BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.01.2017

DELIVERED ON : 01.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MRS. JUSTICE J.NISHA BANU

W.A.(MD)Nos.1641 and 1642 of 2011
and
M.P.(MD).Nos.1 of 2011 & 1 of 2012 in W.A.(MD).No.1641 of 2011
and
M.P.(MD).Nos.2 of 2011 & 1 to 3 of 2015 in W.A.(MD).No.1642 of 2011

W.A.(MD).No.1641 of 2011

M/s.Arasan Textile Mills (P) Ltd.,
rep. by its Director,
97/1A, Kootudankadu,
Mangalagiri Post,
Thoothukudi - 628 103. .. Appellant / Petitioner

Vs.

1. The Second Appellate Committee,
   Government of India,
   Ministry of Textiles (III Section),
   rep. by Member Secretary,
   Udyog Bhavan,
   New Delhi.

2. The Textile Commissioner,
   New CGO Building,
   New Marine Lines,
   Mumbai - 400 020.

3. The Appellate Committee,
   Ministry of Textiles,
   Udyog Bhavan,
   Moiulana Azad Road,
   New Delhi.

4. The Assistant Director,
   Cotton Textile Export Promotion
   Council, Engineering Centre,
   Vth Floor,
   9 Mathew Road,
   Mumbai.

5. The Tamil Nadu Mercantile Bank Ltd.,
   56, 57, Beach Road,
   Tuticorin - 628 001. .. Respondents/Respondents

W.A.(MD).No.1642 of 2011

M/s.The Tuticorin Spinning Mills Ltd.,
106, Palayamkottai Road,
Tuticorin - 628 008,
rep. by its Managing Director. .. Appellant /Petitioner

Vs.

1. The Second Appellate Committee,
   Government of India,
   Ministry of Textiles (III Section),
   rep. by Member Secretary,
   Udyog Bhavan,
   New Delhi.

2. The Textile Commissioner,
   New CGO Building,
   New Marine Lines,
   Mumbai - 400 020.

3. The Assistant Director,
   Cotton Textile Export Promotion
   Council, Engineering Centre,
   Vth Floor,
   9 Mathew Road,
   Mumbai.

4. The Senior Manager,
   Indian Bank,
   Advances Department,
   16 A & B, Emperor Street,
   Tuticorin - 628 001. .. Respondents/ Respondents

COMMON PRAYER: Writ Appeals have been filed under Clause 15 of the Letters Pattent, against the common order dated 21.11.2011, made in W.P.(MD).Nos.7922 and 8479 of 2005 by a learned Single Judge of this Court.

Prayer in WP(MD). 7922/ 2005 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court pleased to issue a WRIT OF CERTIORARI Calling for the proceedings of the 1st respondent in Order No.14/273/2005/E.111/1222 dated 14.06.2005 quash the same and pass such further or other orders as this hon'ble Court may deem fit

Prayer in WP(MD). 8479/ 2005 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Ceriorari ,calling for the records relating to the proceedings of the first respondent herein in Order no. 14/269/2005-exports III/1322 dated 12/07/2005(received on 09/09/2005)quash the same

For appellants in both the appeals : Mr.V.R.Shanmuganathan
Special Government Pleader

For 1st respondent in both the appeals : Mr.R.Vijayarajan,
Senior Panel Counsel

For 2nd respondent in W.A.(MD).No.1641/2011 : Mr.G.R.Swaminathan,
Asst. Solicitor General of India

For 2nd respondent in W.A.(MD).No.1642/2011 : Mr.R.Murugappan,
CGSC

For 3rd respondent in W.A.(MD).No.1641/2011 : Mr.K.K.Senthilvelan

For 4th respondent in W.A.(MD).No.1641/2011 & for 3rd respondent in W.A.(MD).No.1642/2011 : Mr.Jose John

For 4th respondent in W.A.(MD).No.1642/2011 : Mr.Pala Ramasamy

COMMON JUDGMENT

(Judgment of the Court was delivered by **R.SUBBIAH, J.**)

Both the writ appeals have been filed as against the common order passed in W.P.(MD).Nos.7922 and 8479 of 2005, whereby and whereunder a learned Single Judge of this Court has refused to interfere with the impugned orders directing the appellants to forfeit EMD / BG.

2.Since both the appeals have arisen out of common order, both the appeals are heard together and disposed of by way of this common judgment.

3. For the sake of convenience, the parties are referred to as per their rank in the writ petition.

4. The brief facts which are necessary to decide these writ appeals are as follows;

(a)The petitioners / Textile Mills were allotted quota under the first cum first serve contract reservation system for export of cotton yarn under Category-I to Italy, France, etc. during January to June, 1988 by the Textiles Export Promotion Council

(TEXPROCIL), Bombay. Since the petitioners exported less than the quantity allotted, the TEXPROCIL directed the petitioners to pay Rs.20,92,560/- and Rs.8.12 lakhs respectively as compensation. As against the said demand, the petitioners filed first appeals before the Textile Commissioner. The Textile Commissioner, by order dated 15.10.1989, modified the order of the original authority and directed the petitioners to pay Rs.8.5 lakhs and Rs.6 lakhs respectively. Aggrieved by the said order, the petitioners have filed second appeals before the Second Appellate Committee. But, the same was rejected. As against the said orders, the petitioners have filed W.P.(MD).Nos.7922 and 8479 of 2005 respectively before the learned Singe Judge of this Court. After hearing both sides, the learned Single Judge has dismissed both the writ petitions holding that there is no illegality in the order passed by the Second Appellate Committee. Aggrieved by the said common order, these appeals have been filed.

