per the terms of Advance Licence the petitioner could have exported only the goods mentioned therein and none of the documents on the basis of which the petitioner desires the respondent to hold that the petitioner has fulfilled the export obligation are proof of export of those goods; (d) merely because the petitioner may have brought in the foreign exchange would not mean that the petitioner has exported the goods which it was as per the terms of the Advance Licence required to export; (e) that as per the Rules, the petitioner was required to produce the DEEC book in fulfillment of the export obligation and which admittedly had not been produced; (f) that as per para 7.25 supra of the Handbook of Procedure, the petitioner is required to furnish (i) BCER in the form prescribed and (ii) DEEC book containing details of imports and exports duly endorsed and signed by the Customs Authorities and the petitioner has not produced the same; (g) that ***Mohan Machines Ltd.*** supra is a case of advance

authorisation and is not applicable; and, (h) that *Dencap Electronics (P) Ltd.* also is not applicable in the factual scenario and therein the petitioner was found to be not in breach whereas the petitioner here is in breach.

11. The senior counsel for the petitioner in rejoinder argued (i) that the adjudication order imposing penalty is beyond the show cause notice; (ii) that though the adjudication order imposes penalty on the directors of the petitioner also but admittedly no show cause notice was given to them; and, (iii) that the petitioner exported the same goods which was required to export; attention in this regard is drawn to the BCER and to the copies of Bills of Lading.

12. What immediately becomes vivid on encapsulation as aforesaid of the controversy is, that the petitioner also admits that what it was required as per the Rules to submit in proof of fulfillment of export obligation, it has not submitted. The petition does not also challenge the Rules requiring the petitioner to submit particular documents in fulfillment of export obligation and which the petitioner is unable to submit. However what the petitioner wants this Court to do, without challenging the Rules and without fulfilling the requirement thereof, is to nevertheless relieve the petitioner of the rigors of non-fulfillment of export obligation. Significantly it is also not the case of the petitioner that even if it is found to be in non-fulfillment of the export

obligation it is not liable for the demand imposed on it. What the petitioner further wants this Court to do in exercise of its power of judicial review under Article 226 of Constitution of India is to sit in appeal over the concurrent finding of fact of the Adjudicating Authority, Appellate Authority and the Reviewing Authority, of the documents submitted by the petitioner not establishing fulfillment by the petitioner of the export obligation under the Advance Licence.

13. In my opinion, the scope of the jurisdiction of this Court in exercise of power of judicial review does not extend to, without quashing the Rule aforesaid, granting relief to the petitioner even though it is non-complaint therewith or to interfere with the factual finding of the three Statutory Authorities. Paragraph 7.25 of the Handbook of Procedures, on which the petitioner also relies, titled “Fulfillment of Export Obligation” unequivocally provides that the licence holder “shall” furnish i) BCER in the form annexed; and, ii) DEEC containing details of imports and exports duly endorsed and signed by the customs authority, in support of having fulfilled the export obligation. Such procedures have been laid down to do away with adjudication, whether export obligation has been fulfilled or not. Once the authorities, for admitted non furnishing by the petitioner of documents

prescribed, have in accordance with the said Rule concluded that the petitioner has not fulfilled the export obligation, no fault can be found therewith. This Court under Article 226 is not to distribute reliefs, to which the petitioner in accordance with law and Rules is not entitled to. The power under Article 226 is only to ensure that the authorities whose action is subject matter of judicial review, have acted in accordance with law.

14. What remains to be seen is whether the judgments relied upon by the petitioner hold to the contrary. I am afraid, I am unable to read ***Dencap Electronics (P) Ltd.*** holding to the contrary. The Division Bench of this Court in that case was concerned with the import of second-hand machinery on concessional duty against an export obligation. The Division Bench as a matter of fact found that though the machine had been imported and trial production commenced but on account of financial crises and non-cooperation from the foreign collaborator export obligation could not be fulfilled and the machinery was confiscated and the Bank Guarantee furnished for the balance import duty to be realised for non-fulfillment of export obligation was encashed and thus the entire import duty realised. It was in this scenario that it was held that Section 11 of the FTDR Act providing for contravention of the provisions

thereof and the rules, orders and export and import policy was not attracted as there was no contravention on the part of the importer.

15. The counsel for the respondent is correct in contending that the facts of the present case bear no similarity whatsoever to *Dencap Electronics (P) Ltd.* Here, the petitioner is not pleading any circumstances beyond its control for non-fulfillment of the export obligation. It is also not the case of the petitioner that the import duty, in lieu whereof it was to fulfill the export obligation, has been paid by it or recovered from it, for it to be said that the obligation to export no longer survives. Rather, it is the plea of the petitioner that it has fulfilled the export obligation though is unable to prove the same in the manner required by law.

16. Similarly in *Mohan Machines Ltd.* there was no doubt that the export obligation had been fulfilled and it was in view thereof that it was held that for technical lapses the petitioner should not be penalised.

