IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.03.2021

PRONOUNCED ON : 08.04.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.20146 & 31788 of 2018
and
WMP.Nos.23619, 37020 & 37022 of 2018

M/s.Unitex Fashions (India Private Ltd.,)
No.21A/Plot No.9
Paalvadi Street,
Nerkundram,
Chennai 600 107,
Rep.by its Managing Director ... Petitioner in both W.Ps.

vs

1.The Additional Director General of Foreign Trade,
Shastri Bhavan Annex, 4th Floor,
26, Haddows Road,
Chennai 600 006.

2.The Assistant Commissioner of Customs (RRU-II)
Office of the Commissioner of Customs II,
No.60, Rajaji Salai,
Chennai.

3.The Zonal Joint Director General of Foreign Trade,
Shastri Bhavan Annex, 4th Floor,
26, Haddows Road,
Chennai 600 006. .. Respondents in W.P.No.20146 of 2018

1.The Deputy Commissioner of Customs,(EPCG)
Customs House,
No.60, Rajaji Salai,
Chennai 600 001.

2.The Director General of Foreign Trade,
Shastri Bhavan Annex, 4th Floor,
26, Haddows Road,
Chennai 600 006.

3.The Zonal Joint Director General of Foreign Trade,
Shastri Bhavan Annex, 4th Floor,
26, Haddows Road,
Chennai 600 006 .. Respondents in W.P.No.31788 of 2018

Prayer in W.P.No.20146 of 2018 : Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Mandamus directing the 1st and 3rd respondents to consider the representation dated 29.05.2012 submitted by the petitioner and refix the annual average turnover and issue export obligation discharge certificate to the petitioner.

(Prayer amended vide order dated 17.07.2020 made in WMP.No.37053 of 2018 in W.P.No.20146 of 2018)

Prayer in W.P.No.31788 of 2018 : Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorari calling for the records connected with Order in Original No.23390/2014 dated 05.12.2013 issued by the first respondent and quash the same.

For Petitioner : Mr.C.Manohar Gupta (in both W.Ps.)

For Respondents : M/s.Hema Murali Krishnan
Senior Standing Counsel
(In W.P.No.31788 of 2018)

Mr.T.V.Ganesh, SCGPC
(In W.P.No.20146/2018)

C O M M O N O R D E R

By this common order, both the writ petitions are taken up together for hearing and disposed by this order.

2. W.P. No. 20146 of 2018 has been filed for a Writ of Mandamus, to direct the 1st and 3rd respondents namely the Additional Director General of Foreign Trade and the Zonal Joint Director General of Foreign Trade, to consider the representation of the petitioner dated 29.05.2012 submitted by the petitioner and to refix the annual average turnover and issue an Export Obligation Discharge Certificate to the petitioner.

3. W.P.No.31788 of 2018 has been filed for a Writ of Certiorari, to quash the impugned Order-in-Original No.23390 of 2014 dated 05.12.2013 passed by the Deputy Commissioner of Customs (EPCG), Custom House, Chennai-1.

4. For disposal of these two writ petitions, facts that are relevant are stand. The petitioner was engaged in manufacture of ready made garments and had obtained an Export Promotion Capital Goods license under the Export Import Policy issued under the Foreign Trade (Development and Regulation) Act, 1992. As per the license issued to the petitioner on 06.01.2003, the petitioner was required to export 5 times the CIF value of the capital goods within a period of eight years from the date of issuance of the license. As per the license, the petitioner was entitled to import capital goods worth US$ 598,919.99. The petitioner was also required to maintain average of past three years export performance of the same and similar products mentioned in Paragraph 2 of the said license of ready made garments. The annual average of the past export performance was fixed as Rs.197,933,333.33/-.

5. It is the case of the petitioner that due to the general recession, the petitioner was unable to carry on the business and factories and its assets were taken over under the provisions of the SARFAESI Act, 2002 and possession taken by the Union Bank of India, Overseas Branch, Chennai 24.10.2010 and 10.11.2011.

