IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2018

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.Nos.21208 & 21209 of 2017
and
W.M.P.Nos.22106 to 22109 of 2017

M/s. S.S.D.Oil Mills Company Limited
represented by its Director,
Shri.R.Deepan Dorai
No.52, 48th Street, Ashok Nagar,
Chennai - 600 083 ..Petitioner in both the W.Ps.

Vs.

1. The Assistant Director General of Foreign Trade,
   26, Haddows Road, Shastri Bhavan Annexe,
   Chennai - 600 006.

2. The Joint Director General of Foreign Trade,
   Udyog Bhawan, H-Wing, Gate No.-02,
   Maulana Azad Road,
   New Delhi - 110 011.

3. Additional Director General of Foreign Trade,
   Udyog Bhawan, H-Wing, Gate No.02,
   Maulana Azad Road,
   New Delhi - 110 011

4. Director General of Foreign Trade,
   Udyog Bhawan, H-Wing, Gate No.02,
   Maulana Azad Road,
   New Delhi - 110 011.

5. Export Promotion Capital Goods (EPCG) Committee
   Director General of Foreign Trade,
   Udyog Bhawan,H Wing, Gate No.02,
   Maulana Azad Road,
   New Delhi - 110 011. ..Respondents in both the W.Ps.

Prayer: Writ Petition No.21208/2018 is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari and call for the records pertaining to the impugned order-in-review in file No. 18/01/2016-17/ECA-I dated 18.05.2016 passed by the 4th respondent and quash the same.

Prayer: Writ Petition No.21209/2018 is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus and call for the records to the impugned order dated 16.05.2017 issued by the 5th respondent in F.No.01/37/218/337/AM-17/EPCG-II to the petitioner company quash the same and further direct the 5th respondent to consider the export of alternate product for fulfilment of export obligation with respect of EPCG authorization No.0430000746 dated 12.09.2002.

For Petitioner in both W.Ps. : Mr.Hari Radhakrishnan
For Respondents in both W.Ps.: Mr.T.V.Krishnamachari, S.P.C.C.G

COMMON ORDER

W.P.No.21208 of 2017 is filed against the order passed by the 4th respondent dated 18.05.2016 in dismissing the review application. W.P.No.21209 of 2017 is filed against the order dated 16.05.2017 passed by the 5th respondent. Consequently, the petitioner also seeks for a direction to the 5th respondent to consider the export of alternate product for fulfilment of export obligation with respect of EPCG authorization No.0430000746 dated 12.09.2002.

2. The case of the petitioner in short is as follows:

The petitioner Company is in the business of import and export and obtained Import Export Code No.0492020779. They have obtained EPCG authorizations bearing Nos.0430000746 dated 12.09.2002 for import of Vapour Absorption Heat Pump and Membrane Filter Press. With the use of imported goods, the petitioner company has an obligation to export Vanaspathi and Margarine, within a period of eight years from the date of issuance of the said licence. Due to intense competition from Sri Lanka, it was difficult to export Vanaspathi and Margarine and as a result, the petitioner was forced to export Cotton Seed Hulls and Cotton Linters from the year 2003 which is a by-product obtained from the manufacture of Vanaspathi and Margarine. The export of edible oil was banned through Notification No.85(RE-2007)/2004-2009 dated 17.03.2008 which was extended till 30.09.2010 by notification dated 04.09.2009. Therefore, there was no export during the year 2008-09. The petitioner has exported 30.19% Vanaspathi during the non-ban period. The petitioner through letter dated 16.06.2012 requested DGFT office at Chennai to amend the EPCG authorization for inclusion of Cotton Seed Hulls and Cotton Seed Linters as alternate export products. In the meantime, the first respondent viz., the Assistant Director General of Foreign Trade, issued a show cause notice in November, 2013, proposing to impose penalty for suspension of Import Export Code. Subsequently, the first respondent passed an order-in-original dated 16.01.2014 imposing penalty of Rs.39,42,308/- on the petitioner on the ground that export documents were not submitted for the fulfilment of the export obligation. The petitioner filed an appeal before the third respondent, who in turn passed an order on 11.02.2016, dismissing the appeal on the ground that the export alternative product was inadmissible since the amendment of para 5.4.1 of the FTP was applicable from January, 2004. The petitioner filed a review against the order-in-appeal before the fourth respondent. However, the fourth respondent passed the impugned order-in-review dated 18.05.2016, dismissing the same on the ground that the petitioner company has not established any incorrectness, impropriety or illegality in the adjudication process. The petitioner company once again represented before the fourth respondent stating that EPCG Committee has considered the inclusion of alternate products even for licences issued prior to 2004. However, the second respondent through letter dated 28.06.2016 informed the petitioner that they can file a representation before the fifth respondent for appropriate relief. Accordingly, the petitioner filed an application on 26.08.2016 before the fifth respondent. The petitioner filed a writ petition before this Court in W.P.No.384 of 2017 seeking for disposal of the petition dated 26.08.2016. This Court, by order dated 06.01.2017, disposed of the said Writ petition by directing the fifth respondent to dispose of the representation of the petitioner dated 26.08.2016. Thereafter, the fifth respondent passed the impugned order dated 16.05.2017.

