IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.04.2024

PRONOUNCED ON : 03.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

W.P.No.11007 of 2021
and W.M.P.No.11659 of 2021

M/s.Gem Granites Private Limited,
Rep. by its General Manager S.Gpoal,
No145, Injambakkam,
Chennai – 600 041. ...Petitioner

-Vs-

1. The Director General of Foreign Trade,
   Ministry of Commerce & Industry,
   Government of India,
   Udyog Bhawan,
   New Delhi – 110 001.

2. The Development Commissioner,
   Ministry of Commerce and Industry,
   MEPZ-SEZ, NH-45, Tambaram,
   Chennai – 600 045. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records pertaining to the impugned order F.No.01/92/171/13/AM-19/PCVI/61-62 dated 12.01.2021 passed by the first respondent and quash the same as illegal, without jurisdiction and in violation of principles of natural justice.

For Petitioner : Mr.Ganesh Aravind
For Mr.Lakshmi Kumaran

For Respondents : Mr.N.Ramesh,
Special Panel Counsel

ORDER

This writ petition has been filed challenging the order passed by the first respondent dated 12.01.2021, thereby dismissed the appeal filed by the petitioner as against the order-in-original dated 16.05.2018 passed by the second respondent, thereby imposing penalty of Rs.9.62 lakhs.

2. The petitioner company is engaged in the manufacture and export of commodities such as dimensional granite blocks, processed, dressed, cut and granite slabs. It's export oriented unit holding Letter of Permission dated 21.12.2004 issued by the second respondent. It was subsequently extended from time to time. It was issued to the petitioner for its factory located at No.145, Injambakkam, Chennai – 41, for export.

3. The process of manufacturing is that the mother rock, which is approximately about 700 to 800 cubic meters in size is cut. Further cut

into smaller blocks and from these blocks, the trimmed dimensional and dressed blocks are produced. The natural defects are eliminated and then blocks with uniform color and grain are cut after further eliminating weathering, flaws, cracks, patches and other defects by a continuous process of drilling and trimming. After this process, trimmed dimensional blocks which are about 5 to 8 cubic meters in volume and about several tons in weight are produced. These blocks are transported to the factory for further processing which involve chipping, pitching, drilling, dressing, sawing, splitting, washing, breaking and trimming.

4. When the export orders are received for dimensional blocks, these processes are completed at the quarry site itself and directly exported from the quarries as bringing the dimensional blocks to the factory and then sending them to the port involves huge transportation and handling cost, which can otherwise be avoided. Considering the huge size of the dimensional blocks, they alone are exported from the quarry itself without brining them into the factory.

5. While being so, the petitioner had declared his export and import details in their Annual Performance Report. On receipt of the same, the petitioner was issued with show cause notice dated 24.11.2016 by the second respondent seeking details of exports of granite blocks made by the petitioner from the quarry site for the period from 2011-2016. The petitioner by its reply dated 24.11.2016, furnished the details of their exports.

6. However, the petitioner was issued with show cause dated 24.03.2017, stating that by exporting Rs.961.79 lakhs worth of dimensional blocks during the year 2011-16, directly from the quarries, which were not licensed premises under the Letter of Permission, thereby the petitioner contravened the provisions of Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992, (hereinafter referred to as "the Act") as such, the petitioner was caused show cause notice as to why adjudication proceedings as contemplated under Section 13 of the Act, should not be initiated against the petitioner for imposition of penalty under Section 11(2) of the Act.

7. Though the petitioner submitted explanation the same was not considered and enquiry was conducted and the petitioner was imposed penalty of Rs.9.62 lakhs by the second respondent, thereby holding that there is contravention of the provisions of the Act and Rules made thereunder. Aggrieved by the same, the petitioner filed an appeal before the first respondent and the same was also rejected by the impugned order. Hence, the petitioner approached this Court by way of the present writ petition.

8. The learned counsel appearing for the petitioner submitted that the first respondent had no jurisdiction to impose penalty under Section 11 of the Act, since there is no contravention of provision under the Act, Rules, orders and the Foreign Trade Policy. In order for penalty to be imposable under Section 11(2) of the Act, there must be an import or export of goods made in contravention of the provisions of the Act, Rules and Orders made thereunder.

8.1. He further submitted that as per the Foreign Trade Policy, the only requirement as applicable to export oriented unit is that it shall not engage in export of goods prohibited in ITC(HS) and that the unit shall earn positive net foreign exchange. The issue related to direct export of granite blocks from the quarry is no longer *res integra* and has been decided in favour of export oriented unit by the Tribunal, which held that once positive net foreign exchange is maintained and export obligations are fulfilled, the exporters are eligible for the exemption.