6. It is further case of the petitioner that while applying for EPCG license, the petitioner made certain mistakes as a result of which, the annual average of the past export performance was fixed as Rs.197,933,333.33/- as mentioned above. It is further case of the petitioner that though the petitioner was required to export 5 times of the CIF value of the import capital goods, it discharged the Enquiry Officer within the 1st order of the license itself. It is submitted that the export obligation fixed on the petitioner was Rs.2,88,67,944/- equivalent to US$ 598,919.99 and that the average export value achieved by the petitioner as on 05.12.2013 was Rs.2,88,67,944/- and therefore the petitioner was not required to achieve the average value of Rs.197,933,333.33/- for all the years during which period the license was in force.

7. The petitioner was issued with a notice dated 10.03.2011, by the Zonal Joint Director General of Foreign Trade under the provisions of the Foreign Trade (Development and Regulation) Act, 1992 read with Chapter V of the Import and Export Policy and relevant Hank Book of Procedures 2002-2007 vol.I. To the notice dated 10.03.2011 issued by the Zonal Joint Director General of Foreign Trade, the petitioner sent a reply dated 29.05.2012 i.e., after a lapse of 14 months and requested for re-fixation of the annual average as per the stipulation in clause (3) of the license dated 06.01.2003.

8. It is the case of the petitioner that the petitioner

had not only exported ready made garments but also exported fabrics to their overseas clients during the period from 1999 to 2002 and at the time of filing of the EPCG license, they have given export turnover of both garments and fabrics by mistake. It is submitted that since the import of sewing machines under the EPCG license was meant only for manufacture and export of ready made garments, it was not necessary on the part of the petitioner to give value of the fabrics exported during the aforesaid period for fixation of the annual average of Rs.197,933,333.33/- and that on realization of mistake, the petitioner approached the Director General of Foreign Trade, New Delhi and the Zonal Joint Director General of Foreing Trade, Chennai and requested the officers to re-fix the annual average of Rs.12,98,71,410/-, taking into account the annual average value of the export ready made garments of the petitioner during the period 1999-2000 to 2001-2002.

9. Under these circumstances, the representation dated 29.05.2012 of the petitioner was considered and disposed by the officers under the Ministry of Commerce.

10. As far as W.P.No.31788 of 2018 is concerned, it is the contention of the petitioner that though the petitioner was issued with a Show Cause Notice dated 19.10.2011 by the Office of the Deputy Commissioner of Customs/1st respondent (in W.P.No.31788 of 2018), the impugned Order-in-Original No.23390 of 2014 dated 05.12.2013 was not served on the petitioner and was sent to the petitioner's factory address bearing Door No.19, Vinayagapuram, 2nd Street, Arumbakkam, Chennai and therefore it remained un-communicated on the petitioner as the factory had been auctioned by the Union Bank of India, Overseas Branch, Chennai 24.10.2010 and 10.11.2011. Under these circumstances, the petitioner prays for a Certiorari, to quash the same and to pass fresh order. It is further submitted that the petitioner came to know about the impugned order dated 05.12.2013, only after recovery notice was issued on 26.06.2018 and therefore the petitioner was entitled for relief.

11. Mr.T.V.Ganesh, learned SCGPC for the 1st to 3rd respondents (the officers under the Commerce Ministry) in W.P.No.20146 of 2018 submitted that the writ petition was not maintainable as the petitioner obtained license by filing copy of the Registration-cum-Membership Certificate issued by the Apparel Export Promotion Council dated 29.10.2001, a copy of the Permanent Registration Certificate issued by the Regional Joint Director of industries and commerce dated 14.12.2001 and copy of the Auditor's Certificate dated 03.01.2003 along with the application for EPCG license and it is pursuant to the aforesaid documents filed by the petitioner, the EPCG license dated 06.01.2003 was issued to the petitioner on the strength of these

documents as per the provisions of the Foreign Trade (Development and Regulation) Act, 1992 read with Chapter V of the Import and Export Policy and relevant Hank Book of Procedures 2002-2007 vol.I as was in force during the period in dispute when the license was issued.

12. The petitioner neither filed any documents to substantiate discharge of export obligation or having maintained the annual average of 197,933,333.33/- all through the period during the validity of the license. Since no application was filed for redemption of the conditions of the license for obtaining Export Obligation Discharge Certificate (EODC) from the Director General of Foreign Trade, Chennai, a Show Cause Notice dated 10.03.2011 was issued to the petitioner as to why the customs duty plus 15% interest per annum on the amount of duty portion should not be recovered from the petitioner and why action should not be taken against the petitioner for failure to discharge the export obligation in time.

