IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2020

CORAM

THE HON'BLE MR. JUSTICE C. SARAVANAN

W.P. Nos. 34110 to 34112 of 2003 and 21002 to 21004 of 2009 and 33553 of 2003

W.P. Nos. 34110 to 31112 of 2003:

M/s. South India Exports,
10, Nainian Street,
Wall Tax Road,
Chennai 600 003
rep. By its Managing Partner
Indermal Ramani ... Petitioner in W.P. Nos. 34110 to 31112 of 2003

-vs-

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

2. The Deputy Commissioner of Customs,
   (Group 7) Customs House,
   60, Rajaji Salai,
   Chennai 600 001.

3. Indian Overseas Bank,
   Sowcarpet Branch,
   Chennai 600 079.

4. The Director of Revenue Intelligence,
   No.27, G.N.Chetty Road,
   Chennai-17. ... Respondents in W.P. Nos. 34110 to 31112 of 2003

(R4 impleaded as per order made in W.P.Nos.34110 to 34112/2003, 21002 to 21004/2009 & 33553/2004, dated 31.10.2019)

Prayer in W.P. No. 34110 of 2003: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the Second Respondent in his communication dated 03.11.2003 in his proceedings in F.No.S45 EU/ME/7007, 7020 and 7032/02/GR.7 so far it relates to BG No. 67/01 dated 07.01.2002 for a sum of Rs.4,99,000/- in Licence No.0410011166 dated 21.12.2000 invoking the bank guarantee given by the Petitioner as against Advance Licence No.0410011166, quash the same.

Prayer in W.P. No. 34111 of 2003: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the Second Respondent in his communication dated 03.11.2003 in his proceedings in F.No.S45 EU/ME/7007, 7020 and 7032/02/GR.7 so far it relates to BG No. 68/1 dated 03.01.2002 for a sum of Rs.57,000/- in Licence No.0410006836 dated 22.06.2000 invoking the bank guarantee given by the Petitioner as against Advance Licence No.0410006836, quash the same.

Prayer in W.P. No. 34112 of 2003: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the Second Respondent in his communication dated 03.11.2003 in his proceedings in F.No.S45 EU/ME/7007, 7020 and 7032/02/GR.7 so far it relates to BG No. 74/01 dated 23.01.2002 for a sum of Rs.4,36,000/- in Licence No.0410020265 dated 22.11.2001 invoking the bank guarantee given by the Petitioner as against Advance Licence No.0410020265, quash the same.

For Petitioner in W.P. Nos.
34110 to 31112 of 2003 : Mr. Murali kumaran
For Mr. R. Gopinath

For Respondents in W.P. Nos.
34110 to 31112 of 2003 : Mr. K. Srinivasamurthy
SCGSC (For R1)

: Mr. J. Rajkumar Jhabakh
(For R2)

: Mr. V. Sundareswar
Senior Standing Counsel
(For R4)

: No appearance (For R3)

W.P. Nos. 21002 to 21004 of 2009:

M/s. South India Exports,
10, Nainian Street,
Wall Tax Road,
Chennai 600 003
rep. By its Managing Partner
Indermal Ramani ... Petitioner in W.P. Nos.
21002 to 21004 of 2009

-vs-

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

2. The Commissioner of Customs,
(Group 7) Customs House,
60, Rajaji Salai,
Chennai 600 001.

3. The Deputy Commissioner of Customs,
(Group 7) Customs House,
60, Rajaji Salai,
Chennai 600 001.

4. The Director of Revenue Intelligence,
No.27, G.N.Chetty Road,
Chennai-17. ... Respondents in W.P. Nos. 21002 to 21004 of 2009

(R4 impleaded as per order made in W.P.Nos.34110 to 34112/2003, 21002 to 21004/2009 & 33553/2004, dated 31.10.2019)

Prayer in W.P. No. 21002 of 2009: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the Second and Third Respondents to certify the export obligations that stood fulfilled by the Petitioner in relation to the Duty Exemption Entitlement Certificate S.No.A041412 dated 27.11.2001 either by making endorsements in the DEEC Book or by forwarding the details to the First Respondent.

