IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.10.2018

CORAM:

THE HON'BLE Mr. JUSTICE R.SURESH KUMAR

W.P.No.42928 of 2002

M/s. Victory Laminations Limited,
Nos.41 to 43 SIDCO Industrial Estate,
Gummudipoondi - 601 201. ..Petitioner

Vs

1. The Government of India,
   Represented by
   The Director,
   Ministry of Commerce and Industry
   Department of Commerce,
   New Delhi.

2. The Appellate Committee,
   Represented by Under Secretary to
   Government of India,
   Ministry of Commerce & Industry,
   Department of Commerce,
   New Delhi.

3. The Development Commissioner,
   Madras Export Processing Zone,
   Tambaram,
   Chennai - 600 045. ..Respondents

Prayer : This Writ petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorari, to call for the records on the file of the second respondent relating to the impugned F.No.12013/50/2001-ADJ/AC, dated 29.05.2002 and quash the same.

For Petitioner : Mr.T.Ramesh,

For Respondents : Mr.Madana Gopal Rao
Senior Standing Counsel
for Central Government

O R D E R

The prayer sought for in this writ petition is for the issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the second respondent relating to the impugned F.No.12013/50/2001-ADJ/AC dated 29.05.2002 and to quash the same.

2. The short facts which are required to be noticed for the disposal of this Writ Petition are as follows:-

The petitioner is a private limited company and they want to establish a 100% export oriented unit of manufacture of Sacks and Bags of Polymers. Accordingly, he applied for license to the respondent/department. On consideration of the request made by the petitioner, after having considered the merits of the claim of the petitioner, the respondent/department, by order dated 14.10.1993, in LOA.No.PER:407(1993)/EOB/394/93, had issued a license, whereby, the petitioner had been extended all the facilities and privileges admissible under 100% Export Oriented scheme, for the establishment of the new undertaking, i.e., the petitioner unit at Gummidipoondi in the State of Tamil Nadu, for the manufacture of Sacks and Bags of Polymers of Ethylene with initial capacity of 810 metric tone. Along with the said licence or permission dated 14.10.1993, certain conditions were imposed whereby, the export obligation had been fixed, also NFEP (Net Foreign Exchange Payment) had also been fixed.

(ii) Pursuant to the said license/permission given by the respondent/department, the petitioner started establishing the unit and after having established the unit, it started commercial production on 27.10.1995. Since the petitioner unit is 100% export oriented unit hereinafter referred to as '100% EOU', it had, in total, upto the year 2000, had exported the goods worth about 142.66 lakhs only, as against the export obligation of 355.10 lakhs. However, the petitioner unit achieved NFEP at 29.35% as against fixed norm of 20%.

(iii) It seems, in view of the short fall of the export i.e. 142.66 lakhs only as against the obligation of Rs.355.10 lakhs, the respondent department by invoking the provisions of the Foreign Trade (Development and Regulation) Act 1992, hereinafter referred to as 'F.T.(D & R) Act' and imposed the penalty of 2,00,000/-. As against the said order of slapping penalty on the petitioner unit, he preferred an appeal before the Appellate Committee, which was also rejected by confirming the order passed by the Development Commissioner thereby, a sum of Rs. 2,00,000/- had been imposed as penalty against the petitioner for the alleged non fulfillment of export obligation during the relevant period i.e., between 1995-2000. Aggrieved over the said order passed by the Appellate Authority, dated

27.05.2002, the petitioner has moved this writ petition with the aforesaid prayer.

3. Mr.T.Ramesh, learned counsel for the petitioner would submit that, no doubt it was an 100% EOU and the permission/license was issued by the respondent/department on 14.10.1993 and as per the said permission, the petitioner was entitled to enjoy the facilities and privileges admissible under the 100% EOU. It is also no doubt that, there had been some export obligation had been fixed and the NFEP percentage has been projected.

4. Though the commercial production of the unit was started in October 1995, inspite of the best efforts having been taken by the petitioner unit upto 2000, the petitioner unit, due to other various factors, had been in a position to export only worth about 142.66lakhs exportable goods as against the export obligation of 355.10lakhs. However, the unit has achieved NFEP at 29.35% as against the fixed norm of 20%.

5. In this context, learned counsel appearing for the petitioner would submit that, since the export obligation in a whole has to be taken into account for the entire period of ten years, for which, the initial permission and license was issued and the said ten years period shall be calculated from the original date of commercial production, the respondent/department ought not to have invoked the provisions of the F.T.(D & R) Act and the penalty, ought not to have been slabbed on the petitioner.

6. In support of his contention, learned counsel would rely upon the subsequent renewal of export obligation, which was in fact given by the respondent/department, by communication dated 20.11.2000 whereby, the revised projection given by the petitioner unit had been approved by the respondent/department. In view of the revised approved projection of export obligation dated 20.11.2000, the petitioner unit had to achieve Rs.11.26 Crores for a period of 5 years i.e., from 2000-2005 and also the NEFP production of 20.52% also to be achieved. When a revised projection, since had been approved by the respondent/department, fixing the obligation on the petitioner to achieve the same, within the next five years period i.e., from 2000-2005, in consonance with the earlier condition imposed by the department along with original order/permission, dated 14.10.1993, the said revised projection should also be taken into account and the respondent should have awaited till the completion of the entire next five years period i.e., till 2005 and before which, they should not have invoked the provision of the Act for making any penalty on the petitioner, for the alleged non-compliance of the export obligation.

