

IN THE HIGH COURT OF JUDICATURE OF MADRAS

RESERVED ON : 18.08.2020

PRONOUNCED ON : 02.09.2020

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.Nos.21689 to 21696 of 2016
& WMP.Nos.18539 to 18541 of 2016

In W.P.No.21689 of 2016

M/s.Simplex Infrastructures Ltd.,
(Formerly Simplex Concrete Piles (India) Ltd.,)
rep. by its Authorised Signatory
Mr.Sandip Baran Das,
Simplex Infrastructures Ltd., Simplex House,
27, Shakespeare Sarani, Kolkata-700 017
and having branch office at:
21, Casa Major Road,
Egmore, Chennai. ... Petitioner in all the Petition

-Vs-

1. The Union of India
through Secretary,
Ministry of Commerce,
Udyog Bhawan, New Delhi.
2. The Joint Director General of Foreign Trade,
4th Floor, Shastri Bhavan,
Annex, 26 Haddows Road,
Chennai-600 006.
3. Policy Interpretation Committee,
DGFT, Udyog Bhawan,
New Delhi. ... Respondents in all the Petition

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records of the 2nd respondent in the impugned notice vide (i) F.No.04/21/21/00002/AM 03/1918 (ii) F.No.04/36/21/00144/AM 04/1918 (iii) F.No.04/36/21/00207/AM 04/207 (iv) F.No.04/36/21/00018/AM 06/1918 (v) F.No.04/36/21/00321/AM 06

(vi) F.No.04/21/21/370/AM 06/1918 (vii) F.No.04/21/21/00455/AM 06/1918 and (viii) F.No.04/21/21/501/AM 06/1918 respectively dated 26.02.2016 and to quash the same as arbitrary and illegal.

For Petitioner : Mr.Sujit Ghosh,
for Mr.Arun Karthik Mohan

For Respondents: Mr.G.Karthikeyan,
Additional Solicitor General

C O M M O N O R D E R

With the consent of both the parties, the present Writ Petitions are heard through Video Conferencing on 18.08.2020.

2. In all these Writ Petitions, the petitioner is an Export Promotion and Capital Goods (hereinafter referred to as "EPCG") licence holder, who had imported various capital goods on concessional rate of 5% of customs duty. The goods were utilised by the petitioner for the manufacture of various export items. After fulfillment of the export obligation, the petitioner applied for the redemption of EPCG licence and in view of the fulfillment obligation, the second respondent had granted the Export Obligation Discharge Certificate (EOD) on various dates between 02.03.2006 and 27.08.2008 for each of the eight applications. After lapse of many years from the EOD certificate, the present impugned notices have been sent, seeking to regularise the case and recover the customs duty along with interest.

3. Mr.Sujit Ghosh, learned counsel for the petitioner, predominantly raised two grounds challenging the impugned notices. Firstly, the second respondent herein has no jurisdiction to review his own order, in the absence of any explicit provision under the statute. Even otherwise, Section 16 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "FTDR Act") empowers the Director General of Foreign Trade to review the orders made by the Joint Director General of Foreign Trade and as such, the impugned notices by the second respondent is without any authority of law.

4. Secondly, he submitted that the impugned notices have been issued after about 10 years from the issuance of the EOD Certificate which is contrary to the limitation prescribed under the proviso to Section 16 of the Act, which prescribes a period of two years for such a power to review.

5. Mr.G.Karthikeyan, learned Additional Solicitor General opposed the above said submissions stating that the limitations of two years under Section 16 will commence from the date of demand notice and not from the issuance of EOD Certificate. With regard to the authority of the second respondent to review his own order under Section 16 is concerned, no counter statements have been made in the common counter affidavit filed by the respondents. He also submitted that the petitioner had given a representation seeking for personal hearing and without availing such hearing, had filed the present Writ Petitions and therefore, the Writ Petitions deserves to be rejected.