Prayer in W.P. No. 21003 of 2009: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the Second and Third Respondents to certify the export obligations that stood fulfilled by the Petitioner in relation to the Duty Exemption Entitlement Certificate S.No.A028642 dated 22.06.2000 either by making endorsements in the DEEC Book or by forwarding the details to the First Respondent.

Prayer in W.P. No. 21004 of 2009: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the Second and Third Respondents to certify the export obligations that stood fulfilled by the Petitioner in relation to the Duty Exemption Entitlement Certificate S.No.A037574 dated 21.12.2000 either by making endorsements in the DEEC Book or by forwarding the details to the First Respondent.

For Petitioner in W.P. Nos.
21002 to 21004 of 2009 : Mr. Murali kumaran
For Mr. R. Gopinath

For Respondents in W.P. Nos.
21002 to 21004 of 2009 : Mr. K. Srinivasamurthy
SCGSC (For R1)

: Mr. P. Rajkumar Jhabakh
(For R2 and R3)

: Mr. V. Sundareswar
Senior Standing Counsel
(For R4)

W.P. No. 33553 of 2004:

M/s. South India Exports,
rep. By its Managing Partner
Indermal Ramani
No. 10, Nainiene Street,
Park town,
Chennai - 600 003. ... Petitioner

-vs-

1. The Commissioner of Customs (Sea Exports),
Customs House,
33, Rajaji Salai,
Chennai 600 001.

2. The Director of Revenue Intelligence,
No.27, G.N.Chetty Road,
Chennai-17. ... Respondents

(R2 impleaded as per order made in W.P.Nos.34110 to 34112/2003, 21002 to 21004/2009 & 33553/2004, dated 31.10.2019)

Prayer: Writ Petition filed under Article 236 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the Respondent dated 30.10.2004, in its proceedings in F.No.CAU/DRI/2/2004 and quash the same.

For Petitioner : Mr. Murali kumaran for
Mr. R. Gopinath (For R1)

For Respondents : Mr. J. Rajkumar Jhabakh (For R2)

C O M M O N O R D E R

By this Common Order, all the writ petitions are being disposed.

2. Earlier the petitioner had filed W.P.Nos. 34110 to 34112 of 2003, seeking to quash impugned communications dated 03.11.2003 of the Deputy Commissioner of Customs seeking to invoke the bank guarantee furnished by the petitioner in

respect of the following 3 Advance Licences:-

Licences	Date
0004010282	10.01.1997
0004011748	10.06.1997
0004013597	27.07.1998

3. During the pendency of the above writ petitions, the Commissioner of Customs (Sea-Exports) passed order in Original No.30850004 (Job No.1589/2004) dated 30.10.2004 pursuant to show cause notice dated 09.01.2004 was issued by the Directorate of Revenue Intelligence. Therefore, the petitioner has filed W.P.No.33553 of 2004, to quash order in Original No.30850004 (Jog No.1589/2004) dated 30.10.2004 of the Commissioner of Customs (Sea Exports).

4. Later W.P. Nos.21002 to 21004 of 2009 were filed for a mandamus to direct the Deputy Commissioner of Customs to certify that export obligations in respect of the following DEEC Book issued for Advance Licence were fulfilled and to forward the same to the Director General of Foreign Trade for Redemption of these 3 Licences and for a direction to the respondent to endorse DEEC Books :-

Sl.No.	Date	DEEC Book
1	27.11.2001	S.No.A041412
2.	22.06.2000	S.No.A028642
3.	21.12.2000	S.No.A037574

5. The petitioner had obtained 7 different advance licences under the Duty Exemption Scheme as detailed below:-

Licences	Date
0004010282	10.01.1997
0004011748	10.06.1997
0004013597	27.07.1998
0410001776	06.10.1998
04100016876	22.06.2000
0410011166	21.1102001

6. The petitioner imported steel coil on the strength of these advance licences and cleared them without payment of duty by availing the benefit of Notification No.30/97 customs dated 14.04.1997 and Notification No.51/2000 customs dated 27.04.2000. These notifications contemplate actual user conditions.