7. However, Mr.Madana Gopal Rao, learned Standing Counsel appearing for the respondent department has made the submissions that, no doubt the license and permission was given on 14.10.1993, under which, certain privilege and facilities also had been extended to the petitioner as an 100% EOU. When the unit wants to enjoy the benefits and privileges as an 100% EOU, certainly, the export obligation fixed in this regard, by the department should have been fulfilled by the petitioner. in the case of the petitioner.

8. When it's performance, after five years, was reviewed, it was found that, even though the unit achieved NFEP percentage more than what has been fixed and projected, however, has failed to fulfill the export obligation as the unit achieved only a sum of Rs.142.66 lakhs against the obligation fixed in this regard, that was Rs.355.10 lakhs.

9. Therefore, there had been a sharp decline in fulfilling the export obligation on the part of the petitioner for the first five years period from the date of commercial production and therefore, the Development Commissioner has rightly invoked the provision of Section 11(2) of the Act. Accordingly, he had imposed the penalty of Rs.2,00,000/-.

10. Learned Standing Counsel appearing for the respondent by relying upon the provision would further submit that, even though as per the proviso to Section 11(2) of the Act, the respondent Department is entitled to impose the penalty of five times of the worth of the export, the Development Commissioner as well as the Appellate Authority had imposed only a penalty of Rs.2 lakhs against the petitioner. This lenient view was taken on the petitioner by taking into account its achievement in NFEP, as the same was achieved as 29.35% as against 20%.

11. Learned counsel would further submit that, no doubt subsequently, by order dated 20.11.2000, the revised projection had been approved by the respondent department under which, new export obligation as well as NFEP had been fixed and projected, that would be applicable to the petitioner's unit only for the next five years period. Therefore, the same cannot be clubbed with the first 5 years period for which, separate EO had been fixed and separate NEFP had been projected. For the non fulfillment of the export obligation in the first 5 years period, which was admittedly very low comparing with the fixation, certainly, the petitioner was liable to be imposed with five time penalty, which had not been imposed at all by taking into account its achievement on NFEP. Therefore, the learned Standing Counsel would submit that, certainly such imposition namely, penalty of 2 lakhs is strictly in consonance

with Section 11(2) of the Act and an order was issued on the basis of the admitted failure on the part of the petitioner unit in fulfilling the export obligation fixed originally at the time of giving permission/license in the year 2003. Therefore, the learned counsel would submit that, the impugned order does not require any interference from this Court.

12. I have considered the said rival submissions made by the learned counsel for the parties and have perused the materials placed before this Court.

13. The admitted facts are that, the petitioner was given license to start the unit as an 100% EOU. Being the 100% EOU for the manufacture of sacks and bags of polymers of ethylene, the petitioner had been conferred with certain facilities and privileges by the order of the respondent dated 14.10.1993. It is the case of the respondent/department that, even though the commercial production had been made from 27.10.1995, at the end of the five years period from the date of commercial production, the petitioner had shown poor performance and achieved only Rs.142.66% worth of export which is far below than what is fixed in this regard, for the said period which was Rs.355.10 lakhs.

14. Therefore, according to the respondent, since there had been a sharp decline in fulfilling the export obligation on the side of the petitioner, though the respondents are entitled to impose the higher penalty of five times of the worth of the deficit value, such a higher penalty had not been imposed, by taking into account that the petitioner unit achieved NFEP at 29.35% as against the fixed percentage of 20.

15. In this context, it is the case of the respondent/department that, merely because of the approval given by the respondent/department in the revised projection of the export obligation, by order dated 20.11.2000, the petitioner cannot take shelter for his non-full filing of the export obligation for the first five years period.

16. However, it is the case of the petitioner that, the revised projection approval given by the respondent/department in the year 2000 was made only by taking into account the export obligation fulfilled by the petitioner during the first five years period. Further, having taken into account of the past performance of the export obligation fulfilled on the side of the petitioner and also taking into account the plea raised by the petitioner for having non-fulfilled the entire obligation in the first five years period, the revised projection has been approved by the respondent/department. Therefore, once the petitioner achieved the revised projection during the next five

years period, the entire export obligation should have been taken into account for the entire 10 years period and if at all any lack in fulfilling the obligation on the part of the petitioner by taking the whole 10 years period, then only it can be decided by the respondent/department, by invoking the provisions of the Act, for imposing penalty.

17. I have considered the said submissions made by the learned counsel for the petitioner.

18. In this context, the original order dated 14.10.1993, giving the said permission reads thus :

> "With reference to the above mentioned application, Govt. is pleased to extend to you all the facilities and privileges admissible under the 100% as oriented scheme for the establishment of a new undertaking at Plot No.41-10, Sidco Dev.Indl.4854, Gummidipoondi in the State of Tamil Nadu manufacture of the following item (s) upto the capacities specified below basis of maximum utilization of plant and machinery.