3. A counter affidavit is filed on behalf of the respondents wherein it is stated as follows:

The petitioner has not fulfilled the export obligation by export of Vanaspathi and Margarine as per EPCG authorisation license granted to them. The petitioner has not paid the customs duty plus interest to customs towards non-fulfilment of export obligation as per the conditions of the licence. The petitioner had failed to discharge the Export Obligation as per the condition of EPCG Authorisation License, in full. The export obligation at 30.90% was not accepted by the Appellate Authority. The petitioner has not established the incorrectness, impropriety or illegality of the adjudication process. The petitioner has not initiated for export obligation for the alternative products during the pendency of EPCG Authorisation for cotton seed hulls or cotton seed linters and almost after 5 ½ years, by means of letter dated 16.06.2012, the petitioner is not entitled to have retrospective prospectus, since their EPCG licence had already expired and thus, they are not entitled to export alternative products.

4 . Heard both sides and perused the materials placed before this Court.

5. The petitioner is engaged in the business of import and export. They obtained EPCG authorisation dated 12.09.2002 for import of Vapour Absorption Head Pump and Membrane Filter Press with counter obligation to export Vanaspathi and

Margarine in order to get the benefit out of such EPCG licence. It is claimed by the petitioner that they have exported 30.19% of the total export obligation by exporting Vanaspathy and the balance obligation could not be complied with due to the ban imposed between 17.03.2008 to 30.09.2010. It is their further case that they exported cotton seed hulls and cotton linters claiming is to be the by product. The petitioner claims that export of such product to be considered as an alternative product for granting the benefit under the EPCG licence. The Original Authority rejected their claim on the reason that the petitioner is not producing any export documents in support of the export obligation. Before the Appellate Authority, it appears that the petitioner has produced the export documents and however, the Appellate Authority rejected the same by stating that there was no provision for fulfilment of export obligation with alternative product. The appellate authority also found that the provision notified in 2004, permitting the export of alternative product, cannot be applied retrospectively. When the petitioner filed a review before the fourth respondent, the same was rejected by stating that the said authority did not find any incorrectness, impropriety or illegality in the adjudication process. However, the Joint Director General of Foreign Trade, by proceedings dated 20.07.2017, granted liberty to the petitioner to file a representation before the EPCG Commission for proper consideration Thus, the petitioner has approached the EPCG and filed a representation which was rejected by the impugned order dated 16.05.2017.

6. Mr.Hari Radhakrishnan, learned counsel for the petitioner submitted that all the three reasons stated in the impugned order dated 16.05.2017 are factually incorrect, apart from the fact that the first and second reasons are not preceded with any notice and on the other hand, they are stated as the first time in the impugned proceedings. Insofar as the third reasoning is concerned, the learned counsel sought to rely upon the minutes of the EPCG Committee held on 23.09.2010, taking a decision to permit the alternative product export retrospectively to all those who holds EPCG licence.