7. The Directorate of Revenue Intelligence investigated and found that the petitioner had wrongly availed the benefit of the above notifications and had breached the conditions of the advance licence in as much as the imported goods were not

used by the petitioner but were traded and export obligations were discharged by exporting traded goods and therefore the benefit of the exemption claimed by the petitioner under these notifications on the strength of the respective advance licences were liable to be rejected.

8. After above show cause notice was issued, the petitioner filed a preliminary reply and wanted the Commissioner of Custome (Sea-Exports) to pass an order on their preliminary objection regarding the jurisdiction of the Directorate of Revenue Intelligence to issue the aforesaid show cause notice particularly in the light of the fact that out of 7 advance licences, the export obligation in respect 4 advance licence had been discharged and those licences also had been redeemed and that in respect of 2 advance licences the petitioner had submitted documents for getting (EODC) with the Deputy Commissioner of Customs-Group 7 to redeem the licences and that in respect of the last mentioned advance licence the petitioner had substantially discharged the export obligation during the pendency of the first three writ petitions.

9. The learned counsel for the petitioner relied on the following decisions:-

i. AIR 1961 SC 117 in J.K.Cotton Spinning and Weaving Mills;
ii. AIR 1979 SC 65 in U.P.State Electricity Board;
iii. AIR 1980 SC 2181 in Life Insurance Corporation of India;
iv. AIR 1966 SC 1931 in Maharaja Pratap Singh Bahadur;
v. AIR 191 SC 855 in Asoka Marketing.

10. The learned counsel for the petitioner further relies on a Division Bench Judgment of this Court in the case of Union of India v. Oceanic Export Corporation, dated 09.09.1998.

11. Defending the respondents, the learned counsel for the Customs Department, Joint Director General of Foreign Trade and the counsel for the Director General of Foreign Trade, it was submitted that the petitioner has an alternate remedy before the Customs Excise Service Tax Appellate Tribunal against the impugned Order in Original No.30850004 (Job No.1589/2004) dated 30.10.2004 passed by the Commissioner of Customs (Sea-Exports).

12. It was further submitted that issue as to whether the petitioner was entitled to the benefit of the respective notification cannot be agitated in the benefit of the respective notification cannot be agitated in a writ proceedings as they go into the disputed questions of facts.

13. They further submit that the Director of Revenue Intelligence had jurisdiction to issue to Show Because Notice and therefore the writ petition were liable to be dismissed.

14. The learned counsel appearing on behalf of the

respondents relied on this Court's decision of the learned Single Judge in the case of M/s. FAL Industries Limited v. Directorate General of Foreign in 2013 (199) ECR 454 (Madras), dated 21.08.2013 wherein reference was made to para.16, 22, 23 and 27. The same is reproduced below:

> "17. But, I find it very difficult to accept the said contention for more than one reason. Though, the Foreign Trade (Development and Regulation) Act, 1992, does not make a specific provision empowering the authority to demand interest in the event of failure of the licensee to fulfill his export obligation, under Rule 6(2)(b) of the Foreign Trade (Regulation) Rules, 1993, the second respondent has been empowered to require the licensee to execute a bond for complying with the terms and conditions of the licence. If only such a bond is executed, the second respondent could issue a licence. What are all the terms and conditions, which could be incorporated in the bond have not been elaborately dealt with the Foreign Trade (Regulation) Rules, 1993, says that the applicant for a license shall execute a bond for complying with the terms and conditions of the licence. It is only in exercise of the said power conferred under Rule 6(2)(b) of the Foreign Trade (Regulation) Rules, 1993, before issuing licence to the Petitioner, the second respondent required the petitioner to execute a bond. It is only in terms of the said Rule, the bond was executed. Therefore, it cannot be stated at any stretch of imagination that the execution of the bond has got no sanction of law. I hold that the execution of the bond has a legal backing of the Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade (Regulation) Rules, 1993.
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> 23. But, the learned counsel for the petitioner would rely on an unreported judgment of a Division Bench of this Court in Commissioner of Customs (Sea) vs. M/s. Meris Pharma India Private Limited (C.M.A.No.3221 of 2004) (referred to above). I have carefully gone through the said judgment. In my considered opinion, the said judgment cannot be taken as a precedent in respect of the law, which is under discussion in the present judgment. In that case, the judgment of the Hon'ble Supreme Court in Rexnord Electronics and Controls Limited case (cited supra), was not at all brought to the notice of the Division Bench. It was also not argued before the Division Bench that interest could be levied under a bond, which is outside the scope of the Customs Act. The whole gamut of argument of the Customs Department before the Division Bench was that, as per the provisions of the Customs Act, interest could be demanded for the failure of the exporter to

