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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.139 OF 2016

R.K.Mining Pvt. Ltd. & Ors. ..Petitioners.
V/s.
Union of India & Ors. ..Respondents.

Mr.Girish Kulkarni with Mr.Aditya Mithe i/b. Murnmai Kulkarni for the petitioners.

Mrs.N.S. Jain, APP for the respondent-State.

CORAM: NITIN W.SAMBRE, J.

DATE : APRIL 13, 2018

P.C.:-

The petitioners had obtained DGFT authorisation enclosed with the condition slip incorporating the following conditions :-

"2. The firm is under obligation to Export Item

Sr. No.	*ITCHS Code*	*Export Item name*
1	*26011110*	*Crushing of Iron Ore*

worth US$2,731,313.37 i.e. 8 times the duty saved of Capital Goods on FOB basis within a period of 8 years (12 years in case duty saved is Rs.100 Crores or more) from the date of issue of auhorisation. The Export Obligation shall be fulfilled by the use of *the Imported Capital Goods.*

3. The firm is also required to maintain its average of the past the three years export performance of the same and similar products mentioned in Para 2 above. The annual average of the past export performance is Rs.0.00.

4. The firm may also discharge export Obligation indicated in Para 2 above by way of direct export / through third party export. In all such cases name the Exporter, name of EPCG authorisation holder, date and number of EPCG authorisation should also be indicated in Shipping Bills.

5. If EPCG Authorisation Holder is Merchant Exporter, the name of the Supporting Manufacturer shall be indicated in the Shipping Bills. The Authorisation holder shall fulfill the obligation imposed on the authorisation and discharge the stipulated Export Obligation though the Capital Goods installed is in supporting manufacturers factory.

6. Import of Capital Goods under this authorisation shall be subject to actual user condition.

7. Authorisation holder shall submit statement of export within three months from the expiry of block year duly certified by a Chartered Accountant and concerned Bank to the Regional authority. He shall also submit yearly performance of exports in electronics format.

8. The EPCG authorisation is issued on the basis of self declaration submitted in terms of PARA 5.3 of HAND BOOK OF PROCEDURES 2004-2009 subject to condition that in case the HQrs EPCG Committee disallows the Capital Goods including Jigs, fictures, dies, moulds and spares, the authorisation holder shall pay Customs duty together with 15% interest on such goods.

9. The CG is to be installed at the following address:

Name and address of the Supporting Manufacturer (s) Own Factory

Address					
Sl. No.	*Name*	*Address*	*Type of unit*	*Registration No.*	*Date*
1	*R.K.MINING PVT. LTD.*	*OBULAPURAM VILLAGE, D. HIRELAL, ANANTPUR, DISTRICT (A.P.)*	*Others*	*11111111*	*11-6-2008*

10. This Authorisation will be operative as per provisions of the Foreign Trade Policy and Hand Book of Procedures 2004-2009 or any other law / provision time being in force."

2. Though the basic authorisation was taken by the petitioners for importing the machine which should have been installed at the place mentioned in the condition slip, however, without any permission it was shifted to Allahabad resulting into initiation of prosecution against the applicant.

3. The said prosecution is questioned in the present petition on the following grounds :-

That at the relevant time when the authorisation was given effect to and the machine was imported, there was a ban on mining activity in the receiving State for which, the machine imported into India was to be used. As such, the prevailing circumstances including the financial liability prompted the petitioners to shift the machine to Allahabad. It is further claimed that the Joint Director of Foreign Trade ('DGFT' for short) had vide communication dated April 10, 2012 has passed the following order :-

> *"Sub: Request for Permission to Shift the imported material against Lic.No.0930005111/ 27.8.2008 - Regarding*
>
> *With reference to your letter dt.17.2.2012 on the above subject, I write to inform you that permission to Shift the imported material against the above mentioned licences as per para 5.3.1. of HBP 2009-2014 has been acceded to and the CGs installed in the premises of your supporting manufacturer i.e. M/s.Meja Urja Nigam(P) Limited (A joint venture of NTPC Limited and UP Rajya Vidyut Umadan Nigam Limited) Allahabad shall be intimated to us in the form of Installation Certificate issued by the Competent Authority as per policy and procedure within 30 days from the date of issue of this letter.*
>
> *All other terms and conditions of the licence remains unchange. "*

4. As a consequence thereof, the condition that the machine, imported should have been used at Obulapuram village as provided in the auhorisation was not denied and in absence of

any authorisation, same was shifted for use at Allahabad. It is further claimed that the proceedings *qua* order-in-original and penalty levied is continued before the Customs, Excise and Service Tax Appellate Tribunal, WZB, Mumbai ('the CESTAT' for short). As a consequence, prosecution based on aforesaid default against the present petitioners is questioned in the present petition is liable to stayed in view of the law laid down by the Apex Court in the matter of *Lakme Limited V/s. State of Gujarat*[1] particularly paragraph 8 which reads thus :-

> *8. Shri Akshay Mehta, learned Counsel for the Revenue has relied upon in the case of K.Sadasivam Vs. Enforcement Officer, Enforcement Dte., Madras reported in 1999(105) E.L.T. 269 (Mad.) In para 15 the Court observed as under:*
>
> > *"However it cannot be denied that the decision in the appeal before the FERA Board in Appeal No.171 of 1993 will have a hearing in the Criminal Case in C.C.No.881/93. Even I can say that the judgment of the FERA Board in the appeal that will be preferred by the petitioner/accused in the event of not succeeding before the Magistrate Court can also be filed as an additional document on the side of the accused in the appeal that may arise in the criminal case in C.C.No.881/93 in future. Having waited so long, I am of the view that some reasonable time must be given to enable*

