IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.12.2020

C O R A M

The Hon'ble Mr. Justice SENTHILKUMAR RAMAMOORTHY

Writ Petition No.13537 of 2009

Unitex Exports,
B-24, Mugappair Industrial Estate,
Mugappair, Chennai-600 058,
Rep.ByP.K.Radhakrishnan,Mg.Partner.

...Petitioner

vs.

1. Apparel Exports Promotion Council
Readymade Garments Complex,
Thiru-Vi-Ka Industrial Estate,
Guindy, Chennai-600 032.

2. The Textile Commissioner,
Export Promotion Branch,
New CGO Complex,
48, New Marines Lines,
Mumbai-400 020.

3. The 2nd Appellate Committee,
Ministry of Textiles, Government of India,
Export-III Section,
Room No.339, Udyog Bhavan,
New Delhi-110 011.

...Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari calling for the records relating to the orders of the Third Respondent dated 08.05.2008 in No.14/187/207-IT and quash the same.

For Petitioner : Mr.Rangesh
For Respondents : Mr.Venkatasamy Babu
CGSC
R2 & R3



O R D E R

By this writ petition, the Petitioner challenges the order dated 08.05.2008 of the third Respondent, which confirmed the order dated 10.07.2007 of the second Respondent, which, in turn, affirmed the revised original order dated 30.11.2005, and thereby confirmed the forfeiture of the earnest money deposit

(EMD) of Rs.3,58,760/- for the failure to fulfil the export quota obligations of the Petitioner.

2. The Petitioner states that it had applied for and been granted a quota in respect of export of apparels by the Apparel Promotion Export Council (AEPC). In terms of the said quota, the Petitioner undertook the obligation to export 1,80,789 pieces to the USA, Canada and the European Union. In connection therewith, the Petitioner had provided an EMD. The EMD was required to be refunded provided the Petitioner fulfilled not less than 90% of the export obligations. The Petitioner surrendered 12,912 pieces from and out of its quota on 03.12.2004 on account of the embargo imposed by the USA. Consequently, the said 12,912 pieces were reduced from the quota of the Petitioner, and the revised and revalidated quota was 1,67,877 pieces. As against the revised quota obligation of 1,67,877 pieces, the Petitioner states that it exported 1,49,935 pieces which amounts to 89.31% of the allotted quota.

3. Therefore, the shortfall was only 1,158 pieces for the purpose of achieving the 90% export obligation target. Such target was required to be achieved on or before 31.12.2004. Meanwhile, on 26.12.2004, the tsunami caused extensive destruction along the coastal belt of Tamil Nadu and Puducherry. According to the Petitioner, a consignment of about 6,770 pieces, which the Petitioner endeavoured to export, was damaged due to the tsunami tidal waves. Consequently, the Petitioner could not fulfil the export obligation. The Petitioner further states that the relaxation up to 15.01.2005 for fulfillment of the export obligation was communicated to the Petitioner belatedly and, therefore, the Petitioner could not fulfill the obligation. In these circumstances, an order dated 01.10.2005 was issued by AEPC which came to be revised by order dated 30.11.2005. The said revised order was challenged in an appeal before the second Respondent and the said appeal was dismissed on 10.07.2007. The appellate order was carried in appeal before the third Respondent. The third Respondent confirmed the order of the second Respondent by order dated 08.05.2008, which is impugned herein.

4. I heard Mr.Rangesh, the learned counsel for the Petitioner, and Mr.Venkatasamy Babu, the learned Central Government standing counsel on behalf of the Respondents.

5. The main contention of Mr.Rangesh was that the Petitioner admittedly exported 1,49,935 pieces out of the total revised export quota obligation of 1,67,877 pieces (i.e. after deducting the surrendered quota of 12,912 pieces). As such, the shortfall was only 1,158 pieces. As against the shortfall, the Petitioner had made a bona fide attempt to ship 6770 pieces but

the said garments were damaged due to the tsunami tidal waves and the certified invoices had to be surrendered to the AEPC. In support of this contention, the learned counsel referred to a letter dated 06.05.2008 from the Petitioner to the 2nd Appellate Committee, Ministry of Textiles, New Delhi, wherein there is reference to the damaged consignment. On this basis, he submits that if the said consignment had been exported as per the bona fide intention of the Petitioner, the Petitioner would have exported more than the 90% export quota obligation requirement. He further submits that neither the original authority nor the appellate authority took the aforesaid facts into consideration and thereby rejected the appeal of the Petitioner. The next contention of Mr.Rangesh is that the extension up to 15.01.2005 on account of the force majeure event, i.e. the tsunami, should have been duly communicated. By drawing reference to the appellate order dated 10.07.2007, he pointed out that the appellate authority merely recorded that the tsunami does not qualify as a force majeure condition as per paragraph-16 of the order of the Ministry of Textiles, Notification No.1/128/99/(EXPORTS-1) dated 12.11.1999. Consequently, he submits that the impugned order is liable to be set aside.

6. On the contrary, Mr.Venkatasamy Babu submits that the admitted position is that the Petitioner did not fulfill the export obligation even to the extent of 90%. By drawing reference to paragraph 7 of the affidavit of the Petitioner, he pointed out that the Petitioner admitted that only 1,49,935 pieces were exported. He also pointed out that if there is a shortfall, the Respondents are entitled to forfeit the EMD to the extent of such shortfall. In the present case, he pointed out that the original order as well as the impugned order were passed after providing a reasonable opportunity to the Petitioner and after considering the submissions of the Petitioner. For this purpose, he referred to the order dated 01.10.2005 which refers to the presence of the Petitioner's representative at the personal hearing on 25.07.2005. In fact, he points out that based on the representation of the Petitioner, a revised order came to be issued on 30.11.2005 whereby the amount to be forfeited was revised downward from Rs.13,11,700/- to Rs.3,58,760/-.