13. He submits that the notice categorically called upon the petitioner to reply within a period of 10 days from the date of the said Show Cause Notice, failing which, the case would be decided exparte and action would be initiated against the petitioner under the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and the rules made thereunder.

14. The learned counsel further submits that the petitioner was called for hearing on 22.03.2011 between 3.00 p.m., and 5.00 p.m.. However, the petitioner ignored the said notice and woke up after 14 months and filed representation dated 29.05.2012. It is submitted that re-fixation of the export obligation and the annual average from 197,933,333.33/- to Rs.12,98,71,410/- after the expiry of the license cannot be permitted. In any event, the petitioner has not filed any documents to substantiate the discharge of export obligation for the respondents to issue Export Obligation Discharge Certificate and therefore prays for dismissal of the writ petition in W.P.No.20146 of 2018.

15. Defending the impugned order, Ms.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents/Customs Department in W.P.No.31788 of 2018 submits that the petitioner has not participated in the Show Cause Proceedings dated 19.10.2011 issued by the Deputy Commissioner of Customs Department and therefore cannot plead violation of principles of natural justice as the petitioner did not produce any documents or evidence to show that it had fulfilled the export obligations. Letters dated 16.08.2010, 19.10.2011, 25.06.2013 and 19.07.2013 were issued to the petitioner fixing alternate

dates for hearing. Despite receipt of the said notice, the petitioner neither participated nor filed any reply and therefore the impugned order dated 05.12.2013, Order-in-Original No.23390 of 2014 was passed. It is further submitted that the petitioner cannot plead ignorance and in any event, in absence of any documents to substantiate the discharge of export obligation by the petitioner, the petitioner was bound to pay customs duty. Foregone, at the time of import of capital goods under the EPCG licenses read with relevant notifications issued under the Customs Act, 1962.

16. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel in W.P.No.31788 of 2018 and the learned Standing Central Government Panel Counsel in W.P.No.20146 of 2018 for the respondents.

17. The petitioner had applied for EPCG license based on three documents furnished at the time of application with the Director General of Foreign Trade for grant of EPCG license No.0430000906 dated 06.01.2003 under the provisions of Export Import Policy for the Assessment Year 2002-2003.

18. It was issued based on the average exports made by the petitioner during the last three years. The annual average of Rs.197,933,333.33/- was fixed in the said license dated 06.01.2003. The license permitted that the petitioner to import capital goods worth US $ 598,919.99. The petitioner was required to discharge the export obligation i.e., 5 times the CIF value of the imported capital goods within a period of eight years from the date of issuance of the license by maintaining an annual average export of Rs.197,933,333.33/- p.a. The petitioner was also required to export goods worth US $ 598,919.99.

19. The petitioner imported the capital goods for a total sum of Rs.57,73,588/- (US $ 1,19,793.99/- . Thus, the petitioner was required to discharge an Export obligation equivalent to 5 times the above value in eight years. At the time of import, these goods were cleared by the petitioner on the strength of the EPCG license dated 06.01.2003 bearing License No.0430000906 read with notification No.44/2002-Customs dated 19.04.2002.

20. According to the petitioner, the total due saved under the license is Rs.57,73,588.80/-. The export obligation achieved by the petitioner was 5 times the CIF value of the capital goods and the petitioner has discharged the export obligation in the very first year. The petitioner submitted that the petitioner achieved the average export during the

Assessment Years 2003-2003 to 2004-2005, which is detailed below:-

Financial Year	Total Value of Exports (Other Than Exports Under Specific EO) INR	Details of Shipping Bills For fulfilment of Average Export Obligation
2002-2003	134787968.00	134787968.00
2003-2004	152476106.00	152476106.00
2004-2005	108312626.00	108312626.00
Total	Rs.395576700.00	Rs.395576700.00

21. Facts are not in dispute. The petitioner had imported capital goods under EPCG license for a value of Rs.57,73,588/-[US$ 1,19,793.99]. Thus, under the aforesaid license, the petitioner was required to export ready made garments equivalent to five times the value of the imported goods. In other words, the petitioner was required to export goods were Rs.,2,88,57,944.00 (Rs.57,73,588 x5] or for US $ 5,98,919.99- [US $ 1,19,793.99 x5] over a period of eight years under the aforesaid EPCG license.