fulfill the licence conditions issued under the Foreign Trade (Development and Regulation) Act, 1992. The Division Bench, after having elaborately dealt with the provisions of the Customs Act, ultimately held that for such failure to fulfill the export obligation in terms of the licence, the customs authority has got no power to demand interest, Regarding that proposition laid down by the Division Bench, I am in full agreement. But, before the Division Bench, it was not at all argued that the demand of interest could be made by the authority under the Foreign Trade (Development and Regulation) Act, 1992 in terms of the bond, which is outside the purview of the Customs Act.

24. As I have already pointed out, in the instant case, interest is demanded not within the purview of the Customs Act, but, as per the terms of the bond executed in terms of the Foreign Trade (Development and Regulation) Act, 1992. Thus, the Division Bench had no occasion to consider, whether the authority under the Foreign Trade (Development and Regulation) Act, 1992, has got power to demand interest in terms of the bond executed as per the licence in the event of failure to fulfill the export obligation. The Division Bench has further held that for such failure to fulfill export obligation, the customs authority has got no power to demand interest. Regarding that proposition, as I have already pointed out, there can be no second opinion. That was not a case where payment of interest was made by an authority under the Foreign Trade (Development and Regulation) Act, 1992, in terms of the bond. Therefore, the judgment of the said Division Bench has got no application to the facts of the present case at all.

28. But, in the instant case, as I have already concluded, it cannot be said that the interest cannot be demanded by the authority under the Foreign Trade (Development and Regulation) Act, 1992, in the event of failure of the exporter to fulfill his export obligation in terms of the bond executed and the licence issued. I am bound by the law laid down by the Hon'ble Supreme Court in Rexnord Electronics and Controls Limited vs. Union of India and others, reported in (2008) 12 Supreme Court Cases 156, referred to above, wherein, the Hon'ble Supreme Court, after an elaborate discussion has held that a bond executed in terms of the licence under the Foreign Trade (Development and Regulation) Act, 1992, creates a contractual obligation, under which, the authority under the

Act, can demand interest from the exporter for his failure to fulfill the export obligation."

15. The respondents, further placed reliance on yet another decision of this Court in M/s. Shri Shakambari Exports v. The Joint Director of Foreign Trade and Others in 2010 (179) ECR26 (Madras) dated 01.07.2010, wherein it was held as follows:

"7. Though elaborate submissions have been made on the facts, the short questions, which arises for consideration is as to whether, the second respondent is justified in invoking the Bank Guarantee. Admittedly, the petitioner had imported the stainless steel under three advance licenses without payment of duty with a corresponding obligation to export manufactured stainless steel utensils. It is the case of the petitioner that they have completed 90% of the export obligation, but however, from the order in original passed by the Commissioner of Customs (Exports) dated 29.05.2004, it is seen that on the basis of the information furnished by the DRI, the first respondent has also issued show cause notice for cancellation of the advance licenses. However, the second respondent being an authority, functioning under the provisions of the Customs Act is bound by the notification and is entitled to enforce the statutory bond executed by the petitioner for while availing the benefit of Customs notification No.30/97. As long as the export obligation, discharge certificate is not produced before the Customs authority, they are entitled to invoke the provisions of the bond executed by the petitioner. However, in the instant case, the fact appears that there has been violation of conditions of the notification itself as it is stated that the office premises of the petitioner does not exist in the place given in the licence, which would obviously mean that there were no manufacturing factories. In fact the Hon'ble Division Bench of this Court in Commissioner of Customs (SEA), Chennai-1 vs. CESTAT, CHENNAI 2009 (240) ELT 166 considered the case, where advance licenses were obtained by misrepresentation without even having manufacturing facilities and the Hon'ble Division Bench also took note of the independent powers of both the first respondent Department as well as the Customs Department and held that the claim of the department was justified.

