IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5637 OF 2010

Homeyar Jal Tavaria ....Petitioner

V/s.

The Union of India and Ors. ...Respondents

Mr. Shriram Sridharan for Petitioner.
Mr. Pradeep S. Jetly, Senior Advocate a/w Mr. Jitendra B. Mishra for Respondents.

CORAM : K.R. SHRIRAM &
PRITHVIRAJ K. CHAVAN, JJ.
DATED : 10th JUNE, 2022

P.C. :

1. Petitioner is challenging the legality and validity of an order dated 9th April, 2010/13th April, 2010 passed by Respondent No.2 by which the appeal filed by petitioner was dismissed and order dated 5th February, 2008 passed by Respondent No. 3 was upheld.

Rule came to be issued on 16th August, 2010. Ad-interim relief in terms of prayer clause (c) to the extent the order covered petitioner was granted.

2. Respondent No.2, in the impugned order, has upheld the order passed by Respondent No.3 calling upon petitioner to pay a sum of Rs.2,30,50,017/- being penalty that was imposed on one Taulis Pharma Ltd. This was because petitioner was the Director at the relevant point of time and the order directs recovery of penalty from petitioner because he was the Director of the company at the relevant point of time.

3. Taulis Pharma Ltd. (formerly known as Tata Pharma Ltd.) (hereinafter referred to as the company) had obtained an advance licence dated 5th December, 1996 for import of deprotenized blood extract with an export obligation to export Solcoseryl Injection. The licence had been issued by Respondent No.3. During the period from 1st October, 1995 to 2nd July, 1998 petitioner was the Managing Director of the company.

4. Respondent No.3 issued show cause notice dated 7th August, 2001 to the company but the show cause notice was sent to the address of petitioner. This is notwithstanding the fact that petitioner had resigned from the company way back in July, 1998. Petitioner responded to Respondent No.3 and stated that petitioner had resigned from the company in July, 1998 and that he did not have documents with him to even respond to the show cause notice. Notwithstanding that petitioner received an order dated 5th February, 2008 passed by Respondent No.3 imposing penalty of Rs.2,30,50,017/- on the company to be recovered from the company and its Directors, which included petitioner. The penalty was imposed under Section 11(2) of The Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act) read with Rules 10, 13 and 14 of the Foreign Trade (Regulation) Rules 1993. This adjudication order was passed based on the show cause notice dated 26th April, 2002 issued on the company. From the adjudication order itself it appears that notice of personal hearing had also been issued to the company. Petitioner had never received any show cause

notice calling upon petitioner to show cause why penalty under the provisions of FTDR Act should not be imposed upon or recovered from petitioner.

5. It is stated in the petition that petitioner has not been served any show cause notice dated 26th April, 2002 nor given a notice of personal hearing before passing of the adjudication order. It is also alleged that even the demand notice or refusal order referred to in the adjudication order were also not served upon petitioner. The adjudication order, as rightly stated by petitioner, does not mention anywhere that any show cause notice or demand notice or personal hearing notice or refusal order was ever issued to or served upon petitioner.

6. When petitioner received the adjudication order dated 5th February, 2008 petitioner filed an Appeal before Respondent No.2. The Appeal was heard and dismissed by an order dated 13th April, 2010. It is this order which is impugned in this petition.

7. At the outset we have to note that to the averment in the petition in paragraph no.22 that petitioner was neither served with a show cause notice dated 26th April, 2002 nor petitioner was given any notice of personal hearing before passing the adjudication order dated 5th February, 2008 it has not been denied in the affidavit in reply. Petitioner's averment

in paragraph no.22 that demand notice dated 7th August, 2001 and refusal order dated 3rd October, 2001 referred to in the adjudication order dated 5th February, 2008 was not served on petitioner has also not been denied in the affidavit in reply. Therefore, on this ground alone the adjudication order should go.

8. When we read the adjudication order dated 5th February, 2008, the entire order proceeds on the basis that obligations to comply with the provisions of FTDR Act was that of the company, the notices were issued to the company and even penalty has been imposed on the company. It will be useful to reproduce the following portion from adjudication order.

> *"I, therefore, <u>impose fiscal penalty on the noticee firm</u> to the extent of Rs.1,60,57,053/-. I, also impose an additional fiscal penalty of Rs.69,92,964/- which is equivalent to 50% of cif value, <u>as the noticee firm has defaulted in the export obligation</u> imposed on the licence. Thus, the fiscal penalty amount i<u>mpose on the noticee firm is</u> Rs.2,30,50,017/-. The undersigned, therefore, in exercise of the powers vested under the Foreign Trade (Development & Regulation) Act, 1992, impose a total fiscal penalty of Rs.2,30,50,017/- (Rupees Two Crores, Thirty Lakhs, Fifty Thousand, Seventeen Only). Thus , the Noticee firm and its Director viz., Shri. N.D. Khurody and Shri. H.J. Tavaria are hereby directed to pay the above said penalty amount and produce the requisite evidence to this office within a period of 30 days from the date of this Adjudication Order."*
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> *(emphasis supplied)*

9. Therefore, though penalty has been imposed on the company because company has defaulted in the export obligation imposed on the licence, in the adjudication order, Respondent No.3 has gone ahead and stated that the noticee firm and its Directors are hereby directed to pay

above penalty amount and produce the requisite evidence to his office. There is no discussion at all in the order as to how the Directors of the company become personally liable to pay penalty amount. Mr. Sridharan submitted that there is no provision in the Act which permits recovery of penalty from the Directors personally of any penalty that has been imposed on the company. Mr. Jetly in fairness agreed that there is no such provision.

10. In the submissions made to Respondent No.2 it has been submitted that there is no provisions under the FTDR Act for imposing liability on the Directors for liability of the company. The impugned order does not deal with any provisions and submissions of petitioner.

11. In the circumstances, we have no hesitation in setting aside the order dated 13th April, 2010 passed by Respondent No.2. Mr.Jetly submitted that the matter be remanded back to Respondent No.2 for *denovo* consideration. Having considered the adjudication order which is also impugned in this petition, we feel no purpose will be served by remanding the matter. We say this because the adjudication order also is fallacious because the entire order proceeds on the basis that show cause notice has been given to the company, personal hearing has been given to the company, penalty has been imposed on the company but penalty is attempted to be recovered from the Director without any basis being laid in the adjudication order. Therefore, the adjudication order dated 5th February, 2008 is also

quashed and set aside to the extent of the directions upon petitioner to pay the penalty amount.

12. Petition accordingly disposed with no order as to costs.

(PRITHVIRAJ K. CHAVAN, J.) **(K.R. SHRIRAM, J.)**