22. It is the case of the petitioner that the requirement to maintain its average of the past three years export performance of the same or similar goods mentioned in para 2 of the Annexure A of the EPCG license dated 6.1.2003 was wrongly arrived by the licensing authority based on the incorrect information by the petitioner on the export of fabrics as well even though the petitioner was required to maintain such export performance of the ready-made garments alone.

23. To discharge the export obligation for import of capital goods for a sum of Rs.2,88,57,944.00.(Rs.57,73,588 x 8) in eight years, the average export performance of the petitioner per year would be only Rs.36,07,243/-. Therefore, it would have been sufficient for the petitioner to maintain an average export performance of Rs.36,07,243/- per annum only i.e [Rs.2,88,57,944.00/8].

24. However, the average export performance to be achieved by the petitioner in a year was fixed in the EPCG license dated 6.1.2005 at Rs.1,97,93,333.33 per annum. The said average export performance of Rs.1,97,93,333.33 per annum almost equivalent to 68% of the total export obligation to be achieved by the petitioner over a period of eight years for a value of Rs.2,88,57,944.00 under the said license. Thus, the calculation of average export performance of Rs.1,97,93,333.33

per annum in the licence was skewed.

25. Therefore, failure of the petitioner to achieve a average export performance for the appellant to Rs.1,97 93,333.33 per annum cannot be to the disadvantage of the petitioner, if the petitioner was in a comfortable position to achieve the export obligation of Rs.2,88,57,944.00.

26. In this case, it is the case of the petitioner that between 2002-2003 and 2004-2005 the petitioner had exported goods worth Rs.39,55,76,700.00 which exceeded the overall export obligation to be achieved by the petitioner for a sum of Rs.2,88,57,944.00. This would require a proper examination both by the officers of the Ministry of Commerce i.e. the respondent Nos.1 and 3 in W.P.No.20146 of 2018 /respondent Nos.2 and 3 in W.P.No.31788 of 2018 and the respondent No.2 in W.P.No.20146 of 2018 and the respondent No.1 in W.P.No.31788 of 2018 independently. Petitioner shall file therefore such application or representation with the respective officers and explain their case within a period of 30 days from date of receipt of a copy of this order

27. I therefore set aside the impugned order in W.P.No.31788 of 2018 and remit the case back to the respondents under the Ministry of Commerce and the Ministry of Finance to re-examine the issue a fresh in

the light of the above observation and after considering the submission of the petitioner. Benefit of several amnesty schemes which were issued by the Ministry of Commerce from time to time may also be extended if the petitioner is otherwise entitled to the same. These may also be examined by the officers.

28. The petitioner is therefore directed to file a fresh copy of the application for discharge of export obligation within a period of 30 days from the date of receipt of a copy of this order. The officers under the Ministry of Commerce shall examine the issue a fresh and decide as to whether the petitioner has indeed discharged the Export Obligation or whether there was any short fall and thereafter pass appropriate orders in accordance with law on merits.

29.The officers of the customs Department shall await for further orders before passing a fresh Denovo orders on merits. The entire exercise shall be carried out by the respondents/officers within a period of six months from the date of receipt of a copy of this order.

30. In the result, W.P.No.20146 of 2018 stands disposed

and W.P.No.31788 of 2018 stands allowed with the above observations. No cost. Consequently, connected miscellaneous petitions are also closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

kkd

To

1.The Additional Director General of Foreign Trade,
Shastri Bhavan Annex, 4th Floor,
26, Haddows Road,
Chennai 600 006.

2.The Assistant Commissioner of Customs (RRU-II)
Office of the Commissioner of Customs II,
No.60, Rajaji Salai, Chennai.

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5. The Director General of Foreign Trade,
Shastri Bhavan Annex, 4th Floor,
26, Haddows Road,
Chennai 600 006.

+1cc to Mr.Gupta & Ravi, Advocate, S.R.No. 22169
+4cc to Mr.V.V.Ganesh, Advocate, S.R.No.22109 & 22110
+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No. 22064

W.P.Nos.20146 & 31788 of 2018 and
WMP.Nos.23619, 37020 & 37022 of 2018

SSD(CO)
GN(05/07/2021)