IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 12.03.2024

CORAM

THE HONOURABLE MR. JUSTICE R.SURESH KUMAR
AND
THE HONOURABLE MR. JUSTICE K.KUMARESH BABU

Writ Appeal No.296 of 2015
and M.P.No.1 of 2015

M/s.FAL Industries Ltd.,
(now merged with Forbes & Company Limited),
Regional Office: The Catholic Centre,
108 Armenian Street, Chennai – 600 001. ... Appellant

Registered Office: Forbes Building,
Charanjit Rai Marg, Fort Mumbai – 200 001.

Represented by its Managing Director,
Ashok Barat.

Vs

1.Directorate General of Foreign Trade,
Udyog Bhavan, New Delhi – 110 011.

2.Deputy Director General of Foreign Trade,
Udyog Bhavan, New Delhi – 110 011.

3.Foreign Trade Development Officer,
New Delhi.

4.State Bank of India,
Commercial Branch,

232, NSC Bose Road,
Chennai – 600 001. ... Respondents

PRAYER:- Writ Appeal has been filed under Clause 15 of Letter Patent against the order dated 21.08.2013 made in W.P.No.44020 of 2002.

For Appellant : Mr.S.Murugappan

For RR1 to 3 : Mr.K.Subbu Ranga Bharathi
Central Govt. Standing Counsel

For R4 : Mr.R.Imayavaramban
for M/s.Ramalingam Associates

JUDGMENT

(Judgment of the Court was made by Mr.K.KUMARESH BABU.,J.)

This Intra-Court Appeal had been preferred by the unsuccessful Petitioner, wherein, they challenge to the demand made by the second respondent herein upheld by the learned Single Judge.

2. Heard Mr.s.Murugappan, learned counsel for the appellant, Mr.K.Subbu Ranga Bharathi, learned Central Government Standing Counsel appearing on behalf of the respondents 1 to 3 and Mr.R.Imayavaramban, learned counsel for M/s.Ramalingam Associates appearing on behalf of the fourth respondent.

3. Mr.S.Murugappan, the learned counsel appearing on behalf of the appellant would submit that the appellant is engaged in the manufacture and export of various products including typewriters and air purifiers. A Scheme called to Export Promotion Capital Goods Scheme came to be introduced by the Government and the appellant had obtained a licence from the first respondent for the purpose of manufacture and export of air purifiers. Under the said Scheme, the importer was eligible to avail the concessional rate of customs duty for importing machineries, which was subject to the condition that the licencee exports a specified quantum of goods manufactured by using the machinery. He would further submit that the appellant had imported machineries worth about Rs.59,59,050/- and based upon the concessional duty that was available to them, they had also paid a sum of Rs.8,68,724/-. The appellant company had executed a bond with the customs authority and also an undertaking with the first respondent with regard to the completion of the exporting obligations as required under the licence.

4. Since, there was no demand for the air purifiers abroad, the appellant company was not able to make any exports what so ever, pursuant to the licence granted, in spite of its best efforts. By a public notice dated 06.04.1999, the Government of India granted extension of the export obligation in respect of the licence holder under the Scheme. The appellant company had also applied to the first respondent for extension of the export obligation period for which a bank guarantee furnished by the fourth respondent was also submitted to the first respondent. In spite of the extension granted, the appellant was not able to full fill its obligation under the licence.

5. In the interregnum, the Director of Revenue Intelligent, had issued a show cause notice calling upon the appellant to explain as to why the differential duty should not be demanded and as to why they should not be liable to charged with interest at 24% per annum, on the basis of the bond that had been executed. By an order dated 23.02.2000 the Commissioner of Customs had passed orders confiscating the goods imported. But however

allowed them to be redeemed the same on payment of a fine of Rs.11,58,000/-. The said authority had also confirmed the difference in duty, apart from imposing a penalty of Rs.1,16,000/- in terms of section 11(a) of Customs Act, 1962, besides the demand of 24% interest per annum on the differential custom duty. Against which, a Statutory Appeal had been preferred before the Appellate Tribunal. The Appellate Tribunal, by its order dated 13.09.2002 had confirmed the demand of duty, but, however had set aside the confiscation and the penalty and also the demand of interest at 24%.

