

(2012) 05 DEL CK 0166

Delhi High Court

Case No: CM No. 5366 of 2012 (for directions) in Writ Petition (C) 2016 of 2012

Xtraa Cleancities Ltd.

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision: May 2, 2012**Acts Referred:**

- Foreign Trade (Development and Regulation) Act, 1992 - Section 15
- Special Economic Zones Act, 2005 - Section 21

Hon'ble Judges: Rajiv Sahai Endlaw, J**Bench:** Single Bench**Advocate:** Amit Sibal, Mr. Prashant Kumar and Mr. Amit Singh, for the Appellant; A.S. Chandhiok, ASG and Mr. Jatan Singh, P.S. Parmar for UOI, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

The Adjudicating Authority constituted u/s 21 of the Special Economic Zones, Act, 2005 r/w Foreign Trade (Development & Regulation) Act, 1992 has vide order dated 21st December, 2011 imposed penalty of `66.30 crores on the petitioner Company and also suspended the Importer Exporter Code No. 4606000066 of the petitioner Company, a Unit in Vishakhapatnam SEZ. The petitioner Company appealed against the said order to the Appellate Authority constituted u/s 15 of the Foreign Trade Act. That the petitioner Company prior to imposition of the penalty aforesaid entered into an agreement for purchase on High Seas, of Fatty Acid Methyl Ester (FAME) for a total sale consideration of `72 crores. The petitioner Company claims to have been unable to pay the said sale consideration and was thus unable to have the said imported goods released which are claimed to be incurring demurrage. The petitioner Company further claims that the foreign seller of the said goods has agreed to take back the said goods and the petitioner Company was thus required to re-export the same. However since the Importer Exporter Code No. 4606000066 of the petitioner Company had been suspended, the petitioner Company was unable to. The petitioner Company in the circumstances applied to the Appellate Authority for revoking the suspension of the Importer Exporter Code No.

4606000066 for the purpose of re-exporting the said goods.

2. The Appellate Authority vide order dated 23rd March, 2012, though permitted the petitioner Company to export/re-export the said goods but subject to conditions of securing the penalty amount aforesaid and against the imposition of which the appeal was pending.

3. The petitioner Company earlier filed W.P.(C) No. 1788/2012 impugning the imposition of the said conditions. The said writ petition was disposed of vide order dated 29th March, 2010 whereby the petitioner Company was permitted to submit alternative security then what had been demanded by the Appellate Authority.

4. However dispute arose about the acceptance of the said alternative security also and which led to the filing of the present petition which was disposed of vide detailed order dated 12th April, 2012. The interest of the respondents were sought to be protected by directing the petitioner Company inter alia to furnish a bond giving security of all the assets of the petitioner Company. The respondents were directed to furnish the draft of the bond to the petitioner Company.

5. Disputes have yet again arisen and in which regard this application has been filed in the disposed of writ petition. Notice of this application was issued and a reply thereto is handed over in the Court and is taken on record.

6. It is recorded in our order dated 12th April, 2012 disposing of the writ petition that the assets of the petitioner Company of which security was directed to be given in the form of a bond, are mortgaged with the State Bank of India (SBI) which is holding a first charge over the said assets. Notwithstanding the same, the goods (FAME) aforesaid were permitted to be exported on the security of the same assets, on twofold argument of the counsel for the petitioner Company. It was submitted that the penalty if ultimately found recoverable from the petitioner Company was recoverable as arrears of land revenue and which are recoverable irrespective of charge created in favour of any other entity, SBI in this case. It was secondly submitted that the dues of the SBI were secured not only by creating a charge in favour of SBI, of the assets of the petitioner Company but also by creating a charge of the personal assets of the Director of the petitioner Company and the dues now outstanding were much less than the combined value of the assets of the petitioner Company and the assets of the Director of the petitioner Company.