7. On the other hand, the learned counsel appearing for the respondent, after reiterating the contentions raised in the counter affidavit submitted that the authorities have considered the claim of the petitioner and found that they are not sustainable, since the petitioner has not discharged the export obligation as per the conditions of the licence.

8. Perusal of the impugned order dated 16.05.2017 would show that the same came to be passed based on three reasons. First reason being that the petitioner had 5 ½ years during which there was no restriction as imposed by notification No.85(RE-2007)/2004-2009 dated 17.03.2008 and notification dated 04.09.2009. Thus, according to the fourth

respondent, during the said period the petitioner did not make any export. On the other hand, it is contended by the petitioner that 30% of the Vanaspathi was exported as per the terms of the EPCG licence which fact has not been considered by the fourth respondent. In other words, it is the contention of the petitioner that before arriving at such a conclusion, the petitioner was not put on notice. I find force in the above said submission. Since it is the claim of the petitioner that 30% of the Vanaspathi was already exported during the said period, certainly, it is for the fifth respondent to consider the said claim once again by inviting the petitioner to place all the relevant materials in support of such claim.

9. The second reason stated in the impugned order is that the petitioner made the benefit under the EPCG licence after its expiry. Against the above said reasoning, the learned counsel for the petitioner invited this Court's attention to Clause 5.11.3 of Export Promotion Capital Goods Scheme in Handbook of Procedures to contend that if there is any ban in respect of a particular products the period during which such ban is in operation, has also to be given as an extension period for the licence and therefore, the claim made by the petitioner is in order. This again is a matter for the fifth respondent to consider and decide on merits after hearing the petitioner. The third ground is in respect of retrospective application of the permission granted to export the alternative products. When it is contended by the respondent that the said provision was notified in the year 2004 and the same cannot be applied retrospectively, the petitioner's claims that in view of the decision taken in the minutes of the EPCG committee held on 23.09.2010, such permission has to be applied retrospectively to all those who hold EPCG licence. Therefore, this again is a matter for the fifth respondent to consider the matter afresh after hearing the petitioner.

10. Considering the above stated facts and in view of the discussion stated supra, I am of the view that the fifth respondent shall have to consider the matter once again afresh after giving an opportunity of hearing to the petitioner.

11. Learned counsel for the respondents submitted that any order that is to be passed by the fifth respondent cannot go beyond the scope and ambit of Regulation 5.11. Needless to say that the authority viz., the fifth respondent, shall consider the claim of the petitioner and pass orders on merits and in accordance with law by applying the relevant regulations and provision and also by considering the explanation to be submitted by the petitioner. The petitioner is given two weeks time to give a detailed explanation to the 5th respondent from the date of receipt of a copy of this order. On receipt of such explanation, the 5th respondent shall pass fresh orders on merits and in accordance with law as stated supra, within a period of four weeks thereafter. Since

this Court has remitted the matter to the fifth respondent, W.P.No.21209/2017 is allowed and the impugned order passed by the fifth respondent dated 16.05.2017 is set aside.

12. Since the order passed by the fourth respondent dated 18.05.2016 got merged with the order passed by the fifth respondent dated 16.05.2017 in view of the fact that such order was passed by the fifth respondent only in pursuant to the liberty granted by the fifth respondent as discussed supra, I do not think that anything survives in the writ petition filed against the order of the fourth respondent dated 18.05.2016. Accordingly, W.P.No.21208 of 2017 is closed as no further order is necessary. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To
1. The Assistant Director General of Foreign Trade,
26, Haddows Road, Shastri Bhavan Annexe,
Chennai - 600 006.

2. The Joint Director General of Foreign Trade,
Udyog Bhawan, H-Wing, Gate No.-02,
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5. The Export Promotion Capital Goods (EPCG) Committee
Director General of Foreign Trade,
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Maulana Azad Road,
New Delhi - 110 011.

+1cc to Mr.T.V.Krishnamachari, Advocate SR.NO.72470
+1cc to Mr.Hari Radhakrishnan, Advocate SR.NO.73367

MR(CO)
sm:15.11.2018