6. He would further submit that the second respondent herein by a notice dated 27.03.2002 had called upon the appellant to pay 24% of interest on custom duty and had claimed an interest for a sum of Rs.95,44,751/-. He would submit that the Appellate Tribunal had held that there is no provisions under the Customs Act to demand an interest of 24% and therefore, the claim of the second respondent seeking 24% of interest on the differential customs duty is not traceable to any of the provisions of the Enactment either it be the Customs Act, 1962 or the Foreign Trade

(Regulation) Rules 1993. However, by the impugned communication in the writ petition dated 26.11.2002, had called upon the fourth respondent to disburse an amount of Rs.64,87,912/- immediately in favour of the Customs, Chennai from the date of issue of the said letter. He would therefore, submit that the said communication, which relates to the payment of 24% of interest on the customs duty is liable to be set aside.

7. He would further submit that the learned single judge had not appreciated the material facts on record and only by relying upon a judgement of the Hon'ble Apex Court in ***Rexnord Electronics and Controls Limited's case*** reported in ***2008 (12) SCC 156*** had dismissed the Writ petition. In that context, he would submit that the said judgment does not deal with the facts of the present case and the judgment relied upon by the appellant in ***VVS sugars case*** reported in ***1999 (4) SCC 192*** and in the case of ***India Carbon Limited's case*** reported in ***1997 (6) SCC 479*** would only be squarely applicable to the case on hand, wherein the Hon'ble Apex Court had held that only when there is substantive provision for payment of interest alone, the demand of penalty or interest could be levied. Therefore,

he would submit that the order impugned before us would have to be set aside and consequently, the impugned communication issued by the second respondent would also have to be set aside.

8. The learned counsel appearing for the respondents 1 to 3 would submit that the appellant had been extended the benefit of an EXIM policy under Export Promotion Capital Goods Scheme, wherein a licencee would be permitted to import machinery with a reduced customs duty on the condition that the said company/ individual export goods manufactured through the imported machineries. He would submit that on an application made by the appellant for manufacture of the air purifiers under the said policy, the appellant had been granted licence to import machinery for the manufacture of air purifiers with a the condition that the appellant exports a quantified number of air purifiers manufactured by using the said machineries. Based upon the said licence issued to them, the appellant had imported the machineries and had availed the benefit of reduced customs duty. However the appellant had not exported even one air purifier, as obligated under the licence, even after the extended period. He would

submit that while granting a licence, the appellant had executed an Indemnity cum Guarantee Bond in the year 1993, under which they were obligated to perform their export obligation and realise a free foreign exchange to an extent of USD 817520 within the period specified under the agreement. On failure to fulfill his obligations, they were obligated to pay an amount equal to 24% of interest per annum on the amount of duty saved from the date of import of first consignment till the date of payment. Admittedly, in this case, the appellant has not exported any materials bringing in any foreign exchange whatsoever. Hence, as per the Indemnity cum Guarantee Bond executed by the appellant, they are liable to pay a value equal to 24% of interest on the difference in customs duty which otherwise he would be liable to pay on the date of import of the machinery.

9. He would further submit that dehors the Indemnity cum bank Guarantee executed by the appellant, the appellant had executed a bond in favour of the Customs Department agreeing to pay an interest of 24% per annum on the differential customs duty on their failure to fulfill the obligation under the licence. The Tribunal had in fact upheld the order of

difference in demand duty, but had set the side the confiscation of goods imposing of penalty and demand of interest at 24% penalty. The reason assigned by the Tribunal in setting aside the demand of interest was that there was no statutory provisions in the Customs Act for demand of interest. The Tribunal had relied upon the decision of the Settlement Commission in the cases of ***Rajshri Plastiwood Limited*** reported in ***2001 (130) ELT 295 and Philips (India) Limited Vs CC. Mumbai*** reported in ***2001 (137) ELT 697*** to come to such a conclusion. In that context, he would submit that the Hon'ble Apex Court in the case of ***Rexnold Electronics and Controls Limited*** (referred supra) had held that even if the demand of interest under the Customs Act is not traceable to any statutory provision, when a bond had been executed by the company and the demand of interest is based upon the bond, then such a demand of interest is a valid demand and in that regard it had set aside the order of Settlement Commission by holding that the Settlement Commission did not have jurisdiction to waive the amount of interest payable under the bond.

