IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 08.06.2022
PRONOUNCING ORDERS ON : 10.06.2022

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

W.P.No.20751 of 2014
and MP Nos.2 & 3 of 2014

M/s.Shakthi Knitting Ltd. ,
Rep. by its Joint Managing Director
Shakthi Centre, No.3/606-C,
Nochipalayam Road
Veerapandi Post
Tirupur 641 605. ... Petitioner

-Vs-

1 Union of India
Rep. by its Secretary
Ministry of Textiles
Udyog Bhavan, New Delhi,

2 The 2nd Appellate Committee
Government of India,
Ministry of Textiles
(International Trade Section)
Udyog Bhavan , New Delhi.

3 Apparel Export Promotion Council
Rep. by its Director
No.1 3rd Street, Indira Nagar
(Off. Avinashi Road), Tirupur 641 603.

4 Apparel Export Promotion Council
Rep. by its Director (QRM)
Apparel House, Institutional Area,
Sector-44
Gurgaon 122 003, Haryana,

5 State Bank of Mysore
Rep. by its Chief Manager
72, Appachi Nagar Main
Tiruppur. ... Respondents

Prayer : Writ Petition under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records relating to the order No.14/188/2007-IT dated 8.7.2014, passed by the 2nd respondent herein quash the same.

For Petitioner : Mr.T.Ramesh
for M/s.K.S.Venkatagiri

For Respondents: Mr.S.N.Parthasarathi
SCGSC for R1 & R2

M/s.Murthi & Vasan
for R3 and R4

O R D E R

The Petitioner Company has challenged the order passed by the 2nd respondent, who in turn confirmed the order passed by the First Appellate authority viz., the Textile Commissioner, Mumbai and thereby the order passed by the 3rd respondent, directing the forfeiture of a sum of Rs.20,69,624/- was confirmed.

2. The petitioner is an exporter of readymade garments. The Government of India promulgates Foreign Trade Policy from time to time. The export of readymade garments was regulated in terms of the Knitwear Export Entitlement Quota Policy. In terms of the policy, the 3rd respondent allocates the export entitlements to various readymade garments and knitwear exporters.

3.Wherever an exporter does not fulfil the conditions regarding utilisation of quota, the 3rd respondent is entitled to forfeit the amount of earnest money etc., after issuing show cause notice to the exporter. Any exporter aggrieved by the order of forfeiture has been given two appellate remedies to redress their grievance.

4.The petitioner was sanctioned with a quota for the calendar year 2004, based on their past performance through a sanction order passed by the 3rd respondent on the application submitted by the petitioner. As per the sanction order, the petitioner should have fulfilled the prescribed value of exports within the period upto 30.9.2004. The petitioner was not able to achieve the target and hence sought for extension of time and the time was extended upto 31.12.2004 for the petitioner to achieve the quota and the petitioner also furnished bank guarantee while the extension was granted.

5.The case of the petitioner is that they were proposing to export the readymade garments manufactured by them by sea and the normal trade practice was to book the shipment with the shipping agents, who in turn will book the shipments with the shipping lines. The sea cargo was booked by the petitioner with the freight forwarding agent during the last week of December 2004 and the goods and the customs cleared documents were supposed to be handed over on 26.12.2004. At that point of time, due to severe earthquake, Tsunami struck the Eastern Coast of India and it caused havoc in Tamil Nadu on 26.12.2004. As a result of the same, the port operations were abandoned and the export bookings could not be accepted. This resulted in the petitioner not being able to ship the export garments before the quota deadline of 31.12.2004.

6. After the normalcy was restored, the petitioner exported the garments during the period from 5.1.2005 to 13.1.2005. The petitioner thereby fulfilled over 90 % of the quota allotted to them and according to the petitioner, as per the quota policy notification, there can be no forfeiture of a bank guarantee if the exporter is able to export 90 % or more of the quota fixed.

