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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 28.02.2020

+ LPA 314/2019 & C.M.No.22031/2019 (stay)

HOLOFLEX LTD & ANR

..... Appellants

Through: Mr. Kumarjeet Banerjee, Adv.
with Mr.Gaurav Gupta, Mr.Swastik Darai,
Mr.Robin Singh Rathore, Advs.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Ashim Sood, CGSC with
Mr.Rhythm B., Adv. for UOI.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT(ORAL)

28.02.2020

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1. This LPA has been preferred by the original petitioner in W.P.(C) No.1816/2019. The writ petition preferred by the appellant was dismissed by the learned Single Judge vide judgment and order dated 22nd February, 2019 (Annexure – A/2). Hence, the appellant preferred the present appeal. In the writ petition, the order passed by the Director General of Foreign Trades (hereinafter referred to as ‘DGFT’) dated 13th December, 2018 passed in a review application under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter “FTDR”) was under challenge.

2. The appellant was a license holder under the Export Promotion and Capital Goods, EPCG, scheme on 27th January, 2005, for the import of capital goods, and their subsequent manufacture. The appellant was authorized, in terms of the saved import duty fixed at a value of Rs. 2,17,317.25/-, with a corresponding export obligation of FOB Rs. 17,38,538/-. The obligation was to be discharged before the license expired, i.e., before 27th January, 2013.

3. The appellant, *vide*, bill of entry number 347478 dated 5th February, 2005, imported a capital good with “Model IK 440IR-D He-Cd Laser Head including Model KR1801C power supply” under the EPCG scheme, saving a duty of Rs. 2,11,237/-, and the export obligation corresponding Rs. 16,89,896/-.

4. On 13th December, 2007, the appellant entered into a Product Purchase Agreement with Nokia India Pvt. Ltd., for supply of ‘ICA Holograms’ at the unit located at Nokia Telecom Special Economic Zone, Sriperumbudur, Tamil Nadu.

5. Pursuant to the supply of consignments in accordance with the Product Purchase Agreement, the Development Commissioner of MEPZ SEZ in acknowledgement of the export transaction undertaken by the Appellant issued Form I covering all invoices raised by the appellant in respect of the supply of goods to Nokia SEZ.

6. Post expiry of the appellants EPCG license on 27th January, 2013, the appellant was issued three show cause notices. The first on 26th April, 2013, then on 22nd January, 2014 and lastly, on 4th September, 2014.

7. On 26th April, 2013, the Foreign Trade Development Officer issued a Show Cause Notice, under Rule 7 of the Foreign Trade (Regulation) Rules, 1993, to furnish evidence establishing fulfilment of the export obligation and realization of the said amount.
8. The appellant received another Show Cause Notice on 22nd January, 2014, in pursuance of the aforesaid Show Cause Notice, under sections 14 and 11(2) of the FTDR , asking to show cause as to why fiscal penalty must not be imposed for violations of the conditions of the license by importing the capital goods at concessional rate of Customs Duty in violation of Exim policy.
9. The appellant responded on 29th January, 2014, stating that they had fulfilled the export obligation more than necessary as per the EPCG license, and submitted the eight documents in support of this.
10. The office of the Additional DGTF, responded to the aforesaid communication dated 29th January, 2014, on 26th February, 2014, stating that since the supply of goods appears to be a SEZ unit, the appellant is required to submit a bill of export, for the same to be considered towards fulfilment of the export obligations as per the EPCG scheme.
11. Pursuant thereto, the Joint DGFT, on 26th June, 2014, issued a circular directing further license and renewal of expired license to be refused in terms of Section 9(2) of the FTDR. The petitioner sent a letter dated 16th September, 2014 representing against the said Circular.

12. The appellant received another Show Cause Notice on 4th September, 2014, issued by the Joint DGFT, under sections 14 and 11(2) of the FTDR , asking to show cause as to why fiscal penalty must not be imposed for violations of the conditions of the license by importing the capital goods at concessional rate of Customs Duty in violation of Exim policy.

13. Upon receipt of the aforesaid Show Cause Notice, the appellant responded to the same *vide* communication dated 30th October, 2014, enclosing therewith a certificate dated 25th September, 2014 issued by a M/s Blue Dart Express Ltd. certifying the supply of goods to the SEZ, as well as, a letter dated 15th September, 2014 addressed to the Development Commissioner, SIPCOT High-Tech SEZ authenticating and confirming the supplies made to the SEZ.

14. The Joint DGFT did not accept the documents submitted as sufficient to establish the fulfillment of export obligations and, therefore, passed an order dated 21st November, 2014 imposing a fiscal penalty for a sum of Rs. 2,00,000/-.

15. Aggrieved thereagainst, the appellant filed an appeal before the Additional DGFT under Section 15(1) of the FTDR, making his case that the supply of goods through a recognized courier agency ought be treated as transshipment of goods, and, thus, no further BoE was required to be submitted, apart from claiming that Nokia had issued Form 'I', covering the invoices raised by it and the same must be accepted as requisite document to further the claim of the petitioners export obligation.

16. The appeal, was however, rejected by the Additional DGFT *vide* its order dated 5th March, 2018. Moreover, the appellant preferred a review against such a rejection by the Additional DGFT, which was passed by the DGFT, which was rejected *vide* the DGFT's order dated 13th December, 2018. These orders were impugned by the appellant before the learned Single Judge, by means of WP(C) 1816/2019.