10. He would further submit that the demand of interest under the

Customs Act by the Customs authority on the basis of the bond executed in its favour is different from the demand made by the respondent under the Indemnity cum Guarantee Bond executed by the appellant in favour of the respondents. He would further submit that the demand based upon the Indemnity cum Guarantee was not a demand of interest of 24% but an amount equal to 24% of the differential customs duty that was enjoyed by the appellant, which is a penal charge that the appellant had agreed to pay on its failure to complete his obligations for which the licence had been issued. Therefore, he would submit that the cases relied upon by the appellant in support of their contention cannot be applied to the facts of the present case, which had also been rightly done by the learned Single Judge. The learned counsel for the respondents would also contend that such a clause under the Indemnity cum Guarantee Bond invoked against the appellant even though is not backed by any statutory provisions, the appellant is bound by the Indemnity cum Guarantee bond and therefore, he would submit that there is no reason to interfere with the order passed by the learned Single Judge.

11. Mr.R.Imayavaramban, the learned counsel appearing for the Bank would submit that even in the writ petition they had filed an counter affidavit indicating that the amount had been with held by them only based on the interim order passed by the Court and they are willing to honor their commitment under the bank guarantee subject to the result of the Writ Petition.

12. We have considered the submissions made by the learned counsels appearing on either side and perused the materials available on record before this court.

13. From the facts that had been narrated by the respective counsels, the following facts are emerged.

(a) The appellant had executed an indemnity cum guarantee bond towards the performances of its obligations under the licence that has been granted.

(b)When the appellant was extended the benefit under the licence by the licence Authority, they were levied with a reduced customs duty as per the EXIM policy. They had also executed a bond in favour of the customs authority for payment of the differential customs duty together with interest, if they fail to perform their part of obligation for which they had been granted the benefit of an EXIM policy.

14. It is not disputed that when the appellant company had the benefit of reduced customs duty and if they fail to perform their obligation under the licence for which the benefit had been extended, they would be liable to pay the difference in customs duty. In fact, their challenge to the demand of customs duty had become final, as the appellant had not initiated any further action against the order passed by the Appellate Tribunal. As per the bond that had been executed before the customs authority, they were liable to pay 24% of interest. The same had been set aside by the Appellate Tribunal by holding that there is no statutory provision for such a condition. It is not known whether the Department had preferred any further proceedings against the order.

15. Be that as it may, the issue involved in this *lis* does not arise out of the bond that had been executed by the appellant company in favour of the Customs authorities. The *lis* had arisen out of an Indemnity cum Guarantee Bond that had been executed by the appellant at the time of grant of licence that is on 04.01.1993. The relevant clause under the said agreement, for better appreciation of the facts is extracted hereunder:-

> *"...*
>
> *h) that in the event of his default in meeting the aforesaid obligations/ conditions, he shall pay an amount equal of 24% interest per annum on the amount of duty saved from the date of import of the first consignment till the date of payment.*
>
> *........."*

16. A reading of the said clause would indicate that it is not the interest on the differential customs duty that the appellant ought to pay in their default of fulfilling its obligations under the licence. The said clause deals with an eventuality of the appellant in defaulting in meeting the obligation under the said bond. They would be liable to pay an amount equal of 24% interest per annum on the amount of duty saved. Therefore, the said clause, would only mean that it is a penalty which is quantified at

24% of interest on the duty saved. Therefore, the same cannot be equated to an interest that had been claimed by the customs authorities.

17. In that context, it would be useful to refer to the judgment of the Hon'ble Apex Court in the case of ***Rexnold Electronics and Controls Limited*** reported in ***2008 (12) SCC 156*** that had been referred to by the learned counsel for the appellant. A reading of the aforesaid judgment would indicate that the Hon'ble Apex Court, even in a case, where there is a claim by the Customs Department of 24% interest was held to be valid, as the Settlement Commission did not have the jurisdiction to waive an interest under the bond executed. The judgment relied upon by the appellant in ***India's Carbon Limited case*** cannot be said to be applicable to the facts of the present case for the simple reason, was that the demand therein was for a delayed payment of sales tax. The Hon'ble Apex Court had held that such a demand could not be made unless or otherwise it is supported by a substantive provision of law. Similarly, in the case of ***VVS Sugars*** relied upon by the learned counsel for the appellant, was a levy of interest on the arrears of tax. Therefore, the said judgment also cannot be applied to the

facts of this case. We hold that the aforesaid two judgments may not be applicable to the present case is for the simple reason that there was no issue as to whether a bond executed by a person like the appellant company would be bad, if the same is not supported by any substantive provision.

