

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8396 OF 2019

Forbes Marshall Pvt. Ltd.
(Spirax Marshal Pvt. Ltd. merged with
Forbes Marshall Pvt.Ltd.) a company
incorporated under the Companies Act, 1956
and having its office at A-34/35, MIDC
Estate, H Block, Pimpri, Pune,
Maharashtra- 411018.

... Petitioner.

Versus

1. The Union of India through
the Secretary, Ministry of Commerce
having its office at Udyog Bhavan,
New Delhi- 110 001.
2. The Director General of Foreign Trade
having its office at Directorate General of
Foreign Trade, Udyog Bhavan, New Delhi.
3. The Additional Director General of Foreign
Trade, 2nd Floor, Nishta Bhavan, New Marine
Lines, Churchgate, Mumbai- 400 020.
4. The Joint Director General of Foreign Trade
Officer having its office at "C" Block, PMT
Commercial Complex, Shankarseth Road,
Swargate, Pune- 411 037.
5. The Commissioner of Customs having
its office at Nhava Sheva-II, Jawaharlal
Nehru Customs House, Nhava Sheva,
Tal- Uran, District- Raigad,
Maharashtra- 400 701.

6. The Joint Commissioner of Customs,
EP Monitoring Cell, NS-II, JNCH having
its office at Nhava Sheva-II, Jawaharlal
Nehru Customs House, Nhava Sheva,
Tal- Uran, District- Raigad,
Maharashtra- 400 701. ... Respondents.

Mr.Prakash Shah with Mr.Prasad Paranjape and
Mr.Mihir Mehta i/b. PDS Legal for the
Petitioner.

Mr.D.N.Mishra with Mr.Arun Kumar Roy for
Respondent Nos.1 to 4.

Mr.Pradeep S. Jetly with Mr.Jitendra B. Mishra
for Respondent Nos.5 and 6.

**CORAM : M.S. SANKLECHA AND
NITIN JAMDAR, JJ.**

DATE : 30 August 2019.

P.C. :

Rule. Rule returnable forthwith. At the request of
parties, petition is taken up for final hearing and disposal.

2. This petition under Article 226 of the Constitution of
India challenges the order dated 18 July 2019 passed by the

Additional Director General of Foreign Trade under the Foreign Trade (Development & Regulation) Act, 1992 (Act). The impugned order rejects the Petitioner's contention of having fulfilled its export obligation in terms of Advance Authorization No.311003485 dated 6 November 2007 (said Advance Authorization) in respect of supplies made to Special Economic Zone (SEZ). Thus, seeking a direction that the Petitioner has satisfied its export obligation under the said Advance Authorization. As a consequence of the above relief, the Petitioner seeks a direction to the Respondent No.2- Director General of Foreign Trade to accept the hard copy of the Petitioner's application made in pursuance of Merchandise Export from India Scheme (MEIS) for issuance of MEIS scrip for the exports made in 2015-16 and 2016-17 as the period to make on-line application has already expired.

3. Briefly, the facts leading to this petition are that on 6 November 2007, the Petitioner was granted the said Advance Authorization by the office of the Director General of Foreign Trade. This enabled the Petitioner to import goods to be used in discharge of export obligation. Amongst the imports made under the said Advance Authorization, the Petitioner also supplied goods to one M/s.Reliance Petroleum Limited which is located in SEZ. The supply of goods made to SEZ in terms of relevant Foreign Trade Policy of 2004-09 was considered to be a deemed export and treated as valid discharge of the export obligation under the Advance

Authorization granted by the office of the Director General of Foreign Trade- Respondent Nos.1 to 4.

4. On 1 August 2014, the Petitioner submitted its application for redemption of the said Advance Authorization as it had fulfilled its export obligation thereunder by supplying goods to the unit in SEZ. In support of this, copies of invoices, ARE-1, certificate of payments etc. were enclosed. The Respondents issued a deficiency memo on 11 August 2014 viz. absence of bill of export in discharge of export obligation.

5. The Petitioner could not respond to the deficiency memo, as it was not received. Thereafter the Joint Director General of Foreign Trade, Respondent No.4 issued a show cause notice on 9 August 2018, seeking to impose penalty under the Act for failure to fulfill obligation of export under the said Advance Authorization. The Petitioner was heard and thereafter by his order dated 25 September 2018, Respondent No.4 held that in the absence of bill of export being filed in respect of goods supplied to SEZ, the petitioner cannot be said to have fulfilled export obligation. In the above view, the order dated 25 September 2018 imposed penalty of Rs.71,68,644.80 for non-fulfillment of export obligation.

