IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 23.09.2019

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.25693 of 2019
and
W.M.P.No.25173 of 2019

M/s.Kawarlal & Co.,
No.27, Raghunayakulu Street,
Chennai 600 003,
By its Proprietor K.Ramlal Jain ...Petitioner

Vs.

1.Joint Director General of Foreign Trade
O/o.the Additional Director General of Foreign Trade,
Ministry of Commerce & Industry, 'Kendriya Sadan",
6th Floor, C&E Wing, 17th Main Road,
Koramangala, 2nd Block, Bangalore 560 034.

2.Joint Director General of Foreign Trade,
O/o.the Additional Director General of Foreign Trade,
Ministry of Commerce & Industry, 26, Haddows Road,
Shastri Bhawan Annexe Building, Chennai 600 006.

3.The Joint/Addl. Commissioner of Customs (Imports),
No.60, Rajaji Salai, Customs House, Chennai 600 001.
... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari to call for the records of the order dated 08.08.2019 comprised in File No.No.07/26/JDG/Kawarlal & Co,/AM20 passed by the 1st respondent herein and to quash the same, in so far as the said order has been passed without jurisdiction and authority of law and contrary to the statutory provisions and in total violation to the principles of natural justice and also violating the fundamental rights guaranteed to the petitioner in terms of Art.19(1)(g) and 301 of the Constitution of India.

For Petitioner : Mr.Mohan
for Mr.S.Baskaran

For Respondents : Mr.T.V.Krishnamachari for R1 and R2
Sr. Panel counsel
Mr.S.R.Sundar for R3

O R D E R

This writ petition is filed challenging the order of the first respondent dated 08.08.2019, wherein and whereby, the Importer Exporter Registration granted to the petitioner in IEC Code 0402001630 is suspended under Section 8(1)(a)(b) of the Foreign Trade (Development and Regulation) Act, 1992 read with Foreign Trade (Development and Regulation) Amendment Act, 2010.

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

a) The petitioner is proprietorship concern engaged in the business of importing and supplying of drugs and others raw materials required for the manufacture of chemicals, drugs, pharmaceuticals, food, etc., The jurisdictional Joint Director General of Foreign Trade, Chennai, granted Importer Exporter Code Registration, herein after called IEC Registration to the petitioner. While so, the second respondent issued a show cause notice dated 15.05.2019, as to why fiscal penalty should not be imposed under Section 11(3) of the said Act, without prejudice to any other action that may be taken against noticee under the said Act or any other law in force for the time being. The allegation made in the show cause notice is that the petitioner has involved in illegal imports of bulk drugs from unregistered manufacturing facilities in China and the Authority has reason to believe that the Noticee has imported with malafide interest which attracts the action under Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992 read with the Rule of Foreign Trade (Regulations) Rules 1993. It is also stated in the show cause notice that the above said act of the petitioner attracts action under Sections 8 of the Foreign Trade (Development and Regulation) Act, 1992 to suspend the IEC.

b) The petitioner attended the personal hearing on 17.05.2019 and sought for time by eight weeks, since the details sought for by the Authorities are in respect of period from 2002-2019 and thus, it requires sufficient time to produce the same. An interim reply to the show cause notice was also filed on the very same day. However, the second respondent passed an order dated 17.05.2019 viz., on the very same day of the personal hearing, suspending the IEC of the petitioner. Immediately, on receipt of the said order, the petitioner gave a representation dated 30.05.2019 in detail. Parallely, the petitioner also filed a writ petition before this Court in

W.P.No.19527 of 2019, challenging the said order dated 17.05.2019. This Court, by order dated 22.07.2019 passed in the above writ petition, set aside the impugned order therein only to facilitate a personal hearing to be held fresh and redoing the order. This Court has also directed that the personal hearing should be held by the first respondent herein and thereafter, he shall pass orders after considering the objections, records. Pursuant to the said order passed by this Court, the petitioner gave a written submission in detail on 26.07.2019 before the first respondent. Thereafter, the present impugned order dated 08.08.2019 was passed once again by cancelling the IEC however, by not disclosing any reason for such action. Therefore, the present writ petition is filed before this Court.

