IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2019

CORAM

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition No.26900 of 2004

Vardaria Exporters,
10, Paramasivam Street,
Chennai 600 003,
rep. by its Proprietor.
.. Petitioner

Vs.

The Joint Director of Foreign Trade,
Office of the Joint Director of Trade,
38-39 Whites Road,
Royapettah,
Chennai 600 014. .. Respondent

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the respondent order no.28 of AM 2005, dated 17.5.2004 and quash the same on the grounds set out in paragraph Nos.4 and 5 of this affidavit.

For Petitioner: Mr.N.Muralikumaran
for Mr.R.Gopinath

For Respondent : Mr.J.Madanagopal Rao

O R D E R

This writ petition has been filed challenging the order in original passed by the respondent under Foreign Trade (Development and Regulation) Act, 1992.

2.The grievance of the petitioner is that, the petitioner is an exporter and he was granted with 16 licences under the Exim Policy formulated under the Foreign Trade Act, all the advance licences were granted with a condition that the imported raw materials would be exempted from the levy of customs duty and guarantee for repayment of customs duty, in the event of non-fulfilment of export obligation. Out of 16 licences, 15 licences were redeemed. With regard to the 16^{th} license, 70% of the export obligation already stands completed and the remaining could not be completed in view of the requisition for extension of the period was under consideration of the authorities.

3.Earlier the respondent issued a show cause notice dated 13.02.2002 under Section 14 r/w Section 11(2) of the Foreign Trade Act, 1992, for which the petitioner has submitted a detailed explanation. Thereafter, after conducting an enquiry, a final order of adjudication has been passed on 10.10.2003, by the respondent, holding that in respect of 15 licenses there are minor violations which did not cause any revenue loss, and also held that it could not be held as a malafide violation and imposed a fiscal penalty of Rs.1,00,000/-. So far as the 16^{th} licence is concerned it was deleted from the order, and the matter was remitted back to the licensing section for monitoring of the export obligation as per the Handbook of procedures.

4.After remission, the competent authority has considered the matter and came to the conclusion that there is an excess import on the part of the petitioner to an extent of 890502.25Kgs of Non-magnetic stainless steel sheets/coils and therefore, directed the petitioner to pay customs duty along with 15% interest thereof for the excess import of 890502.25 Kgs of Non-magnetic stainless steel sheets/coils and other charges. Based on the order passed by the competent authority, now once again the respondent initiated a proceedings without issuing a show cause notice to the petitioner and has passed the impugned order demanding a sum of Rs.9,33,95,720/-(Rupees Nine Crores Thirty Three Lakhs Ninety Five Thousand Seven Hundred and Twenty Only). Now challenging the impugned order the present writ petition has been filed.

5.The learned counsel for the petitioner submitted that the original show cause notice has been adjudicated in respect of 15 licences, and a minimum penalty of Rs.1,00,000 has been imposed, and so far as the disputed licence, it was deleted from the order and remanded back to the competent authority to monitor whether the petitioner has fulfilled the export obligation. Now, the competent authority has come to the conclusion that there is an excess import on the part of the petitioner and directed the petitioner to pay customs duty along with 15% interest thereof. Based on this order, a fresh proceeding has been initiated by the respondent, admittedly, without issuing a show cause notice. It has been stated in the impugned order that no separate show cause notice is required for the present as it is covered in the earlier show cause notice. However, the present issue was not covered in the earlier show cause notice and the adjudication has been conducted on totally different issue. Therefore, without issuing any show cause notice, the authority have passed the order in original which is in violation of Section 14 of the of the Foreign Trade(Development & Regulation) Act, 1992.

6.The learned counsel for the respondent would contend that the earlier show cause notice covered the entire issue with respect to all the 16 licences. Whereas after adjudication, the adjudicating authority imposed a penalty in respect of other licences. So far as this disputed licence, the matter was remanded back to the competent authority to monitor whether the petitioner has fulfilled the export obligation. Based on the order of remission, the authorities came to the conclusion that there has been an excess import on the part of the petitioner and also directed the petitioner to pay the customs duty and other charges. This issue is already covered in the earlier show cause notice and there is no need to issue a fresh show cause notice. That apart, against the order of adjudication, appeal lies before the Appellate Authority under Section 15 of the Foreign Trade(Development and Regulation) Act, 1992. Without availing the alternative remedy, the petitioner cannot challenge the order in original in the present writ petition.

7.I have considered the rival submissions and perused the materials placed on record.