7. With regard to the contention that the Petitioner could not fulfill the export obligation on account of a force majeure event, he pointed out that exporters were originally required to fulfil the export obligation on or before 31.12.2004 and that this was extended up to 15.01.2005 on account of the tsunami. The Petitioner did not fulfill the obligation even within the extended time limit of 15.01.2005. Consequently, he submits that neither the original order nor the appellate order are liable to

be interfered with. In this connection, he also contends that the Petitioner has only challenged the order of the third Respondent dated 08.05.2008 and has failed to challenge either the original order or the first appellate order. For these reasons, he submits that this writ petition is liable to be rejected.

8. I considered the submissions of the learned counsel for the respective parties and examined the materials on record.

9. The basic facts are undisputed. The Petitioner has admitted in paragraph 7 of the affidavit that 1,49,935 pieces were exported out of the total revised export obligation of 1,67,877 pieces. The Petitioner further submits that this amounts to 89.31% of the allotted quota. In the event that 90% of the alloted quota is not exported, the admitted position is that the Respondents are entitled to forfeit the EMD/bank guarantee to the extent of shortfall. In this connection, reference should be made to the Notification of the Ministry of Textiles dated 12.11.1999, wherein it is provided, inter alia, as under:

> "(vii) The 'Quota Administering Authority' shall forfeit the EMD/BG, in case of utilisation is 75% or more but less than 90% in case of fast moving items, and 50% or more but less than 75% in case of slow-moving items, proportionate to the shortfall in utilisation."

10. By way of clarification, it may be noted that the parties admit that the items in question in the present case are fast moving items and, therefore, forfeiture of the EMD is permissible if less than 90% of the total export obligation is fulfilled.

11. The Petitioner also relies upon the letter dated 06.05.2008 wherein it is stated that the Petitioner endeavoured to ship 6770 pieces, which were damaged because of the tsunami tidal waves. Upon perusal of the affidavit of the Petitioner, I find that the letter dated 06.05.2008 is not referred to therein; however, I find that there is a reference to a statement to this effect before the appellate authority in the proceedings dated 10.07.2007. Beyond such reference, no proof of the aforesaid was produced by the Petitioner. In effect, the Petitioner admittedly failed to export 90% of the total quota of 1,67,877 pieces either within the original or extended time limit. Thus, the case of the Petitioner rests on the force majeure defence. Therefore, it remains to be considered whether the tsunami qualified as a force majeure event and absolved the

Petitioner of the liability for non-fulfillment of the export obligations.

12. The law on force majeure was examined by the Hon'ble Supreme Court in Energy Watchdog v. Central Electricity Regulatory Commission (2017) 14 SCC 80, wherein the Court held that it is a contractual mechanism to deal with events that justify a temporary exemption from contractual obligations. More recently, in Lanco Hills Technology Pvt. Ltd. v. Manisha Balkrishna Kulkarni 2019 SCC Online SC 1649, the Hon'ble Supreme Court examined the duration for which a force majeure event would absolve a party from its contractual obligations and concluded that it would operate only while the force majeure event subsists. These principles should be applied to this case to test whether the Petitioner is entitled to be absolved of its export obligation.

13. The learned standing counsel for the Respondents invited the attention of the Court to circular No.05/02, dated 25.01.2005, wherein it is stated that relief would be granted if the exporters booked the cargo for shipment in the last week of December 2004 and the shipment had been effected on or before 15.01.2005 by submitting the specific documents such as (a) shipping bill, (b) bill of lading/airway bill and (c) correspondence with the shipping lines/air lines for reserving the cargo space in the last week of December 2004. There is no evidence on record to establish that the Petitioner fulfilled the above obligations before the extended deadline of 15.01.2005. Although the learned counsel for the Petitioner contended that the Petitioner could not fulfill its export obligation on or before the extended deadline because the circular was issued and communicated belatedly, I am unable to countenance the said contention for two reasons. First, the Notification dated 12.11.1999 does not contain a force majeure clause and force majeure is a contractual mechanism to deal with temporary events that impede performance of contractual obligations. More importantly, even where a contract or policy contains a force majeure clause, a party can rely on such clause only until the force majeure event ends. In the present case, there is no evidence to show that the Petitioner was unable to fulfill its export obligation until 15.01.2005 on account of the tsunami. In these circumstances, the belated communication of the extended deadline is not material as regards reliance on force majeure.

14. The admitted position in this case is that the Petitioner was heard both by the original authority and by the two appellate authorities before issuing the impugned order. Even with regard to the calculation of the forfeiture amount, I find that the shipment shortfall details have been set out in

sufficient detail in the revised original order dated 30.11.2005. In these circumstances, I find that the Petitioner has failed to make out a case to quash the impugned order.

15. Accordingly, this writ petition is dismissed. No costs.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

To

1. Apparel Exports Promotion Council,
Readymade Garments Complext,
Thiru-vi-ka Industrial Estate,
Guindy, Chennai-600 032.

2. The Textile Commissioner,
Export Promotion Branch,
New CGO Complex,
48, New Marines Lines,
Mumbai-400 020.

3. The IInd Appellate Committee,
Ministry of Textiles, Government of India,
Export-III Section,
Room No.339, Udyog Bhavan,
New Delhi-110011.

+1cc to M/s.Venkataswamy Babu, in SR.NO..40155

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rv(18/01/2021)