6. Section 16 of the Foreign Trade (Development and Regulation) Act, 1992 reads as follows:-

16. Review.- The Central Government, in the case of any decision or order, not being a decision or order made in an appeal, made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, may on its or his own motion or otherwise, call for and examine the records of any proceeding in which a decision or an order imposing a penalty or redemption charges or adjudicating confiscation has been made and against which no appeal has been preferred, for the purpose of satisfying itself or himself, as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit:
Provided that no decision or order shall be varied under this section so as to prejudicially affect any person unless such person -

(a) has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied, and

(b) has been given a reasonable opportunity of making representation and, if he so desires, of being heard in his defence."

7. As rightly pointed out by the learned counsel for the petitioner, Section 16 of the FTDR Act empowers the Director General to review any decision or order made by the Joint Director of Foreign Trade. The power of review of any decision or order is only under Section 16.

8. As and when the second respondent had issued the EPCG licence and the Export Obligation Discharge Certificate, he becomes "functus officio" and if at all, such an order of the

second respondent is to be reviewed, the same can be done only by the Director General, as provided under Section 16. Apparently, the impugned notice issued by the second respondent itself is without any jurisdiction and contrary to the statutory provisions.

9. The learned counsel for the petitioner relied upon the decision of the Gujarat High Court in the case of Alstom India Ltd., Vs. Union of India reported in 2014 (301) E.L.T. 446 (Guj.) on this proposition. The relevant portion of the order reads as follows:-

"31. On going through the provisions of the FTDR Act, we find that those do not grant power to the Respondent No.2 or its subordinates to re-determine or re-verify the deemed export benefits if such benefits have been approved or granted as per the provisions of the FTDR Act except by way of review as provided in Section 16. In the absence of any power under FTDR Act, the Respondent No.2 or its subordinates cannot assume quasi-judicial power for instance, the power to re-determine or re-verify under the administrative guidelines i.e. Para 7 of the ANF-8 Form. Therefore, by virtue of Para 7 of the ANF-8, the Respondent No.2 is deriving the quasi-judicial power which is beyond the provisions of FTDR Act. We have already pointed out that according to Section 6 of the FTDR Act, the Respondent No.2 or the officer subordinate to him cannot usurp the power under Sections 3, 5, 15 and 19 of the FTDR Act. According to Section 3, it is for the Central Government which may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.

...

32.1 Section 16. on the other hand, authorizes the Central Government, in the case of any decision or order made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate W.P.(C)4455/2013 Page 7 to him, to act on its own motion or otherwise, by calling for and examining the records of any proceeding for the purpose of satisfying itself or himself, as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit. The proviso. however, says that no decision

or order shall be varied under section 16 so as to prejudicially affect any person unless such person has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied and has been given a reasonable opportunity of making representation, and, if he so desires, of being heard in defence.

...

33. We, thus, find that although specifically prohibited under Section 6 of the Act, the DGFT has been illegally vested with the power to intervene in the subject matters coming within the purview of Sections 3, 5, 15, 16 and 19 in clear violation of sub section (3) of Section 6 of the FTDR Act. In other words, what is specifically prohibited by the FTDR Act, by taking aid of the HOP, the D.G.F.T has assumed such power in colourable exercise of the power conferred upon it."

10. Following the aforesaid decision in Alstom India Limited, a Division Bench of the Delhi High Court in Simplex Infrastructure Ltd., Vs. Union of India & others in WP.(c) No.4455 of 2013 had held that Joint DGFT has no powers to review his own orders in view of Section 16 of the FTDR Act. The relevant portion of the order reads as follows:-

"4. ... Further, it is argued that the power to review an order under the policy is granted to the DGFT under Section 16 of the Act, which in this case was impermissibly exercised by the Deputy DGFT.

..

..

8. In this case, the impugned order-in-original, which acted upon the decision taken by the PIC, is of the Joint DGFT, dated 30 th March, 2012. Clearly, in terms of the decision in Alstom (supra), with which this Court concurs, there can be no review of an earlier refund except in accordance with the provision of Section 16 of the FTDR Act, which only permits the DGFT or the Central Government (in case the original order was by the DGFT) to exercise the power of review."

11. The respondents have not come forward with any counter arguments to substantiate this ground and thus, the impugned notices itself is liable to be struck down on this ground.