3. A counter affidavit is filed by the respondents 1 and 2. The crux of the contention raised in the counter affidavit is as follows:

The proprietor of the petitioner company has got criminal antecedents, since he has violated the Drugs and Cosmetics Act and a criminal case is pending against the petitioner filed by Central Bureau of Investigation on the file of the VIII Principal Special Judge for CBI cases, Chennai. The allegation in the FIR is that the petitioner imported bulk drugs raw materials from China in criminal conspiracy with public servants and with Customs clearing agents without a valid Registration Certificate and import license. The petitioner is a habitual offender. Hence it was deemed prudent to suspend the IEC of the petitioner as preventive step to stop further import illegal, unregistered bulk drugs ito the country which have grave implication on public health under Foreign Trade (Development and Regulation) Act, 1992. The petitioner has imported drugs from unregistered source from China in violation of various Acts and Rules, which was confiscated and is being investigated by the concerned Authorities. The petitioner involved in illegal trade operations and is liable for action under Section 8 of the FTDR Act. The show cause notice issued to the petitioner leading to the impugned order has clearly mentioned the cause of action and the petitioner firm imported bulk drugs from China from unregistered sources. As directed by this Court earlier, the impugned order was passed by the first respondent himself. As against the impugned order, a right of appeal is available to the petitioner under Section 15 of the above said Act. Therefore, the writ petition is not maintainable without exhausting the statutory remedy of appeal.

4. Mr.Mohan, learned counsel for the petitioner, after reiterating the above contentions raised by the petitioner submitted that an order passed by the Authority, punishing a person must contain reasons and findings. In the absence of any

such reasons and findings, a punitive order cannot withstand the scrutiny of this Court, as the same is to be construed as a non speaking order. After saying so, the learned counsel invited this Court's attention to the show cause notice dated 15.05.2019, previous order passed in original dated 17.05.2019, the order passed by this Court in W.P.No.19527 of 2019 dated 22.07.2019, the representation given by the petitioner dated 30th May 2019, further written statement of the petitioner made on 26.07.2019 and the impugned order of suspension and submitted that the impugned order thus is totally bereft of reasons and therefore has to go.

5. Per contra, the learned counsel for the respondents, after reiterating the contentions raised in the counter affidavit, submitted that the impugned order is passed by the first respondent after giving an opportunity of hearing to the petitioner and considering their objections. He further submitted that in view of the reasons stated in the show cause notice, the first respondent has rightly suspended the IEC. The learned counsel further contended that in any event, as the appellate remedy is available to the petitioner, they can work out the relief before such Appellate Authority by challenging the order of suspension.

6. Heard both sides. Perused the materials placed before this Court.

7. The petitioner is aggrieved against the order of suspension of IEC. There is no dispute to the fact that the petitioner was issued with a Certificate of Importer Exporter Code bearing No.0402001630 dated 16.04.2002.

8. Section 8 of the Foreign Trade (Development and Regulation) Act, 1992, deals with the power of the concerned Authority to suspend or cancel the importer Exporter Code (IEC), which reads as follows:

> "8.Suspension and cancellation of Importer-exporter Code Number:-
> (1) Where-
> (a) any person has contravened any of the provisions of this Act or any rules or orders made thereunder or the foreign trade policy or any other law for the time being in force relating to Central excise or customs or foreign exchange or has committed any other economic offence under any other law for the time being in force as may be specified by the Central Government by notification in the Official Gazette; or
> (b) the Director General or any other officer authorised by him has reason to believe that any person has made an export or import in a manner prejudicial to

the trade relations of India with any foreign country or to the interests of other persons engaged in imports or exports or has brought disrepute to the credit or the goods of, or services or technology provided from, the country; or

(c) any person who imports or exports specified goods or services or technology, in contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy,

the Director General or any other officer authorised by him may call for the record or any other information from that person and may, after giving to that person a notice in writing informing him of the grounds on which it is proposed to suspend or cancel the Importer-exporter Code Number and after giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice and, if that person so desires, of being heard, suspend for a period, as may be specified in the order, or cancel the Importer-exporter Code Number granted to that person.