7.The Ministry of Textiles started receiving various representations from the exporters seeking for extension of time to meet the quota fixed for them due to the disruption caused by Tsunami during the last week of December 2004. The representations were taken into consideration and a quota policy circular was issued on 25.1.2005 and the relevant portion in the circular is extracted hereunder:

> “2. The matter has been carefully examined in the Ministry and it has been decided that:
> i) QAAS may not invoke the performance guarantee of such exporters who had booked their shipments in the last week of December, 2004 and have submitted the proof of shipment made upto 15th January, 2005 (in place of 31st December, 2004) against the valid endorsement given by the Councils for all country / categories.
> ii) In respect of valid quotas in category US-338/339, the performance guarantee may be returned to the exporters who have not taken endorsements, as the Council had stopped endorsements on 21.12.2004 and the category is about to hit embargo due to over endorsements. (In respect of US-347/348 there is no threat of embargo and the endorsements were not stopped at any stage).

8. The above circular was followed by a clarificatory circular dated 11.2.2005 and the relevant portion in this circular is extracted hereunder :

> “1. It is further clarified that in order to get relief in Tsunami cases where the exporter had booked their cargo for shipment in the last week of December, 2004 and the shipment had been effected by

15th January, 2005 the following documents may be submitted in the respective regional office of AEPC.

(a) Shipping bill,

(b) Bill of lading/airway bill

(c) Correspondence with the shipping lines/air lines for reserving the cargo space in the last week of December, 2004."

9.The specific case that has been put forth by the petitioner is that they have fulfilled all the conditions prescribed in the above circulars and the shipment had been effected by 15.1.2005 and as a consequence, they are entitled for the relief granted in the circulars and they have fulfilled their quota obligations.

10. The grievance of the petitioner is that the 3rd respondent issued a notice dated 27.6.2005 calling upon the petitioner to explain as to why the bank guarantee furnished by the petitioner should not be forfeited on account of short shipment/non-shipment. The petitioner gave a reply to the 3rd respondent. The stand taken by the petitioner was not accepted by the 3rd respondent and an order was passed on 26.9.2005 wherein forfeiture was ordered to the tune of Rs.20,69,624/-. This order was confirmed by both the appellate authorities. Aggrieved by the same, the present Writ Petition has been filed before this Court.

11. The first and second respondents have filed a counter affidavit and the relevant portions are extracted hereunder:

> "13. In this present case, the petitioner was allotted NIE/NQ/PP quota during the year 2004 under country/category EU/4, 7,26, US/340,338, 347, 638 & US/2GR. As the Petitioner unit did not utilize the quota fully, the 3rd respondent had forfeited an amount of Rs.20,69,624/- by issuing a speaking order vide No.AEPC/T/OTH/PDC/2004/SPK-ORD/852 dated 26/09/05 (Annexure-'A').
>
> 14. It is submitted that aggrieved by the forfeiture imposed by the 3rd respondent, the petitioner went in appeal to the 1st Appellate Committee i.e., the Office of the Textile Commissioner, Mumbai. The Committee after perusing the records and on hearing the representative of the petitioner found that the circumstances as stated in the appeal by the petitioner are not of FORCE-MAJEURE conditions. The Petitioner has taken the plea of Tsunami for

the short supply. However, the petitioner could not produce any valid documentary evidence to prove that the space had been booked for shipment before the date of Tsunami. Partial relief of Rs.1,54,356/- was granted towards the proof of shipment submitted after the issuance of speaking order. Therefore, the Committee vide Order-in-appeal No.21/144(S)/2005/EP-II/726 dated 18/06/2007 (Annexure-'B'), revised the forfeiture amount to Rs.19,15,268/- and ordered the 3 respondent to issue revised order accordingly.