12. Insofar as the ground of limitation raised by the petitioner is concerned, Section 16 empowers the Director General to review the order, within a period of two years from the date of the decision or the order passed. Apparently, all the impugned notices in the aforesaid Writ Petitions are beyond the period of two years. As a matter of fact, the notices are after a long delay between 8 to 10 years and there is absolutely no explanation for this inordinate delay in the proposal to review the order. The only ground raised by the learned Additional Solicitor General, is that, the two years period prescribed under Section 16 would commence from the date of the demand notices. I am unable to contemplate as to how such date of reckoning could be construed from the proviso to Section 16, when it is unambiguously provided that two years period will commence from the date of decision or order which is sought to be revised.

13. The learned Additional Solicitor General also submitted that since the petitioner had requested for an opportunity of personal hearing, pursuant to the impugned notices, the option of filing the Writ Petitions instead of availing the personal hearing, requires dismissal of the Writ Petitions on the ground of non availment of the alternate remedy. I am not in agreement with such a submission. It is a settled proposition of law, that when a notice is issued without jurisdiction and against the authority of law, this Court may be justified in exercising its powers under Article 226 of the constitution of India and interfere with such a notice. Even otherwise, a mere option expressed to raise objections to the impugned notices will not disentitle or be a bar to the petitioner to avail the powers under Article 226 of the Constitution of India. Thus the petitioner would be entitled to succeed on the second ground of limitation also.

14. For all the foregoing reasons, the impugned notices dated 26.02.2016 passed by the second respondent herein are hereby quashed. Consequently, connected Miscellaneous Petition is closed. The Writ Petitions stand allowed. No costs.

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Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

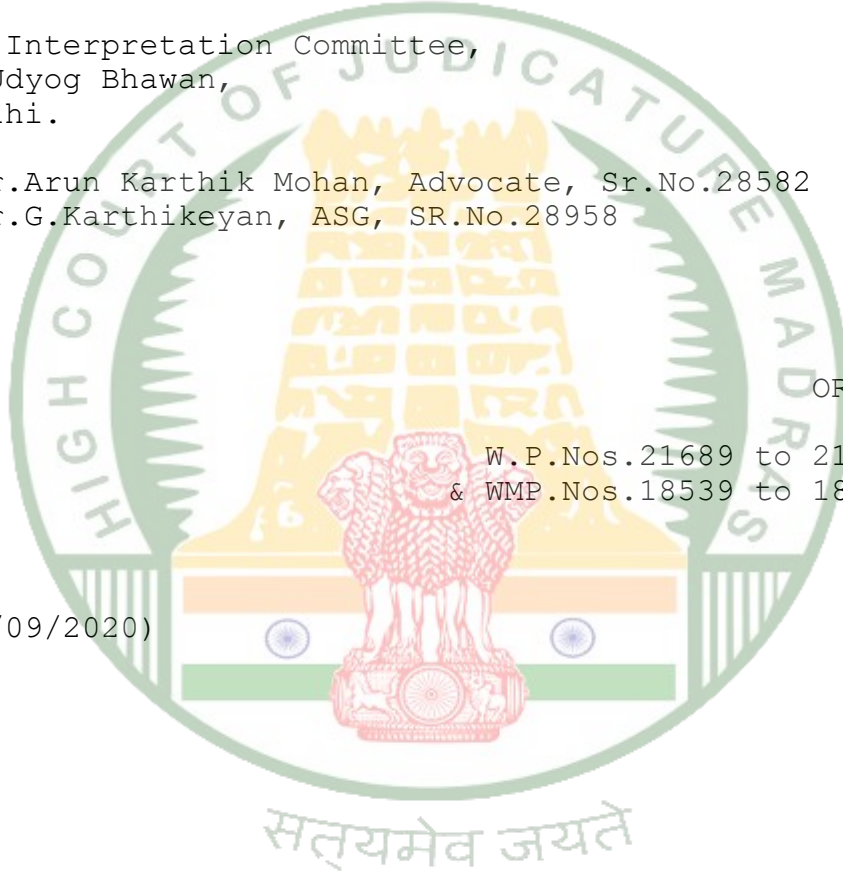
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+lcc to Mr.Arun Karthik Mohan, Advocate, Sr.No.28582
+lcc to Mr.G.Karthikeyan, ASG, SR.No.28958

ORDER MADE IN

W.P.Nos.21689 to 21696 of 2016
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