**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**Reserved on : 01.10.2020**

**Pronounced on : 29.10.2020**

**CORAM:**

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

**W.P.(MD) No.11511 of 2020**

**and**

**W.M.P.(MD) No.10036 of 2020**

M/s.Regent Defence and Engineering Systems Limited,
(formerly known as M/s.Simco Engineering Limited),
No.126, K.Sathanoor Road,
Trichy - 620 021. ... Petitioner

Vs.

1. The Deputy Director General of Foreign Trade,
Office of Addl. Director General of Foreign Trade,
Ministry of Commerce and Industry,
Shastri Bhavan, Haddows Road,
Chennai - 600 006.

2. The Commissioner of Customs,
60, Krishna Block, Rajaji Salai,
Opp. to Dist. Collectorate,
Chennai - 600 001. ... Respondents

**PRAYER:** Writ Petition filed under Article 226 of the Constitution for the issuance of Writ of Certiorarified Mandamus calling for the records of the 1st respondent pertaining to the impugned order vide F.No.04/36/021/00101/AM03, dated 07.08.2020 received on 20.08.2020 and quash the same as arbitrary, unjust, illegal and consequently, direct the 1st respondent to provide a de novo consideration of show cause notice dated 02.07.2019.

For Petitioner : Mr.S.Karunamoorthy

For 1st Respondent : Ms.L.Victoria Gowri
Assistant Solicitor General of India

For 2nd Respondent : Mr.B.Vijay Karthikeyan

**O R D E R**

The writ petitioner is a company incorporated in the year 1961. It was originally known as M/s.Simco Engineering Limited. It was issued with EPCG license dated 15.07.2002 by the Additional Director General of Foreign Trade, Chennai. As per the Annexure 'A' attached to EPCG license, the petitioner was under obligation to export “Single Phase Electricity Metre” worth about US dollars

3247812.67 i.e., five times the C.I.F value of capital goods on F.O.B basis. Within a period of eight years from the date of issuance of license, the export obligation has to be fulfilled by the use of imported capital goods. The petitioner availed the concessional duty under the aforesaid scheme and imported the capital goods cited in the license. They were duly installed in the petitioner's factory premises. However the petitioner furnished bank guarantee in favour of the second respondent for 50% of the duty forgone. However the petitioner could not fulfil the export obligations. The petitioner therefore filed an extension application on 26.02.2011 and again on 11.10.2011. Nothing was heard from the first respondent till 11.07.2019. When the petitioner received notice from the first respondent proposing action under Section 11 (2) r/w Section 9 of Foreign Trade (Development & Regulation) Act, 1992, the petitioner did not submit any explanation in response to the said show cause notice. The first respondent by the impugned order dated 07.08.2020 levied penalty of Rs.5.00 crores in addition to the customs duty and interest thereon. It was further ordered that no further license/authorisation/export incentives would be granted to the petitioner and its directors or to any other firms in which the directors are directly involved in the capacity of proprietor / partners / directors. Questioning the same this writ petition has been filed.

2.The first respondent has filed a detailed counter affidavit opposing the writ prayer. The first respondent has pointed out that the petitioner was obliged to communicate their inability to meet their export obligation from time to time with the passage of each and every block of export obligation period from the date of license i.e., from 15.07.2002 to 14.07.2010. But the petitioner shows to apply for extension of time only after expiry of the period of eight years. The first respondent has further stated that they have nothing to do with the internal management difficulties faced by the petitioner, though the first respondent granted one year extension, the petitioner did not take up any follow up action. When show cause notice was issued on 01.11.2013, the petitioner did not even respond. To the second show cause notice issued on 02.07.2019 also, there was no explanation forthcoming from the petitioner. Having failed to avail the opportunity to show cause notice or attending the personal hearing, the petitioner cannot maintain this writ petition. The petitioner is very much having the statutory remedy of appeal under Section 15 of Foreign Trade (Development and Regulations) Act, 1992. The petitioner has a further remedy of filing a review petition before the Director General of Foreign Trade, New Delhi under Section 16 of the Act. When such effective statutory remedies are available, the petitioner cannot be allowed to by-pass the same. The first respondent has merely enforced the conditions attached to the EPGC license. The petitioner was under an obligation to export to the tune of certain value. The petitioner admittedly failed to discharge the export obligation. When show cause notice was issued, the petitioner did not respond. Hence, the first respondent was justified in passing the impugned order.

3.The learned Assistant Solicitor General of India for Madurai Bench reiterated all the contentions set out in the counter affidavit filed by the first respondent and called upon to this Court to dismiss the writ petition.

4.I called upon the petitioner's counsel to explain as to why the petitioner failed to respond to the second show cause notice issued by the first respondent herein. The learned counsel for the petitioner drew my attention to the e-mail communication sent by the petitioner to their consultant on 23.07.2019. It appears that the consultant had advised the petitioner that they would receive one more notice. This was because the show cause notice dated 02.07.2019 had informed the petitioner that a personal hearing has been fixed on 18.06.2019 between 2:30 p.m. to 4:00 p.m. to appear before the first respondent. Original show cause notice received by the petitioner has been enclosed in the typed set of papers along with the original cover. It can be seen from that it is dated 02.07.2019 and that it was served on the petitioner on 11.07.2019. The last but one paragraph of the show cause notice reads as under.