8.The earlier show cause notice dated 13.12.2002 has been issued in respect of 16 licences. The contents of the show cause notice reads as follows:

> "1.WHEREAS you had filed Advance Licence applications to this office as mentioned in Annexure "A". Based on the facts, documents and declarations furnished therein, this office has issued Advance Licences as mentioned in Annexure "A", and
> 2.WHEREAS the above said licences were obtained by you in your capacity as Manufacturer Exporter.
> 3.It has been reported by the Addl. Director, Directorate of Revenue Intelligence(Zonal Unit), Chennai that you have obtained licences by furnishing false information that you have a factory for manufacturer of resultant products, diverted the duty free imported raw materials instead of utilising the same for export product as required under Actual User Advance License.
> 4.From the foregone, it is evident that you are not eligible for Actual User Advance Licence and you have misdeclared the facts and obtained the licences in a fraudulent manner causing loss to the tune of crores of Rupees to the exchequer. This attracts the provisions of Section 11(1) and 11(2) of the Foreign Trade(Development and Regulation) Act, 1992.
> 5.Therefore, I exercise of powers vested in me under under Section 13 and 14 of the PT(D& R) Act, 1992, hereby call upon you to show cause, why action should not be taken against you (a) to impose fiscal penalty under section 11(2) of the PT(D&R) Act, 1992; and (b)

to suspend/cancel all the Import Export Code Number under Section 8(1)(a)(b) of the PT(D&R) Act, 1992(c) to cancel all the licences issued to you as per sections 9(4) of the PT(D&R) Act, 1992 and (d)to refuse further licences as per sections 9(2) of the PT (D&R) Act, 1992.

6.Your reply along with corroporative evidence, if any, in support of you explanation should reach the undersigned within 15 days from the date of receipt of this notice, failing which, it will be presumed that you have nothing to say in your defence and action will be taken ex-parte on merits on the basis of information and evidence on record without making further references to you.

If you want to be heard in person to explain your case, you may call on the undersigned on or before 14th January, 2003 at 3.30 P.M. "

9.The earlier show cause notice has been adjudicated by the original authority and after conducting a thorough enquiry an order has been passed deleting the 16th licence from the order and it was remanded back to the licensing section to monitor whether the petitioner has fulfilled the export obligation. so far as other 15 licences are concerned, a minor penalty of Rs.1,00,000/- has been imposed. On remission, the competent authority, after considering the materials available on record, issued a demand notice to the petitioner dated 21.01.2004 stating that there is an excess import on the part of the petitioner to an extent of 890502.25Kgs of Non-magnetic stainless steel sheets/coils, therefore, directed the petitioner to pay customs duty along with 15% interest thereof for the excess import. Now, based on that order once again the respondent initiated a fresh proceedings and passed the impugned order, whereby, directing the petitioner to pay a sum of Rs.9,33,95,720/-(Rupees Nine Crores Thirty Three Lakhs Ninety Five Thousand Seven Hundred and Twenty Only).

10.On perusal of the impugned order it could be seen that the earlier show cause notice has been issued on the ground that the petitioner obtained licence on a false information that they are having a factory for manufacture of resultant products, but, they have diverted the duty free imported raw materials instead of utilizing the same for export products. In the said show cause notice, after adjudication a penalty was imposed in respect of 15 licences. So far as the disputed licence, it was deleted from the order and the matter was sent back to the competent authority to monitor whether the petitioner has fulfilled the export obligation. Now on remission and based on the records, a fresh demand notice was issued by the competent authority. Based on that order, the respondent/adjudicating authority has initiated a fresh proceedings and passed the impugned order. As rightly contended by the learned counsel for the petitioner it is altogether a fresh proceeding initiated by respondent for excess import based on the demand notice issued by the competent authority and it has nothing do do with the earlier show cause notice. In the above circumstances, the respondent ought to have given an opportunity to the petitioner, as contemplated under Section 14 of the Foreign Trade (Development and Regulation)Act, 1992, before imposing any penalty on the petitioner. In the instant case the respondent admittedly without issuing a show cause notice has passed the impugned order.

11.Even though it is stated in the impugned order, dated 17.05.2004, that there is no need to issue a fresh show cause since, as the earlier show cause notice stood sufficient to initiate a fresh proceedings, against the petitioner, I am of the considered opinion that findings of the authority is not valid and the respondent cannot initiate a fresh proceedings without issuing a show cause notice, and the impugned order is liable to be set aside on that ground.

12.In the above circumstances the impugned order is set aside, and the matter is remanded back to the respondent, and the respondent is directed to issue a fresh show cause notice in respect of the disputed licence to the petitioner, thereafter, pass orders on merits and in accordance with law. The above exercize should be completed within a period of 6 weeks from the date of receipt of a copy of the order.

13.The writ petition is disposed of accordingly. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

tsg
To

The Joint Director of Foreign Trade,
Office of the Joint Director of Trade,
38-39 Whites Road,
Royapettah,Chennai 600 014.

+1cc to Mr.R.Gopinath , Advocate SR.No. 95023

A.SK(21/02/2020)