1 **2001 (132) E.LT. 20 (Guj.)**

the petitioner accused to move the FERA Board to dispose of his appeal as expeditiously as possible within shortest possible time and get a verdict one way or the other before the FERA Board. Keeping in view this factor in mind I am of the opinion that a reasonable time must be given as held by His Lordship Mr.Justice T.S.Arunachalam, J., in the decision reported in 1991 (52) E.L.T. 168(Madras) and the reasonable time may be only six months and not more than that. Hence I hold that this petition is allowed and the order of the learned Additional Chief Metropolitan Magistrate (E.O.II) Egmore, Madras in Crl.M.P.No.989/97, dated 22-12-1997 in C.C.No.881/93 is set aside, and the case in C.C.No.881/93 on the file of Additional Chief Metropolitan Magistrate (E.O.II) Egmore, Madras is adjourned or postponed till 31-8-1998, and thereafter no further adjournment or postponement of the trial in C.C.No.881/93 shall be given or extended by any one of the courts, and I answer this point accordingly."

8.1 In my view, Sec. 9 as the marginal note indicates, deals with offences and penalties. Sub-section (1) contains 6 clauses which specify the offences :clauses (a) to (c), the first five clauses, deal with specific offences like evasion of payment of duty, or unlawful removal of excisable goods.

8.2 I have gone through the judgment of the Madras High Court. However, in view of judgment of the Supreme Court in G.I.Didwania's case (supra) and three judgments of this Court, *I am of the view that till the Collector, Central Excise Surat decides finally, the criminal prosecution may not continue. It is nodoubt true that by this order there will be indefinite adjournment in the case, however, the order of the Collector, Central Excise Surat has a direct bearing on the criminal prosecution and if petitioners succeed before Collector then entire basis of prosecution will disappear and the assessee will not have to visit unnecessary the criminal courts. When the Collector has still not finally decided the matter the continuation of the criminal prosecution will result into feeling of the petitioner that petitioner is made victim of palpable injustice. In my view, the continuation of criminal prosecution will cause misery and harassment to the petitioner.*

8.3 I am, therefore, of the view that till the Collector, Central Excise Surat decides the adjudication finally, the petitioners cannot be said to have committed an offence and it is interest of justice to stay the proceedings of original Criminal Case pending before the learned Chief Judicial Magistrate, Navsari, till the aforesaid case pending before the Collector, Central Excise Surat. The application is allowed for stay of the criminal proceedings as stated above."

5. None appears for the respondents. From the record, it can be borne out that the import / authorisation was coupled with an exhibit containing condition slip, which puts an embargo on the right of the petitioners to use the machine to be imported.

Needless to mention that the import authorisation granted in favour of the petitioners was attached with substantial concessions *qua* duty to be levied and to be recovered with corresponding obligations, on the petitioners to comply with the conditions provided in the condition slip enclosed with the authorisation permitting import of the machine.

6. The facts remains that after the machine was imported after availing the duty concession no export activities, pursuant to conditions presribed in the authorisation out of the operation of the machine that was imported can be noticed. Atleast, no material is placed on record to demonstrate that the corresponding obligation for the duty concession provided in the authorisation was complied with.

7. The learned counsel for the petitioners though was right in inviting the attention of this Court to the permission granted by the DGFT on April 10, 2012 for use of machine at the place other than one provided in the export authorisation. However, the petitioners were not absolved of the obligation which were incorporated in the condition slip attached to the EPCG

authorisation.

8. Apart from the above, the fact remains that the authorisation in favour of the petitioners is *post* 2010. However, the petitioners imported the machine pursuant to the authorisation way back in 2008 and has not discharged their obligation under authorisation. This is found to be the basis for initiating prosecution against the petitioners vide C.C. No.43/SW/2015 in the Court of the learned Metropolitan Magistrate. The prosecution agency in the aforesaid background has noticed that the act on the part of petitioner in violating the condition in the import authorisation amounts to criminal act which is liable for prosecution.

9. Though the appeal preferred against levy of additional duty and penalty, by the petitioners, is pending before the CESTAT wherein there is interim relief subject to the condition of deposit of part of the revenue, however, the said proceedings takes care of the financial burden imposed on the present petitioners. However, once the Collector having decided the said question against the petitioners, the judgment relied upon by the petitioners in the

matter of *Lakhme Limited (cited supra)* will not be attracted as the petitioners are before the CESTAT against the order of Collector.

10. There is no statutory embargo on the right of the revenue to continue with the prosecution against the petitioners even if the appeal against the order of imposing duty and penalty is pending before the CESTAT.

11. The prosecution agency noticed violation on the part of the petitioners which *prima facie* amounts to commission of offence under sections 135(1)(a) and 135(1)(b) read with 135(1)(i) of the Customs Act, 1962 and under section 120B of the Indian Penal Code.

12. In the wake of above, no interference is warranted in the present proceedings. The petition, as such fails and is dismissed.

(NITIN W.SAMBRE, J.)