7. The crux of the dispute now, is that the respondents" demand for an NOC from the SBI, for execution of the bond aforesaid by the petitioner Company in favour of the respondents, in terms of our order dated 12th April, 2012. The counsel for the petitioner Company contends that it is inconceivable that any banker would give such an NOC. Per contra, the learned ASG has contended that without such NOC from the SBI, the SBI which presently is holding the title deeds of the assets of the petitioner Company and its Director, would on satisfaction of its dues release the said title documents/charge; it is

also contended that though the dues presently of the SBI are stated to be much less than the value of the assets but nothing prevents the petitioner Company from availing further financial limits from SBI on the strength of the charge already created and in both of which eventuality it is argued that the respondents would be left "high and dry".

8. We may also notice another development which has taken place since our order dated 12th April, 2012 disposing of this writ petition. The Appellate Authority has decided the appeal preferred by the petitioner Company against the order of imposition of penalty, by remanding the matter to the Adjudicating Authority for consideration in the light of "additional arguments" raised by the petitioner Company. Though the said order of the Appellate Authority is ambiguous, as to whether the earlier order of the Adjudicating Authority imposing the penalty stands set aside or not and in which regard permission has been granted to the petitioner Company to seek clarification from the Appellate Authority (vide our order dated 25th April, 2012 in W.P.(C) No. 2434/2012 preferred by the petitioner Company) but the fact of the matter remains that the liability, if any of the petitioner Company for penalty is still under consideration by the Adjudicating Authority itself and thus cannot be said to be crystallized as yet.

9. We are, in the circumstances of the opinion that the apprehensions expressed by the learned ASG on behalf of the respondents, can be taken care of without requiring the petitioner Company to seek an NOC from the SBI as desired by the respondents, by clarifying that:-

- a. if any amounts are ultimately found due from the petitioner Company to the respondents, the respondents shall be entitled to recover the same as permitted in law and including by asserting priority (if entitled to) over the dues of the SBI;
- b. by injuncting the petitioner Company from, till the matter aforesaid of penalty is at large, availing any further facilities/financial accommodation from the SBI on the strength of the security already furnished to the said bank and by further restraining the petitioner Company from withdrawing the said security from the said bank even if the dues of the bank are discharged;
- c. by restraining the petitioner Company and its Directors mentioned in the order dated 12th April, 2012 from, till the issue of penalty is at large, doing any other act prejudicially affecting the securities aforesaid and/or affecting the rights aforesaid of the respondents therein;
- d. by permitting the respondents to inform the SBI of the aforesaid, to ensure compliance. We direct accordingly.

10. Though we had in our order dated 12th April, 2012 directed furnishing of a bond by the petitioner Company to the Adjudicating Authority and draft/form of which bond was to be supplied by the respondents to the petitioner Company but it appears that the respondents instead of a "bond" supplied a draft of a "mortgage deed" to be executed by

the petitioner Company. The learned ASG has also argued that the said mortgage deed is to be registered. The petitioner Company claims to have already submitted a bond-cum-legal undertaking in terms of our order 12th April, 2012 with the respondents.

11. The purport of our order dated 12th April, 2012 was not a mortgage deed requiring registration but a commitment by the petitioner Company for recovery of the penalty if any ultimately imposed on it from the assets of the petitioner Company and which according to the counsel for the petitioner Company the respondents in law also are entitled to. Mr. Prashant Kumar, Advocate for the petitioner Company states that he is authorized to make a statement binding the petitioner Company in terms of our order dated 12th April, 2012. We accept the said statement and further secure the respondents by also restraining the petitioner Company from dealing in any manner with the said assets to the prejudice of the respondents, till, as aforesaid the question of penalty is at large.

12. In view of the aforesaid, we direct the respondents to permit the petitioner Company to forthwith re-export the goods aforesaid by treating the Importer Exporter Code No. 4606000066 of the petitioner Company as valid for the said limited purpose and subject of course to compliance of all rules, regulations & laws.

13. This order has been made to ensure the re-export of the goods, to save the petitioner Company from liability for price thereof and of demurrage and we sincerely hope that no further impediments, at least by the Adjudicating Authority shall be posed in the same. The application is disposed of in above terms.