IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.06.2024

CORAM:

THE HON'BLE MR. JUSTICE G.K. ILANTHIRAIYAN

W.P. No.13613 of 2021 and
W.M.P.No.14484 of 2021

M/s.Rockhill Granite & Marble Pvt., Ltd.,
By Director Sri.Subhash Jamad
34, Ormes Road, Kilpauk,
Chennai-600 010. ... Petitioner

vs.

Government of India rep. by its
Deputy Director General of Foreign Trade,
Ministry of Commerce and Industry,
Office of the Additional Director General of Foreign Trade,
Sastry Bhawan, Haddows Road,
Chennai-600 006. ... Respondent

Prayer : Writ Petition is filed under Article 226 of Constitution of India to issue a writ of Certiorarified Mandamus calling for the records relating to F.No.04/21/021/00106/AM03 dated 04.05.2021 and quash the same and directing the respondent to extend the benefits that are available for the petitioner, pursuant to the petitioner's compliance of export obligation.

For Petitioner : Mr.D.Nelliappan

For Respondent : Mr. P.R.Ramesh Babu

ORDER

This writ petition has been filed challenging the order passed by the respondent dated 04.05.2021 thereby imposed fiscal penalty of Rs.1,00,00,000/- in addition to the notional customs duty and interest thereon under section 11(2) of Foreign Trade (Development & Regulation) Act, 1992 read with Foreign Trade (Development & Regulation) Amendment Act, 2010 (Notification dated 20.08.2010) as amended from time to time.

2. The petitioner was granted an Export Promotion Capital Goods (hereinafter called as EPCG) license/Authorization No.0430000700 dated 16.07.2002 for a total C.I.F/F.O.R. Value of Rs.33,00,000/- under 5% concession duty EPCG Scheme for procurement of capital good indigenously listed with the said license/authorization with an obligation to export "Granite rough Blocks and Polished Slab" manufactured out of the indigenously procured capital goods to the tune of total F.O.B value of USD 336,048,87 i.e., 5 times of the C.I.F. value on F.O.B. basis equivalent to free foreign currency over and above the annual average of

the past export performance fixed for Rs.9,19,005.51 within a period of 8 years from the date of its issue, subject to the condition that 15% of export obligation should be met in the 3rd and 4th year and balance 50% of export obligation should be met with the next two years from the date of issue of license. Accordingly, the petitioner was required to submit the export documents under Appendix-9A, as per Para 5.13 of Hand Book of Procedures 2002-2007 within a period of three months from the date of expiry of above block periods. However, the petitioner was required to submit a report on fulfillment of export obligation by 30th April of every year to the Licensing Authority/Regional authority and also required to submit the installation certificate issued by the Central Excise Authority or Chartered Engineer as the case may be, within a period of six months from the date of import to the Regional Authority/Licensing Authority. However, the petitioner failed to do so and as such the petitioner was imposed penalty by an order impugned in this writ petition dated 04.05.2021.

3. The learned counsel for the petitioner submitted that the petitioner had taken efforts to comply with all the requirements. Following the permission of the respondent permitting the petitioner to procure indigenous capital goods in brand new condition. The petitioner had installed the machineries in the quarry for excavation of granite blocks. The petitioner had also extended the bank guarantee to the tune of Rs.5,28,000/- under EPCG scheme notified by the Government under the Export/Import policy and procedure as security for any loss or damage caused or suffered by the Government by reason of breach by the Importer/Exporter of any of the terms or conditions of the license. The petitioner ought to have direct the 3rd party exports or supply 100% export oriented units of rough blocks, polished slabs, polished tiles and stones. Accordingly, the petitioner had done export oriented units. The petitioner also completed export obligation through 3rd party exports. While being so, the petitioner was served with show cause notice. However, without giving opportunity of hearing, order was passed on 04.02.2021. Therefore, it was challenged before this Court in W.P.No.7813 of 2021 and the same was quashed by this Court by an order dated 29.03.2021 and directed to remand back the issue for fresh consideration and final orders by affording a fair hearing to the petitioner.

Therefore, the petitioner was heard. Even then the petitioner was not given opportunity of hearing as directed by this Court. In fact, he submitted documents along with letter dated 28.04.2021 to show that the petitioner had made direct exports and 3rd party exports towards Export Oriented Units and Annual Average. Further, on 06.02.2012, the petitioner submitted request before the Director General of Foreign Trade for reduction of Annual Average maintenance. The same was forwarded to the Zonal Joint Director General of Foreign Trade by its communication dated 13.04.2012. However, the said request was not considered so far. That apart, there is no loss and as such the order for imposing penalty cannot be sustained.

4. The counter affidavit filed by the respondent revealed that on submission of records scrutinizing was done and the following defects were noticed and communicated to the petitioner with a request to furnish documents by communication dated 20.01.2011. The requested documents for scrutiny are as follows :

"a. Copies of Export Promotion Capital Goods shipping bills for Invoice No.1,2,3,4,5,355,356 dated 24.05.2005, 4/1/9.2005, 2/2.6 2006, 414,439,440 as all exports were through

third party. The firm had furnished only Form H Certificate for proof of exports.

b. EPCG license No. and date was not figuring in Shipping Bill No.1601688, 2206749, 2221607, 2428830, 2453134, 2480883 and the exports were through 3rd party which could not be counted towards fulfillment of export obligation.

c. Copies of Bank Realization certificates for all third party exports.

d. Disclaimer certificate from all third parties authorizing M/s.Rockhill granites and Marbles P. Ltd., for claiming the benefit of export obligation under the EPCG license.

e. Statement with shipping details showing Annual average Maintenance from AM03 to AM10 as per ANF 5B of Public Notice No.5/23.8.2010."