ITEM(S) OF MANUGACTURE	UNIT	ANNUAL
ACRES AND DAGG OF POLYMERTS OF ETHYLENE	MT	810

> (HMHOPE/L-) (Eight Hundred Ten Only)"

19. Along with the said order, there had been some conditions imposed which reads thus:

> "2.The above permission is subject to the conditions stipulated in Annexure in addition to the following conditions:-
>
> (i) The entire (100%) production shall be exported to General Currency Area Countries/Hard Currency Area Countries.
>
> (ii) You shall undertake to export the entire production (100%) excluding rejects not exceeding 5(five) percent for a period of 10(ten) years. For, this purpose you will furnish the requisite legal agreement/bank guarantee. After the export obligation period is over

the unit shall be allowed to produce for domestic market in the light of Industrial Policy in force at the time of relation to manufacture of items reserved for small scale sector."

20. This condition No. 2(ii) is crucial which is formed part of the permission given by the respondent/department to the petitioner as an 100% EOU. In the said condition, the respondent/department makes it clear that, the export obligation of 100% excluding the rejection, which shall not be exceeding 5%, should be achieved by the petitioner, within 10 years period. Therefore, if at all, the respondent/department fixed the export obligation of a sum of Rs.355.10 lakhs certainly, that was the fixation, which should be achieved by the petitioner unit for the entire period. Further, once revised projection had been given to the respondent/department for consideration by the petitioner and after considering the same, the revised projection had been accepted and approved by the respondent/department by fixing the new target of export obligation for a sum of Rs.11.26 Crores with an NFEP projection of 20.52%, then the said revised fixation should be merged with the original export obligation fixed in this regard as the petitioner unit is the 100% EOU. Therefore, the revised projection is for the entire period of ten years i.e., in the next five years ending in the year 2005.

21. When that being the position, the respondent/department invoking Section 11(2) of the Act had come to the conclusion that the petitioner/unit since has not fulfilled the export obligation as fixed earlier in the first five years period, even they achieved the NFEP, is liable to be penalised and accordingly, the penalty of a sum of Rs.2 Lakhs was slabbed on the petitioner.

22. In view of the condition No.2(ii) attached with the original approval order and in view of the subsequent approval of revised projection, by order dated 20.11.2000 of the respondent, this Court is of the view that, the revised projection since has been already approved, it should be read with condition No.2(ii) of the original condition imposed against the petitioner and in that respect, what has been projected by way of revised projection now shall be achieved by the petitioner, only in the next five years, i.e., 2000-2005. Therefore, the respondent/department could have waited for the completion of entire next five years period that is, in all, the ten years, for which, the facilities and privileges had already been extended to be enjoyed by the petitioner/unit and thereafter, if the respondent found that, even after completion of the entire ten years period, the petitioner/unit did not

fulfill the export obligation, as approved through the revised projection, by order dated 20.11.2000, then certainly, the respondent would be at liberty to initiate proceedings against the petitioner/unit by invoking the provisions of the Act, where the respondent shall have the power to impose the penalty as has been contemplated under the said provisions of the Act.

23. In the case in hand, the respondent/department merely taken into account the first five years period alone for the assessment of non-fulfillment of export obligation, which is, in the considered opinion of this Court, runs contra to condition No.2(ii) of the permission as extracted above, which shall be read with as a condition imposed for the entire licensing period of 10 years as the very word 'ten years' has been specifically mentioned in the said condition. Therefore, the respondent ought not to have imposed the penalty of 2 Lakhs by only considering the first 5 years period and come to a conclusion about the non-fullfilment on the part of the petitioner and accordingly, both the orders, i.e., order of the Development Commissioner as well as the Appellate Authority are liable to be interfered with.

24. In the result, the impugned orders are quashed. However, it is open to the respondent/department to verify whether the subsequent revised projection as approved by the department dated 20.11.2000, which was supposed to be fulfilled by the petitioner unit in the next 5 years period, which ended in 2005, was fulfilled or not and ultimately, if the department found that the revised projection also has not been fulfilled by the petitioner/unit, it is needless to mention that, the respondent/department has got every power to proceed against the petitioner under the provisions of the Act and in such case, it is for the petitioner unit to confront with the department in the manner known to law.

With this observations and directions, this writ petition is ordered as indicated above. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Director,
   The Government of India,
   Ministry of Commerce and Industry Department of Commerce,
   New Delhi.

2. The Under Secretary to Government of India,
   Appellate Committee, Ministry of Commerce & Industry,
   Department of Commerce, New Delhi.

3. The Development Commissioner,
   Madras Export Processing Zone,
   Tambaram, Chennai - 600 045.

+1 cc to Mr.J.Madanagopal Rao, Advocate, S.R.No.68407

+1 cc to Mr.T.Ramesh, Advocate, S.R.No.68475

W.P.No.42928 of 2002

SPD(CO)
SSM(08/08/2019)