8.2. In support of his contention, he relied upon the judgment of this Court reported in ***2017 (349) E.L.T.214 (Mad.)*** in the case of the ***Jewels Magnum Vs. Development Commer., MEPZ-SEZ, Chennai,*** which held as follows :-

> *28. The learned counsel for the petitioner relied on the Full Bench decision of this Court in the case of (State of Tamil Nadu v. Nu-tread Tyres) (2002) 142 STC 256 (Madras) wherein the Full Bench of this Court has held that the person who makes a declaration must do so with full knowledge that the declaration so made by him is not correct or he made such declaration knowing it to be false. It was held by the Full Bench of this Court that in such case, the authorities must satisfy themselves that there appears an element of mens rea on the part of the assessee to make false representation or misdeclaration*

with full knowledge to evade customs duty or other charges to the exchequer. In the absence of the same, the authorities are not justified in imposing penalty. Further it was held that when there are two views are plausible, in the matter as to whether the goods purchased are covered by the registration certificate or not, the mere issue of a C form certificate by the assessee without any further material will not lead to the conclusion that the assessee has made false representation and the question whether the assessee acted under the honest belief or not is a question of fact. By applying the ratio laid down by the Full Bench of this Court to the facts of this case, in this case, the petitioner manufactured and exported medallions on the basis of the Letter of Approval given to them. Such goods exported by the petitioner was accepted and approved by the respondent without any demur. Moreover, the respondent themselves have given certificate of appreciation to the petitioner firm for achieving highest export turnover in the year 2010-2011 in gem and jewellery sector. Such a certificate could not have been issued by the respondent without examining the manner in which the export process has been commenced and completed by the petitioner, whether the petitioner has violated any of the terms and conditions of LoA and other factors which might have weighed the respondent for issuing such a certificate of appreciation.

Such certificate will also throw much light on the fact that the petitioner has not made any misrepresentation or misdeclaration to cheat the exchequer or there is any mens rea on the part of the petitioner to do so. In such view of the matter, in the absence of any ill-intention or mens rea on the part of the petitioner to gain unlawfully by exporting goods which are not permitted to be exported by them as per the LoA, as has been held by the Full Bench of this Court, the respondent is not justified in imposing penalty."

9. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

10. On perusal of counter filed by the respondents and on the submission made by the learned Special Panel Counsel appearing for the respondents revealed that, the Letter of Permission was issued for manufacturing and exporting the dimensional granite blocks, processed, dressed, cut in all assorted dimensions and granite slabs from the unit at 145, Injambakkam, Chennai. Admittedly, during the period 2011-16, the petitioner had made export from the quarry site to the tune of Rs.961.79 lakhs. The petitioner was not able to bring the blocks from the quarry to

the factory due to logistics constraints. As per the Letter of Permission issued to the petitioner, the unit had to export the entire production or service, excluding rejects and sales in the domestic tariff area as per the provisions of export oriented unit scheme for a period of five years from the date of commencement of production.

11. As per notification No.52/2003 Cus. Dated 31.03.2003, the quarried goods shall be removed from the quarry site only to supply to unit's own processing unit or for supply to another export-oriented unit or the unit in the special economic zone engaged in processing or production or manufacture of articles of granite and export thereon and shall not be allowed to be exported as such or to be cleared in domestic tariff area. But the petitioner failed to follow the mandatory stipulation that goods quarried can be shifted from quarry site only for supply to the unit's own processing zone or for supply to another export oriented unit.

12. Further, the petitioner made exports from the quarry directly, but took shelter under notification No.52/2003 Cus., dated 31.03.2003, in para (iv)7(iv)(g) of the notification, which states that the

petitioner may, subject to such conditions and limitations as they may specify and subject to the provisions of the export and import policy, allow. The petitioner stressed the word in the above notification with the explanation that they have not exported as such, but only after carrying out operations like, trimming, sawing, dressing etc, on the granite block mined.

13. A breach of civil obligations which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. A penalty imposed for a tax delinquency is a civil obligations, remedial coercive in its nature and is far different from the penalty for a crime, or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.

14. In view of the above discussions, this Court finds no infirmity or illegality in the order passed by the first respondent as well as the second respondent. The writ petitioner is devoid of merits and

liable to be dismissed. Accordingly, the Writ Petition stands dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

03.06.2024

Internet: Yes
Index : Yes/No
Speaking/Non Speaking order

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To

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