(2) Where any Importer-exporter Code Number granted to a person has been suspended or cancelled under sub-section (1), that person shall not be entitled to [import or export any goods or services or technology] except under a special licence, granted, in such manner and subject to such conditions as may be prescribed, by the Director General to that person."

9. Perusal of the above said provision would show that the Authority competent is entitled to suspend or cancel the IEC, where any person contravenes any of the provisions of the said Act or any Rules or orders made therein or the trade policy or any other law for the time being in force relating to the Central Excise or customs or foreign exchange or committed any other economic offence under any other law for the time being in force or the Director General or any other Officer authorised by him; where any person has made an import or export in a manner gravely prejudicial to the trade relations of India with any foreign country or to the interests of other persons engaged in imports or exports or has brought disrepute to the credit or the goods of, or services or technology provided from the country; or any person who imports or exports specified goods or services or technology, in contravention of any provision of the said Act. However, it is seen from the above said provision that such suspension or cancellation of IEC can be made , after giving a notice to that person in writing, informing him of the grounds, on which it is proposed to cancel or suspend IEC Code Number and after giving a reasonable opportunity of making a representation in writing within such reasonable time. Thus, it

is evident that the suspension or cancellation of the IEC cannot be done without putting the concerned person on notice and providing him an opportunity of hearing.

10. It is also to be noted at this juncture that such notice in writing should inform the person, against whom the same is issued, the grounds on which the suspension or cancellation, is proposed. In this case, a show cause notice was issued on 15.05.2019, which reads as follows:

F.No.I(147)/Addl.DGFT/ECA/CHE/AM 16 Dated: 15.05.2019

SHOW CAUSE NOTICE

(Under Section 14 of the Foreign Trade (Development and Regulation) Act 1992 for taking action under Section (8) & (11) thereof and FT (Regulation) Rules 1993)

1.1 Whereas M/s Kawarlal & Co (hereinafter referred as Noticee), having address at No.27, Raghunayakulu Street, Chennai 600 003 had applied and obtained IEC No.0402001630 on 16.4.2002 which is mandatory for undertaking any export/import activities under Foreign Trade Policy (FTP) and Hand Book Procedures (HBP).

1.2 Whereas, it has been brought to the notice of this office that the Noticee has involved in illegal imports of bulk drugs from unregistered manufacturing facilities in China.

2.1 Therefore, the undersigned has reason to believe that the Noticee has imported with malafide interest which attracts the action under Section 11(2) of the Foreign Trade (Development & Regulation) Act 1992 (FTDR Act) read with the Rule of Foreign Trade (Regulations) Rules 1993.

2.2 This act of the firm attracts action under Section 8 of the Foreign Trade (Development & Regulation) Act, 1992, as amended from time to time to suspend the Importer Exporter Code No.0402001630.

3.1 The reply to this notice along with documentary evidence for having undertaken all import of drugs and excipients only in compliance with the terms and conditions of the import policy (as amended from time to time) during the period from 16.4.2002 to 14.5.2019 should reach this office within 2 days hereof. In case; the Noticee wants to avail an opportunity of Personal Hearing to explain their case personally, they may appear before the undersigned in this office on 17.05.2019 at 3.30 PM.

3.2 Further, since Proprietor/Directors/Partners of the Noticee are equally responsible collectively as well as severally for the above referred actions of the noticee, all the Proprietor/Directors/Partners are also hereby called upon to show causes as to why fiscal penalty should not be imposed on each under Section 11(3) of Foreign Trade (Development & Regulation) Act 1992. They may also, if they so desire, avail the opportunity of personal hearing within time period specified above.