18. However in the case of ***Rexnold Electronics and Controls Limited,*** it could be seen that the issue was on the basis of a bond that has been executed by the company therein. In the said case, the Settlement Commission had waived an interest that had been claimed by the Department on the basis of the bond executed by the company. The Hon'ble Apex Court had held that the appellant company therein having evaded from payment of the duty, which it was bound to pay is also liable to pay the interest in the terms of the bond executed by it. In fact the Hon'ble Apex Court had held that the Settlement Commission only had a jurisdiction to waive a statutory interest, but not an interest that had been demanded on the basis of the bond executed by the company there in.

19. Further, in this case as we have arrived at a finding that what had

been demanded was a penalty for not fulfilling an obligation which had been quantified to be equal to 24% of interest per annum of the difference in customs duty. The contentions raised by the learned counsel for the appellant that the respondents are not entitled to charge any interest on the difference in customs duty would have to fall.

20. The learned counsel for the appellant had vehemently contended that such a clause under the bond itself would have to be held to be a void condition which in our considered view is without any merits. Learned Single Judge had traced the said clause to Rule 6(2)(b) of the Foreign Trade (Regulation) Rules 1993. For better appreciation the said rule is extracted here under:-

> *"6.Conditions of (licence, certificate, scrip or any instrument bestowing financial or fiscal benefits):-*
>
> .....
>
> *(2)The licensing authority may issue a (licence, certificate, scrip or any instrument bestowing financial or fiscal benefits) for import subject to one or more of the following conditions, namely:-*
>
> *(a)....*

(b) that the applicant for a (licence, certificate, scrip or any instrument bestowing financial or fiscal benefits) shall execute a bond for complying with the terms and conditions of the (licence, certificate, scrip or any instrument bestowing financial or fiscal benefits).”

21. Rule 6 deals with the conditions of licence, Sub Rule (2)(b) of the Rules mandates that an applicant for a licence should execute a bond for complying with the terms and conditions of the licence. The said Rule in clear terms mandates that an applicant for licence should execute a bond for complying with the terms and conditions of the licence. In compliance with the said Rule, the bond had to necessarily be executed by the appellant herein. It is axiomatic that when a person claims certain benefits on certain conditions and if that benefit is extended to a particular individual, he would have to fulfill his obligations on which basis the licence had been granted, or otherwise the executor can be penalised.

22. In this case he had been granted a benefit of reduced customs duty on the promise of bringing in foreign exchange into the country. Since, it had not full filled its part of obligations, definitely it is liable to be

penalised. The condition which the appellant counsel seek to be void on the basis of not being supported by any substantive provision would have to fall, since an execution of bond is contemplated under Rule 6 (2) (b) of Foreign Trade (Regulation) Rules 1993 and the reason for the execution of the bond is for the appellant to fulfill its obligation under the licence. Therefore, it is too farfetched for the appellant to content that the said condition would be a void condition.

23. For the aforesaid findings and the reasonings, we are not inclined to interfere with the order passed by the learned Single Judge.

24. In fine, this Writ Appeal fails and is accordingly, dismissed. However, there shall be no order as to costs. Cosnequently, connected miscellaneous petition is closed.

(R.S.K.,J.) **(K.B., J.)**
12.03.2024

Index: Yes/No
Speaking Order/Non Speaking Order
Neutral Citation:Yes/No
gba

To

1.Directorate General of Foreign Trade,
Udyog Bhavan, New Delhi – 110 011.

2.Deputy Director General of Foreign Trade,
Udyog Bhavan, New Delhi – 110 011.

3.Foreign Trade Development Officer,
New Delhi.

4.State Bank of India,
Commercial Branch,
232, NSC Bose Road,
Chennai – 600 001.

R.SURESH KUMAR., J.
and
K.KUMARESH BABU.,J.

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