Therefore, placing the above submission, the respondents prayed that these writ petitions are liable to be dismissed.

16. I have considered the arguments advanced on behalf of the petitioner and the respondents.

17. The issue as to whether the petitioner had violated the conditions of Notification No. 30/97 - Customs dated 14.04.1997 and Notification No.51/2000 - Customs dated 27.04.2000 or not is a matter which could be decided only during the adjudication process by the Commissioner of Customs (Sea-Exports).

18. In this case, it is a categorical case of the Revenue that the petitioner had failed to observe the conditions of the Licence and the Notifications referred to supra and therefore they were not only entitled to invoke and encash the bank guarantees but also demand duty and interest and levy penalty for such violation.

19. The Customs Act, 1962, does not contemplate staggered adjudication of show cause proceedings. It is not open to the petitioner to truncate the adjudication proceedings in to two or more stages for passing an order at the preliminary stage and thereafter for a final order. The said attempt was merely intended to skirt away from the merits of the allegation that were contained in the show cause notice on a technical and specious ground which is not available to the petitioner.

20. I therefore do not find any merits in these writ petitions filed by the petitioner. Prima facie it appears the petitioner could not have availed the benefit of the notification without observing actual user condition and therefore, the petitioner cannot ask for Export Obligation Discharge Certificate on the strength of exports made by the petitioner from bought and traded goods. I however leave it open to be decided in an appropriate proceedings before the Customs, Excise and Service Tax Appellate Tribunal, as I have not decided the case on the merits and demerits of the allegation. It is better left to be decided by the specialized body like Customs, Excise and Service Tax Appellate Tribunal and if the petitioner is further aggrieved, appellate remedy is open for the petitioner.

21. Under the circumstances, these writ petitions are disposed with the following observations:-

i. W.P.Nos.21002 to 21004 of 2004 and W.P.No.24948 of 2004 are dismissed liberty to the petitioner to file an appeal against impugned Order in Original No.30850004 (Job No.1589/2004) dated 30.10.2004 before the Customs Excise And Service Tax Appellate Tribunal, Chennai within a period of 30 days from the date of receipt of a copy of this order;

ii. The petitioner shall pre-deposit a mandatory sum equivalent to 7.5% of the duty determined vide impugned Order in Original No.30850004 (Job No.1589/2004) dated 30.10.2004 along with the above appeal under 129E of the Customs Act, 1962.

iii. The petitioner shall keep the 3 bank guarantees renewed during the pendency of the proposed appeal and orders to be passed;

iv. In case the petitioner fails to file the appeal in time, respondents are at liberty to not only the encash the subject bank guarantees but also take other measures to recover the duty, penalty and interest as determined by the Commissioner of Customs (Sea-Exports) vide Order in Original No.30850004 (Job No.1589/2004) dated 30.10.2004.

v. The petitioner is entitled to raise all objections that are available in law before the Customs Excise and Service Tax Appellate Tribunal.

22. Writ petitions stands disposed with the above observation.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

ssi

To

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

2. The Deputy Commissioner of Customs,
(Group 7) Customs House,
60, Rajaji Salai, Chennai 600 001.

3. Indian Overseas Bank,
Sowcarpet Branch, Chennai 600 079.

4. The Director of Revenue Intelligence,
No.27, G.N.Chetty Road, Chennai-17.

5. The Commissioner of Customs,
(Group 7) Customs House,
60, Rajaji Salai, Chennai 600 001.

6. The Commissioner of Customs (Sea Exports),
Customs House, 33, Rajaji Salai,
Chennai 600 001.

7.The Customs Excise and Service Tax,
Appellate Tribunal, Chennai.

+1cc to Mr.J.Madanagopal Rao, Advocate, S.R.No. 5059
+3cc to Mr.Megan Law Firm, Advocate, S.R.No. 4711
+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.4883
+1cc to Mr.Rajkumar Jhabah, Advocate, S.R.No. 5505

W.P. Nos. 34110 to 34112 of 2003 and 21002 to 21004 of 2009 and 33553 of 2003

PP(CO)
GN(25/06/2020)