> " ***In any case, in accordance with the principle of natural justice, a personal hearing in your case has been fixed on 18 June 2019 between 2.30 p.m. to 4:00 p.m. to appear before the undersigned.***"

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5.Though June 2019 has been typed out, the date "18" had been hand written. The petitioner had gone by the professional advise received from their consultant that the first respondent was sure to issue one more notice setting out the correct date for personal hearing. But then what the petitioner received was the impugned order dated 07.08.2020. In the impugned order also, it is mentioned that the petitioner did not care to attend personal hearing granted to them on 18.06.2019. To me this is a clear instance of non-application of mind. In the counter affidavit filed before this Court also the very same stand is reiterated at paragraph No."11". Any order passed by an administrative authority must not suffer from non application of mind. The first respondent has rightly taken the decision to grant personal hearing to the petitioner herein. Therefore, the first respondent cannot now take a stand that since the petitioner did not furnish any explanation to the show cause notice, the requirement to give personal hearing is dispensed with. Such a stand cannot be taken because the first respondent had already taken the decision to grant personal hearing. The show cause notice issued by the first respondent however fixed a certain date for personal hearing which is anterior any point of time. The petitioner would therefore be justified in expecting that he would receive a fresh show cause notice. Therefore on this sole ground, the impugned order is liable to be set aside. It is true that the petitioner can file an appeal before the appellate authority and then a review petition before the Director General of Foreign Trade, New Delhi. But this remedy can be by-passed if the petitioner can show violation of the principles of natural justice on the part of the first respondent. The petitioner has demonstrated that the order has been passed in violation of the principles of natural justice. The first respondent has committed the very same error not only in the show cause notice but also in the counter affidavit. The first respondent accuses the petitioner that he has not cared to attend the personal hearing. The first respondent has not noted that the petitioner could not have attended the personal hearing because the notice received on 11.07.2019 called upon the petitioner to attend the personal hearing fixed on 18.06.2019. That apart, as rightly pointed out by the learned counsel appearing for the petitioner, penalty cannot be arbitrarily levied. The petitioner's counsel places reliance on the decision of the Hon'ble Division Bench of Delhi High Court in the case of ***Dencap Electronics (P) Ltd., Vs Additional Director General of Foreign***. The Hon'ble Delhi High Court has held that the discretion to impose a penalty must be exercised judicially. The penalty will ordinarily be imposed in cases were the party acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct or acts in conscious disregard of his obligation but not in cases where there is a technical breach of the provisions of the statute. In the case on hand, the petitioner had imported the capital goods and had also duly installed the same in their factory premises. The installation certificates dated 09.07.2003 and 10.12.2003 issued by the Deputy Commissioner of Central Excise, Tiruchirappali have been enclosed in the typed set of papers. The petitioner has also pointed out that the Company faced a host of management related problems. There were serious disputes between the promoters and the joint venture partner. There were disputes among the members of the board. More than anything else, the product manufactured by the petitioner namely "Single Phase Electricity Metre" itself has become obsolete. Due to march of technology, certain goods can become totally obsolete. Therefore, the petitioner cannot be blamed entirely for the mess in which it has fallen.

6.The first respondent also must take note of the fact that the one year extension expired in the year 2011. The first show cause notice was issued in the year 2013. No further action emanated from the first respondent for almost six years. The second show cause notice was only issued on 02.07.2019 and one year and one month later, the impugned order came to be issued. Therefore, taking into account all these aspects, I am of the view that the interest of justice will be served by quashing the impugned order and remanding the matter to the file of the first respondent for fresh consideration. There is yet another reason as to why I am constrained to quash the impugned order. The first respondent has taken action not only against the petitioner company in whose favour the license was issued but also has penalised its directors. But the directors were not put on notice at any point of time. It is well settled that an incorporated company has an independent existence. Therefore, on this ground also the impugned order has to be set aside. The show cause notice in the final paragraph only states that notice is being issued without prejudice to any other action contemplated against the company and its proprietor/partners/directors under the Act. But in the impugned order, the directors have already been visited with an adverse action. Thus, on this ground also the impugned order is liable to be set aside.

7.It is further alleged in the impugned order that the capital goods allowed to be imported against the license have not been utilised properly. But the materials enclosed in the typed set of papers would show that the imported goods were very much installed in the factory premises of the petitioner. I am therefore of the view that the petitioner deserves to be given one more opportunity to place all the relevant materials so as to persuade the first respondent to revisit the issue. However, the petitioner will not be given any further liberty (privilege) or indulgence. The first respondent is directed to fix date for personal hearing in the month of January, 2021 itself. The petitioner has to necessarily appear before the first respondent on the said date and make out their case. The first respondent shall pass final orders within a period of four weeks thereafter. With this liberty to the first respondent, the order impugned in the writ petition is quashed. With the above terms, the writ petition is allowed. No costs. Consequently connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

skm

**NOTE**: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

**To**

1. The Deputy Director General of Foreign Trade,
   Office of Addl. Director General of Foreign Trade,
   Ministry of Commerce and Industry,
   Shastri Bhavan, Haddows Road,
   Chennai – 600 006.

2. The Commissioner of Customs,
   60, Krishna Block, Rajaji Salai,
   Opp. to Dist. Collectorate,
   Chennai - 600 001.



+1 CC to M/s.B.VIYAY KARTHIKEYAN, Advocate ( SR-20688[F] dated 29/10/2020 )

+1 CC to M/s.S.KARUNA MORTHY, Advocate ( SR-20941[F] dated 03/11/2020 )

**W.P.(MD) No.11511 of 2020**
**and W.M.P.(MD) No.10036 of 2020**
**29.10.2020**

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