15. It is further submitted that aggrieved by the order of the 1st Appellate Committee, the petitioner firm preferred an appeal before the 2nd Appellate Committee in the Ministry of Textiles, New Delhi, the second respondent herein. After hearing the petitioner the 2nd appellate committee observed that the petitioner could not establish the direct linkage between Tsunami and their short/non-shipment and directed the petitioner to submit documentary evidence in support of their claim vide its orders dated 08/05/2008, 10/02/2009 & 10/02/2010. As the petitioner could not produce the relevant documents/evidence in support of their claim in spite of providing various opportunities, the 2nd appellant committee considered the appeal on the basis of the documents available on record and after detailed discussion, decided to reject the appeal vide its order No.14/188/2007-IT dated 08/07/2014. (Annexure-'C').

16. I submit that the petitioner was thus given sufficient opportunity of being heard, the forfeiture order dated 26/09/2005 has been confirmed by both the 1st Appellate Committee and 2nd Appellate Committee after perusing the records and after hearing the representative of the petitioner. I submit that in the circumstances, there is no ground for interference with the said orders and this Hon'ble Court ought not to entertain the present petition."

12. Heard Mr.T.Ramesh, learned counsel for the petitioner,

Mr.S.N.Parthasarathi, learned Central Government Standing Counsel for R1 & R2 and M/s.Murthi & Vasan, learned counsel for R3 and R4.

13. This Court has carefully considered the submissions made on either side and the materials available on record.

14.There is not much of a dispute on the quota policy and the export obligation that has to be fulfilled by an exporter within the stipulated time failing which the concerned authority is entitled to pass an order of forfeiture. It is also not in dispute that the petitioner was expected to fulfil the export obligation by 30.9.2004 and this was extended based on the request made by the petitioner upto 31.12.2004.

15. The Tsunami struck Tamil Nadu coast on 26.12.2004 and it caused havoc. The port operations had to be abandoned during the last week of December 2004 and as a result, the export bookings could not be accepted and the petitioner was not able to ship the export garments before the quota deadline of 31.12.2004.

16. The Ministry of Textiles took into consideration the hardship faced by the exporters who were not able to ship the goods during the last week of December 2004 due to Tsunami. This resulted in the issuance of a circular and a clarificatory circular, referred to supra. The petitioner seeks to take advantage of the extension of time granted by the above circulars. The crux of the issue that is involved in this Writ Petition is to ascertain as to whether the petitioner has fulfilled the conditions imposed in the circular and thereafter complied with the export obligation on or before 15.1.2005.

17. On carefully going through the orders passed by the First and Second Appellate authorities, it is seen that both the authorities have concurrently found that there was absolutely no proof on the side of the petitioner to establish that they had booked the space for shipment during the last week of December 2004. In other words, the petitioner did not produce any document to show that the liners had booked the space for shipment within the stipulated time. Both the authorities have understood the circular and interpreted it to the effect that the booking of space for the shipment should have been done before the date of Tsunami.

18. The learned counsel for the petitioner submitted that the trade practice was such that the shipments were never booked directly with the shipping lines and it was always booked with the shipping agents. The learned counsel submitted that the booking with the freight forwarders took place on 26.12.2004 and

the freight forwarder through letter dated 27.12.2004 informed the petitioner that they are not in a position to accept the booking since the port operations were totally abandoned and port gate was closed due to Tsunami. The learned counsel further submitted that the details furnished before the authorities and before this Court shows that the exports had taken place during the period from 5.1.2005 to 13.1.2005 and this could not have happened without the booking of space for shipment during the last week of December 2004.

19. There are three documents that were expected to be submitted under the clarificatory circular dated 11.2.2005. The petitioner had submitted the first two documents viz., the shipping bill and bill of lading. Insofar as the third document is concerned, the clarificatory circular specifically speaks about the production of the document which must substantiate that the shipping lines had reserved the cargo space during the last week of December 2004. When it came to this document, what was produced by the petitioner was the sea cargo booking made by the petitioner with the freight forwarders on 26.12.2004. According to the petitioner, it is the freight forwarder who in turn co-ordinates with the shipping lines and books a space for shipment. Therefore, this document will not be available with the petitioner. On carefully going through the orders passed by both the appellate authorities, it is seen that the petitioner was given sufficient opportunity to produce the document and the petitioner was not able to produce that relevant document.