17. However nothing on record of the present case leads to the conclusion least suggest that export obligation has indeed been fulfilled. Rather the case of the petitioner is of having fulfilled the export obligation even prior to the date of issuance of the Advance Licence. I fail to see how the exports effected prior to the date of Advance Licence, imposing obligation to effect export within 18

months thereof, can be said to be against the Advance Licence. A perusal of the Advance Licence shows that against the column “category of licence” the words “Quantity Based Advance Licence” were entered. The counsel for the respondent during the hearing also handed over a copy of the Public Notice No.79 (RE-2005)/2004-2009 dated 2nd January, 2006 issued by the DGFT in exercise of powers under Paragraph 2.4 of the Foreign Trade Policy, 2004-09 laying down Guidelines for disposal of the old cases of Advance Licences issued before 31st March, 2002 where the licensee is unable to produce the logged DEEC books and demonstrated that the petitioner was in non-fulfilment thereof also. Attention was also invited to the Customs Notification No.48/99-Customs, dated 29th April, 1999 and 50/2000-Customs and 51/2000-Customs, both dated 27th April, 2000 providing that in order to ensure proper monitoring and utilisation of inputs imported against Advance Licences, a DEEC book is issued along with Advance Licence and at the time of import and export against the Advance Licence entries are made in the DEEC book by Customs to keep record of import/export made against it. Obviously the petitioner, even before the Advance Licence was issued, could not have the DEEC book and it is clear as sky that the exports even if made were not against the Advance Licence and

the petitioner is clearly in violation of its obligation thereunder and there is no reason for interference with the orders impugned.

18. I am also unable to agree with the senior counsel for the petitioner that the words “18 Months” entered against the column “Export Obligation Period” on the Advance Licence dated 22nd December, 1999 permitted the petitioner to fulfil the export obligation prior to 22nd December, 1999 also. The said words required the export obligation to be met during 18 months commencing from 22nd December, 1999 and which the petitioner does not even plead. The exports against which the petitioner wants his export obligation under Advance Licence dated 22nd December, 1999 to be fulfilled are stated to have taken place on 16th February, 1999, 29th January, 1999 and 20th April, 1999.

19. Supreme Court as far back as in *S.B. International Limited Vs. Assistant Director General of Foreign Trade* (1996) 2 SCC 439 held on an examination of the Duty Exemption Scheme under the Imports and Exports Policy of the Government of India that (i) the object behind the scheme is to enable the exporter to import raw materials, components etc. required for the purpose of producing goods for export; (ii) it is a facility provided by the Government - an incentive; (iii) there is no right to advance licence apart

from the policy; (iv) no citizen has a fundamental right to import, much less import free of duty; (v) by granting the advance licence, the Licensing Authority tells the licensee - "I am permitting you to import raw material, components etc. of a particular value free of duties but you must export goods of a particular value within a particular date. If you fail to do so, you will be liable to levy of penalties and other action according to law"; (vi) the duty free import of raw materials etc. is permitted to enable the exporter to sell his goods abroad at a more competitive price, thereby fetching precious foreign exchange for the country; (vii) mere making of an application does not create any right in the applicant since he has no pre-existing right to such licence; (viii) his right is only that which is given by that policy; (ix) the situation could have been different if the policy had said that a person exporting goods of a particular value shall be entitled to an import licence of a particular value; in such a case, the export of goods can be said to create a right in the applicant to get an import licence of the specified value; (x) however under the policy one has to ask for an import licence promising to export goods of a particular value within a particular time; (xi) it is difficult to appreciate how can it be said in such a situation that mere filing of an application creates a vested legal right to obtain a licence; (xii) it is the date

of licence that is relevant and not the date of application therefor; (xiii) the mere fact that the authorities have a discretion to take into account the exports made after the date of application for advance licences makes no difference to this position; it is in the nature of yet another concession; (xvi) what is relevant is that the licence granted is an advance licence – it is granted in advance of export - rather to enable the export; and, (xv) the grant of licence is neither a mechanical exercise nor a formality and is granted only after proper scrutiny and there is no vested right in favour of an applicant.

20. The said view has since been consistently followed. Reference may be made to (i) *Aval Exports Vs. Union of India* (2004) 115 DLT 184, LPA 976-977/2006 preferred whereagainst was dismissed vide judgment dated 8th October, 2013; (iii) *Larsen and Toubro Ltd. Vs. Union of India* (2005) 3 SCC 654; and, (iv) *Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Cock and Chem. Ltd.* (2007) 8 SCC 705.

21. It is thus clear that the export effected by the petitioner prior to the date of issuance of Advance Licence cannot be considered in fulfillment of Export Obligation under the Advance Licence. The whole case of the petitioner was premised on said edifice and fails. There is no error in the

factual finding of the Statutory Authorities, of the petitioner having not fulfilled the Export Obligation. Resultantly, the impugned demand is justified.

22. There is no merit also in the contention of the orders, insofar as against the directors of the petitioner, being bad for the reason of the said directors having not been issued the show cause notice. We may notice that no director has made grievance in this respect.

23. There is thus no merit in the petition which is dismissed with costs of Rs.25,000/- to the respondents.

RAJIV SAHAI ENDLAW, J.

MAY 18, 2016
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