5.The learned counsel for the petitioners submitted that though the applications for allotment of quota were given in time viz., before 14.12.1987, for shipment in January 1988 to June 1988, quota was allotted only in March, 1988 by TEXPROCIL and due to the said delay made by TEXPROCIL, the buyers of the petitioners went back from the contract and refused to take up the manufactured goods and consequently, the petitioners could not export the goods as per the quota fixed by the Council. In fact, the petitioners must seek damages from TEXPROCIL for the delay in issuing the order by TEXPROCIL. But, on the contrary, the TEXPROCIL has demanded compensation for non fulfilment of quota and therefore, the impugned orders are liable to be set aside. He has further submitted that in the year 1988, there was over all shortfall in exporting cotton yarn to European countries and all over India, only 45% of quota alone had met. Since the quota had not been met all over India during the relevant period, the petitioners alone cannot be blamed and they should not be penalised. Thus, he prayed for dismissal of the impugned orders.

6. Countering the submissions made by the learned counsel for the petitioners, the learned counsel appearing for the respondents submitted that the export of textiles and clothing from India are governed on the basis of the bilateral agreements entered into between the Government of India and the Governments of certain developed countries. Since there are quantitative restraints, the exporters are allotted limited quotas for export by the Council. In case of shortfall in fulfillment of the prescribed level of export obligations within the validity period of entitlements, the EMD would be forfeited in accordance with the provisions of the policy. Knowing fully well the above procedures, the petitioners have submitted their applications in the prescribed format along with overseas buyers contract. Though it is stated by the petitioners that there was delay in issuing the order, they could have very well refused to execute the performance bond. But, on

the other hand, they themselves executed performance bonds along with Bank guarantee stating that they would perform the export as per the quota allotted. When that being the position, now the petitioners cannot wriggle out from their liability. Further, the learned counsel for the respondents by relying upon the decisions of the Hon'ble Supreme Court in **State of A.P. Vs. Chitra Venkata Rao**, reported in **(1975) 2 SCC 557** and **Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engg. Works (P) Ltd.**, reported in **AIR 1997 SC 2477** submitted that this Court can make interference in the order passed by the respondents only if there is an error of law on the face of the record and if there is error on the fact, the Court cannot interfere exercising power under Article 226 of the Constitution of India. But, in this case, there is no error on law and also on facts. Thus, he prayed for dismissal of the writ appeals.

7. Keeping the submissions made on either side, we have carefully gone through the entire materials available on record. It is the main submission of the learned counsel for the petitioners that only due to the delay in issuing the order of allotment of quota by TEXPROCIL, the petitioners could not fulfil the quota allotted to them and therefore, they cannot be held responsible. In this regard, the learned counsel for the petitioners have also made a detailed arguments by inviting the attention of this Court to certain clauses of the export policy. But, on the other hand, it is submitted by the learned counsel for the respondents that even assuming for a moment that there is a delay, the petitioners have chosen to execute performance bond. When they themselves executed performance bond on 02.04.1988, now they cannot shirk their liability by putting a blame on the respondents. As rightly contended by the learned counsel for the respondents, if the TEXPROCIL has issued the allotment order with delay, the petitioners can very well refuse to execute the performance bond. But, having executed the performance bonds, now they cannot shirk their liability.

8. More over, the Second Appellate Authority have already considered the said plea and rejected the same stating that the refusal by the foreign buyer to open necessary Letter of Credit on account of fall in yarn prices and poor market conditions are normal commercial risks encountered in business operations and as such they are not covered under force-majeure conditions. As rightly contended by the respondents, if the relief is granted in respect of circumstances which are within the realm of the petitioners' firm, every exporter firm can take that plea and the issue of performance guarantee would become meaningless.

9.It is settled law that the jurisdiction to issue a writ of certiorari under Article 226 of the Constitution of India is a supervisory jurisdiction and the same can be exercised if there is an error of law apparent on the face of the record and not an error of facts. Here, in this case, we do not find any error of law or facts. We do not find any infirmity or illegality in the order passed by the Second Appellate Committee, confirming the decision taken by the Textile Commissioner. The learned Single Judge has also rightly rejected the contentions of the petitioners.

10. In the result, Both the writ appeals are liable to be dismissed and accordingly dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar(CS-III)

/TRUE COPY/

Sub Assistant Registrar

To

1. The Second Appellate Committee,
   Government of India,
   Ministry of Textiles (III Section),
   rep. by Member Secretary,
   Udyog Bhavan, New Delhi.
2. The Textile Commissioner,
   New CGO Building,
   New Marine Lines, Mumbai - 400 020.
3. The Appellate Committee,
   Ministry of Textiles,
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   Moiulana Azad Road, New Delhi.
4. The Assistant Director,
   Cotton Textile Export Promotion
   Council, Engineering Centre,
   Vth Floor,
   9th Mathew Road, Mumbai.

+2 cc to MR.R.Vijayarajan, ADVOCATE, SR NO:11455
+1 cc to MR.Pala Ramasamy, ADVOCATE, SR NO:11506
+2 cc to MR.Jose John, ADVOCATE, SR NO:11729 & 11730
+2 cc to MR.VR.Shanmuganathan, Spl.Govt.Pleader,SR NO:11879&11880
+1 cc to MR.R,Murugappan, ADVOCATE, SR NO:11832

Pre-Delivery Common Judgment made in
Writ Appeal (MD) Nos.1641 & 1642 of 2011
01.03.2017

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MKV-SKN-RSK/13.3.2017/6P-13C