3.3 It may be noted that if no reply is received by the undersigned within above stated time-period, it will be presumed that the Noticee and its Proprietor/Directors/Partners have nothing to say in the matter and the case will be decided ex-parte on merits, on the basis of information already available with this office without any further reference to them. Please note that once the orders are passed, further appeal therein against lies with Zonal Additional Director General of Foreign Trade, Chennai.

4.1 This show cause notice is issued without prejudice to any other action that may be taken against the Noticee and its Proprietor/Directors/Partners under the Foreign Trade (Development & Regulation) Act 1992 or any other law in force for the time being."

(SHAKUNTALA NAIK)
Joint Director General of Foreign Trade.

11. On very same day, the Order in Original also was passed suspending the IEC. It is not in dispute that the said order dated 17.05.2019 was set aside by this Court in W.P.No.19527 of 2019 by remitting the matter back to the first respondent herein to conduct a personal hearing and thereafter, to pass an order on merits and in accordance with law, after considering all the objections and records. It is not in dispute that pursuant to the said order of this Court, the petitioner gave a written statement on 26th July 2019. No doubt, a personal hearing was conducted on 26.07.2019, however, the first respondent passed the present impugned order, cancelling the IEC without stating any reasons or giving any findings. The first respondent has only observed that the critical communications vis-a-vis DGFT office and other Government agencies have been perused, all of which are internal communications and confidential in nature and that in view of the report submitted by the CBI and the ongoing investigation thereof and the nature of the violation of the provisions of the laid down Acts the IEC is suspended. Except saying so, the first respondent has not given a specific reason or finding as to why the IEC granted to the petitioner is liable

for suspension. Needless to state that the above observation of the first respondent which is general in nature cannot be considered as sustainable grounds in the absence of specific details.

12. No doubt, the first respondent has stated that he ordered the suspension in view of the report submitted by the CBI and on going investigations thereof. I find that the above statement of the first respondent in the impugned order lacks any material details and particulars to support the order of suspension. Needless to say that the Licensing Authority, if intends to suspend or cancel the license, should state specific details and particulars as to the reasons which made him to take such action. In the absence of any such finding or reason, such order cannot be sustained. At the same time, this Court makes it very clear that it is not expressing any view on the merits of the allegations made against the petitioner and the response given by the petitioner against such allegations. This Court is inclined to interfere with the impugned order only on the reason that it does not disclose, reflect or finding for suspending the IEC of the petitioner. Therefore, the matter needs to go back to the first respondent once again for passing a speaking order.

13. No doubt, in the counter affidavit, the respondents raised very many allegations and contentions against the petitioner. Learned counsel appearing for the respondents also reiterated the same. It is a settled proposition of law that a counter pleading cannot improve the impugned order. An order should either stand or fall only based on the reasons stated therein and not by substitution of reasons stated in a pleading filed in support of such order. Therefore, I find that the averments made in the counter affidavit cannot be substituted as the reasons for passing the impugned order.

14. Accordingly, the writ petition is allowed and the impugned order is set aside. Consequently, the matter is remitted back to the first respondent to pass a speaking order on merits and in accordance with law within a period of four weeks from the date of receipt of a copy of this order. No costs. The connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

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To

1.Joint Director General of Foreign Trade
O/o.the Additional Director General of Foreign Trade,
Ministry of Commerce & Industry, 'Kendriya Sadan",
6th Floor, C&E Wing, 17th Main Road,
Koramangala, 2nd Block, Bangalore 560 034.

2.Joint Director General of Foreign Trade,
O/o.the Additional Director General of Foreign Trade,
Ministry of Commerce & Industry, 26, Haddows Road,
Shastri Bhawan Annexe Building, Chennai 600 006.

3.The Joint/Addl. Commissioner of Customs (Imports),
No.60, Rajaji Salai, Customs House, Chennai 600 001.

+1cc to Mr.S.R.Sundar Advocate, S.R.No.82361
+2cc to Mr.S.Baskaran Advocate, S.R.No.81508
+2cc to Mr.T.V.Krishnamachari Advocate, S.R.No.81486

BS(CO)
CB(26/09/2019)

W.P.No.25693 OF 2019