20. Both the appellate authorities have rendered a finding to the effect that the circular insists upon the booking of space for shipment with the shipping lines before the date of Tsunami. In the considered view of this Court, this finding is not in line with the circular dated 25.1.2005 and the clarificatory circular dated 11.2.2005 and what has been prescribed therein is that the booking of the shipment by reserving the cargo space should have taken place in the last week of December 2004. The circular does not mention that the bookings should have taken place before the date of Tsunami i.e. on 26.12.2004. A beneficial circular cannot be given a restricted meaning as interpreted by the appellate authorities and any exporter who had fulfilled the shipping requirement in the last week for December 2004 will be entitled for the relaxation provided under the circular.

21. In the light of the above finding, this Court should satisfy itself as to whether the petitioner had fulfilled the third condition by reserving the cargo space in the last week of December 2004. The fulfilment of this condition is not a matter of assumption and it must be considered objectively based on the materials available before this Court.

22. It is now a settled law that a beneficial and an incentive oriented scheme that is extended by a department and i is availed by an assessee or an exporter, such a benefit should not be denied on a mere technicality. In all those cases, the Court must be satisfied that there is substantial compliance and all pre-conditions have been satisfied. It will not be open for the Court to ignore the conditions stipulated in exemption notifications. Once specific conditions are prescribed in an exemption notification, the beneficiary has to necessarily comply with the conditions and the concept of liberal construction would not arise. Exemption being an exception has to be respected regard being had to its nature and purpose. The Court must also take into consideration the object sought to be achieved by the exemption notification.

23.Keeping in mind the above, this Court has to ascertain as to whether the correspondence that took place between the petitioner and the freight forwarding agent fulfil the third document prescribed under the clarificatory circular dated 11.2.2005.

24. Admittedly, the petitioner did not produce any correspondence by the forwarding agent with the shipping lines to prove reservation of the cargo space in the last week of December 2004. Even though the petitioner may not have a direct contact with the shipping lines, that does not in any way prevent the petitioner from collecting the relevant document from the shipping agent which will clearly establish as to whether the shipping line had reserved the cargo space in the last week of December 2004. Just because the exports had taken place between 5.1.2005 to 13.1.2005, this Court cannot assume that such exports had happened only because of the reserving of cargo space in the last week of December 2004. From the correspondence between the petitioner and the shipping agent, it is seen that the agent had informed the petitioner on 27.12.2004 that they cannot accept the booking since the port operations will be closed for 2 days. This means that there were no port operations till 29.12.2004. If at all any cargo space was reserved, it could have happened only between 30.12.2004 and 31.12.2004. There is no document to prove that the booking of cargo space had taken place within these two days.

25. In view of the above discussion, this Court has to necessarily hold that the petitioner did not fulfil the third condition by producing the relevant document as required by the clarificatory circular and therefore, the petitioner will not be entitled to the benefits prescribed by the circulars. The fulfilment of the conditions is a condition precedent for taking the benefits under the beneficial circulars. Both the appellate

authorities concurrently found that the petitioner did not fulfil the third condition and this Court does not find any illegality in the said finding.

26. The upshot of the above discussion leads to the only conclusion that the orders under challenge does not require the interference of this Court and accordingly, this Writ Petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

KP

To

1 The Secretary,
Union of India
Ministry of Textiles
Udyog Bhavan, New Delhi,

2 The 2nd Appellate Committee
Government of India,
Ministry of Textiles
(International Trade Section)
Udyog Bhavan, New Delhi.

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5 State Bank of Mysore
Rep. by its Chief Manager
72, Appachi Nagar Main, Tiruppur.

+1cc to M/s.K.Venkatesan, Advocate, S.R.No.35034

W.P.No.20751 of 2014

VG-II(CO)
SB(20/06/2022)