17. The learned single judge, through the judgement impugned before us, dated 22nd February, 2019, rejected the appellant's claims, as reiterated before the court, and upholding the orders impugned in the said writ. Aggrieved thereagainst, the petitioner has preferred this Letters Patent Appeal.

18. We have heard Mr. Kumarjeet Banerjee, learned counsel for the appellant and Mr. Ashim Sood, learned counsel for the respondent, and have perused the records before us.

19. Mr. Kumarjeet Banerjee, the counsel for the appellant, at the very outset, has submitted that, in light of Rule 23 of the SEZ Rules, 2006, the supplies made by the petitioner must be considered towards discharge of its export obligation under the EPCG Scheme. Rule 23 of the SEZ Rules, 2006 is reproduced herein below :

“23. Supplies from the Domestic Tariff Area to a Unit or Developer for their authorized operations shall be eligible for export benefits as admissible under the Foreign Trade Policy”

20. Mr. Kumarjeet Banerjee, further submits, that in light of paragraph 5.13(b), of the Hand Book of Procedures, the supply to the Nokia SEZ,

constitutes as a “deemed export” and that para 5.13(b) shall govern the procedure for fulfilment of the export obligations of the appellant under the EPCG scheme. Paragraph 5.13(b), of Chapter 5 of the EPCG scheme is extracted herein below:

“(b) For Deemed Exports:

- (i) Copy of ARO/ Back to back Inland letter of Credit or Advance Authorisation of Immediate Supplies

or

Supply invoices or ARE 3 duly certified by the Bond Officer of EOU concerned showing that the supplies have been received;

- (ii) The Authorisation holder shall also furnish the evidence of having received the payment through normal banking channel in the form given in the Appendix-22B or a self-certified copy of payment certificate issued by the Project authority concerned in the form given in Appendix-22C”

21. Mr. Kumarjeet Banerjee, thus submits, that it is under the aforesaid that furnishing of supply invoices and bank realisation certificate, as mentioned in “Appendix 22B” has been stipulated as sufficient evidence for the fulfilment of the export obligation under the EPCG scheme. Moreover, the requirement of Form ARE 3, pertains only to EOUs, which are distinct from SEZ units, and hence, cannot be extended to the case of the appellant here.

22. Mr. Kumarjeet Banerjee, in conclusion, submits that it is matter of record and an admitted fact that the appellant has duly furnished both, supply invoices and the bank realisation certificates in Appendix-22B in realisation to the supply to the Nokia SEZ, and have thus fulfilled its export obligation. Thus, it is evident that there cannot be a requirement to evidence

the bills of Export, and the single judge has, therefore, erred in directing the furnishing of the bills of Export , such a direction being erroneous and ex-facie contrary to the Chapter 5 of the Handbook of Procedures.

23. Mr. Ashim Sood, learned counsel for the respondents has graciously and in an absolutely fair manner, as an officer of the court, has found himself to be agreeing to the appellants reasonings.

24. The question before us, therefore, sublimates down to ascertaining the method for determining whether the appellant had discharged its export obligations.

25. At the outset, it would be relevant to refer to the conditions on which EPCG authorisation was issued to Holoflex, especially clause 10 thereof, is relevant and set out below:

“10. This licence will be operative as per provisions of the
exim policy and Hand Book of Procedures 2004- 2009 or
any other law /provision time being in force”

It is therefore, apparent from the above, that the appellant was required to follow the Handbook of Procedures. Therefore, since the paragraph 5.13(b), of the Hand Book of Procedures governs the procedure for the fulfilment of the export obligations under of Chapter 5 of the EPCG scheme, the supply to the Nokia SEZ, shall be governed by para 5.13(b), as extracted hereinbefore *supra*.

26. Therefore, in light of para 5.13(b) of the HBP, the appellant has fulfilled its export obligation as mandated by the EPCH scheme.

27. It is trite that when a method has been laid down, has laid down, it

necessarily prohibits the doing of the act in any other manner than that which has been prescribed, and thus, the mandate of submission of the Bills of Entry cannot sustain. In *Taylor v. Taylor*¹, as notably followed in *Nazir Ahmed v. King Emperor*² and a plethora of judgments of the Supreme Court, the most well-known being, perhaps, *State of Uttar Pradesh v. Singhara Singh*³, conclude the issue, in law, in favour of the appellants. The legal principle, fossilised over a period of time, is thus enunciated, in *Singhara Singh*³:

“8. In Nazir Ahmed's case² the Judicial Committee observed that the principle applied in *Taylor v. Taylor*¹ a Court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that or nor at all and that other methods of performance are necessarily forbidden, applied to judicial officers making records under s. 164 and, therefore, held that magistrate could not give oral evidence of the confession made to him which he had purported to record under s. 164 of the Code. It was said that otherwise all the precautions and safe guards laid down in Sections 164 and 364, both which had to be read together, would become of such trifling value as to be almost idle and that "it would be an unnatural construction to hold that any other procedure was permitted than which is laid down with such minute particularity in the section themselves."

9. The rule adopted in *Taylor v. Taylor*¹ is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.”
(Emphasis supplied)

28. In view of the aforesaid facts, reasons and judicial pronouncements, we hereby quash and set aside the order passed by the learned Single Judge

¹ (1875) 1 Ch D 426

² AIR 1936 PC 523

³ AIR 1964 SC 358

dated 22nd February, 2019 in W.P(C) No.1816/2019.

29. The appeal is accordingly allowed.

CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 28, 2020

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