6. Being aggrieved by the above order, the Petitioner preferred an appeal to the Additional Director General of Foreign

Trade, Respondent No.3. In its appeal, the Petitioner contended that they have fulfilled the export obligation under the Advance Authorization. This by making supplies to M/s.Reliance Petroleum Limited in an SEZ. In support furnishing photo copies of ARE-1, commercial invoices, certificate of payments for domestic supplies etc. The Petitioner also placed reliance on the decision of this Court in the case of *Larsen & Toubro Limited v. Union of India*¹ which has been upheld by the Hon'ble Supreme Court in Special Leave Petition (Civil) Diary No.2330/2018 (*Union of India v. Larsen & Toubro Limited*) in support of the contention that failure to submit the bill of export would not result in denial of fulfillment of export obligation, if the other contemporaneous documents filed by the party do establish the fact that export had been made. The Respondent No.3- Additional Director General of Foreign Trade by the impugned order did not dispute exports having taken place but denied the benefit for failure to file bill of export. The relevant part of the impugned order reads as under:

“After going through the adjudication order as well as the documents on record and those made available to me by the appellant during the personal hearing and after due application of mind, I find that the appellant has fulfilled the export obligation as they have submitted photocopies of ARE-1, Commercial Invoices, Certificate of Payments for Domestic Supplies (BRC). But they have not submitted Bills of Exports which are required for redemption/closure of the case. The Order of the Supreme Court in the SLP No.2330/2018 is based on the facts of that particular case only and does not give

1 2018 (360) ELT 289 (Bom.)

exemption to others.

In view of the above, and in the interest of natural justice, I, in exercise of powers vested in me, under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992, as amended, pass the following order:

ORDER

Appeal is dismissed.”

7. It is the grievance of the Petitioner that after having held that the Petitioner has fulfilled the export obligation, the Additional Director General of Foreign Trade should have allowed the Petitioner’s appeal. This more particularly because of the binding decision of this Court in the case of *Larsen & Toubro Limited v. Union of India* (supra) upheld by the Supreme Court and the subsequent decisions of this Court in the cases of *Rochem Separation Systems India Pvt.Ltd. v. Union of India*² and *Electromech Material Handling System India Pvt.Ltd. v. The Union of India and others*³ wherein a consistent view is taken by this Court that even in absence of bill of export being submitted by the exporter, the fulfillment of export obligation would be satisfied in case the export to SEZ is evidenced by other contemporaneous documents.

8. Mr.Mishra, learned counsel appearing for Respondent Nos.1 to 4 submits that the bill of export is a material document and in absence of the same being provided, it cannot be said that the

2 2019 (365) ELT 45 (Bom.)

3 2018-TOIL-2150-HC-MUM-CUS

export obligation has been fulfilled. Thus, the impugned order calls for no interference.

9. We find that the impugned order records a finding of fact that the export obligation under the said Advance Authorization has been fulfilled. This satisfaction is reached on the basis of ARE-1, commercial invoices, certificate of payments of domestic supplies (BRC). Nevertheless, denies the benefit of the same for failure/non-supply of bill of export. This issue is no longer *res integra* as this Court in *Larsen & Toubro Limited v. Union of India*; *Rochem Separation Systems India Pvt.Ltd. v. Union of India* and *Electromech Material Handling System India Pvt.Ltd. v. The Union of India and others* (all cited supra) has taken a view that non-availability of bill of export would not by itself lead to denial of benefit of fulfillment of export obligation, if the export to SEZ can be evidenced by other contemporaneous documents.

10. In the present case, there is no dispute that Respondent No.3- Additional Director General of Foreign Trade who passed the impugned order was satisfied that the Petitioner has fulfilled the export obligation but he denied the benefit of export obligation to the Petitioner only on the ground of non-furnishing of bill of export. This view taken by the impugned order is contrary to the binding decision of this Court upheld by the Supreme Court. The distinction made in the impugned order is that the decision of the

Supreme Court in *Larsen & Toubro Limited* (supra) is based on the facts of that particular case, ignoring the ratio of the decision of this Court in the case of *Larsen & Toubro Limited v. Union of India* upheld by the Supreme Court that fulfillment of export obligation in respect of supplies made to SEZ can be established by the documents others than the bill of export, if the same is not available. This principle has been held to be applicable by this Court in numerous cases as referred to hereinabove and there is no reason as to why the same is not to be applied in the case of the Petitioner, more particularly, when the authority is satisfied that export obligation has been fulfilled on the basis of contemporaneous documents.

11. In the above view, we set aside the impugned order dated 18 July 2019. Consequent to the above, the office of the Director General of Foreign Trade to issue the export obligation discharge certificate and redeem the said Advance Authorization dated 6 November 2007 by accepting ARE-1 and other documents submitted as proof of export.

12. Therefore, the Petitioner is now entitled to make an application to the Respondent- Director General of Foreign Trade for issuance of MEIS scrip which the Petitioner could not do as it was put on Denied Entity List on 8 June 2018, in respect of exports made during the period 2015-16 and 2016-17. The Petitioner has stated that on-line applications can be made within a period of three year

for issuance of MEIS scrip on the basis of exports made. However, as the Petitioner was put on Denied Entity List on 8 June 2018 and continued to be so till 19 August 2019 when the Petitioner's name was deleted. Therefore, the Petitioner would not now be in a position to file an application for MEIS scrip on-line. This as the system would not accept it. Therefore, Respondent Nos.1 to 4 would accept a hard copy of the Petitioner's application for MEIS scrip, if filed by the Petitioner. However, acceptance of hard copy of such application would not amount to granting of MEIS scrip or any direction to grant the same. We have not examined the Petitioner's entitlement to the same. Therefore, the Respondents to examine the said application and dispose of the same on its own merits.

13. In the result, Rule is made absolute in the above terms.

NITIN JAMDAR, J.

M.S. SANKLECHA, J.