5. On receipt of the same, the petitioner failed to reply. Therefore, the respondent issued show cause notice to the petitioner. Though the petitioner was given opportunity of hearing on several occasions, the petitioner failed to submit his reply. Finally the petitioner submitted reply, on scrutiny of reply the following deficiencies were noted and communicated to petitioner. The said deficiencies are as follows:

"a. To furnish copies of Export Promotion Capital Goods shipping Bills for Invoice No.1,2,3,4,5,355,3561 dated 24.04.2005, 4/1.9.2005, 2/2.6.2006, 414, 439, 440 as all exports were through third party. The firm had furnished only Form H certificate of exports and one shipping bill for Invoice No.3/2.12.2002, shipping bills for other invoices were yet to be submitted.

b. EPCG license No. and date was not figuring in shipping bill No.1601688, 2206749, 2221607, 2428830, 2453134, 2480883 and the exports were through 3rd party which could not be counted towards fulfillment of export obligation.

c. Copies of Bank Realization Certificates for all third party exports were to be furnished.

d. Disclaimer Certificate from all third parties authorizing M/s.Rockhill Granite & Marble Pvt., Ltd., Chennai for claiming the benefit of export obligation under the EPCG license No. and date.

e. Statement with shipping details showing Annual average Maintenance from AM03 to AM10 as per ANF-5B of Public Notice no.5/23.8.2010, as only summary details of annual average maintenance were submitted. Revised ANF-5B with specific export obligation and annual average maintenance for the license to be furnished and also extended bank guarantee beyond 04.08.2011."

6. Thereafter, the petitioner was served with several reminders to furnish those documents which were stated supra as per various communications, the petitioner failed to produce any of the documents. Finally the petitioner was served with show cause notice and also date fixed for personal hearing. The request made by the petitioner, sufficient time was granted for personal hearing. Even then the petitioner failed to appear for personal hearings. Therefore, the attitude showed by the petitioner delay tactics for evading payment of customs duty and applicable interest thereon against such default. Therefore, the case was adjudicated by an order dated 04.02.2021 and imposed penalty of Rs.1,00,00,000/-. However, the said order passed by this Court on 29.03.2021 remand back the issue for fresh consideration and final orders by the respondent by affording a fair hearing to the petitioner. Accordingly, the adjudicating authority fixed the final hearing on 20.04.2021 and the Director of M/s.Rockhill Granite & Marble Pvt., Ltd., appeared and also admitted that they had fulfilled the specific export obligation even though they had not maintained the annual average of past Export performance, mainly because there was no direct export during 2005-2010 periods. However, the petitioner requested to taken

into consideration the exports done during the period 2010-2011, 2013-14 to 2015-16 for annual average export periods. But as per the conditions of EPCG Scheme, only on successful maintenance of Annual Average till the year in which the specific export obligation is completed. Specific export obligation shall be reckoned towards fulfillment i.e, the specific Export Obligation met over and above the Annual Average Export Performance only would be reckoned towards fulfillment of total Export Obligation. Therefore, the request of the petitioner for considering exports made by them during period not covered under the original export obligation could not be considered as per validity in existence. The specific contention of the petitioner is that the petitioner had made direct exports and 3rd party exports towards Export obligation and Annual Average, they had not maintained the Annual Average from the period of issue of license till the period of fulfillment of specific export obligation. That apart, the bills produced by the petitioner shown towards maintenance of Annual Average were also duplicated, reflecting in specific export obligation fulfillment statement which contravenes the condition of maintenance of Annual Average and fulfillment of export obligation over and above the Annual average export performance. That apart, the request made by the petitioner for considering exports made by them for the subsequent periods 2010-11, 2013-14 to 2015-16 are not covered under export obligation period. Further, the order impunged in this writ petition dated 04.05.2021 has been passed under Foreign Trade (Development & Regulation) Act, 1992 read with Foreign Trade (Development & Regulation) Amendment Act, 2010 (Notification dated 20.08.2010) thereby imposed penalty under section 11(2) of Foreign Trade (Development & Regulation) Act, 1992 read with Foreign Trade (Development & Regulation) Amendment Act, 2010 (Notification dated 20.08.2010) as amended from time to time. As against the said order there is provision for appeal clause under section 15 of Foreign Trade (Development & Regulation) Act, 1992 read with Foreign Trade (Development & Regulation) Amendment Act, 2010 within a period of 45 days from the date of issuance of adjudication order on condition that the petitioner shall pay the entire penalty amount imposed under this Act. However, the petitioner without exhausting the appeal remedy directly approached this Court under Article 226 of Constitution of India in order to avoid the deposit of entire penalty.

7. In view of the above, this writ petition is devoid of merits and liable to be dismissed. Accordingly, this writ petition is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

11.06.2024

Index: Yes/No
Internet: Yes/No
Speaking Order/Non-Speaking Order
gvn

To

The Deputy Director General of Foreign Trade,
Ministry of Commerce and Industry,
Office of the Additional Director General of Foreign Trade,
Sastry Bhawan, Haddows Road,
Chennai-600 006.

G.K. ILANTHIRAIYAN, J.
gvn

W.P. No.13613 of 2021

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