(2009) 10 AP CK 0055

Andhra Pradesh High Court

Case No: Writ Petition No. 10166 of 1999

Suryovonics Ltd.		APPELLANT
	Vs	
Union of India (UOI), Ministry of Commerce, Directorate General of Foreign Trade, The Appellate Committee, Government of India, Ministry of Commerce and Union of India (UOI), Ministry of Commerce		RESPONDENT

Date of Decision: Oct. 13, 2009

Acts Referred:

- Foreign Trade (Development and Regulation) Act, 1992 - Section 20(2), 4
- Imports and Exports (Control) Act, 1947 - Section 4, 4I

Citation: (2010) 2 ALT 137 : (2010) 254 ELT 73

Hon'ble Judges: Sanjay Kumar, J; B. Prakash Rao, J

Bench: Division Bench

Advocate: B. Prakash Reddy, for B. Nalin Kumar, for the Appellant; A. Rajashekar Reddy, Asst. Solicitor General, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

B. Prakash Rao, J.

The petitioner, an industrial concern, seeks writ for mandamus challenging the correctness of the orders passed initially by the first respondent dated 3.3.1998, as confirmed in Appeal by the second respondent dated 4.5.1999, arising out of the proceedings purported to have been issued u/s 4-I of the Imports and Exports (Control) Act, 1947 (for short the Act, 1947).

2. The facts undisputed, are that the petitioner company has entered into a memorandum of understanding with ''Energy Conversion Devices Inc., of USA'' (ECD) with mutual obligations, where under the said ECD has agreed to provide the technology and with buy-back 50% of the installed capacity. Accordingly, the petitioner company submitted an application-dated 20.08.1986 to the Secretariat of Industrial Approvals, Government of India for issuance of letter of intent or industrial licence as contemplated under the Rules. However, the said letter of intent was granted on 19.4.1988 i.e., after lapse of period of 20 months. Immediately, the petitioner applied for conversion of the letter of intent into industrial licence on 12.12.1988. The said licence was issued on 26.12.1999, again with a delay of 12 months. The petitioner states that normally such licence has to be issued within a period of six weeks only and in terms thereof the licence was granted as late as on 24.7.1991. Under the said licence, the petitioner is permitted to manufacture "Photovoltaic Cells, Modules and products/systems based on Amorphous Ssilicon". The complaint of the petitioner is that having regard to such long delays, necessarily it lead to delayed commencement of actual activity. In spite of that, the petitioner was able to commence the commercial production on 1.4.1990. The said ECD agreed for an additional memorandum of understanding to buy-back 100% of the production for two years. Once again with further delay on the part of IDBI, ICIC and IFCI the approval for the project was granted on 20.2.1991 for the further phase to be implemented, therefore according to the petitioner, having regard to the delay of almost 54 months i.e., from 20.08.1986 to 20.02.1991 resulted in increase of project cost from Rs. 15 crore to about Rs. 20.25 crore having an effect on the viability. Meanwhile, the said ECD sold itself to M/s. Cannon, a Japanese multinational company and a new company was formed under the name and style "United Solar Systems Corporation'' in early 1991. The said new company M/s. Cannon with a view to avail the benefits of NAFTA and lower cost of labour in Maxico, decided to set up a plant similar to Phase-I of the petitioner at the border in Mexico. Further M/s. Cannon reneged on agreement complaining about the delays in implementation. Therefore, the petitioner had to seek for alternative market for exports or to make supplies to domestic markets. During the period 1989 to May 1991, the petitioner imported capital goods of Rs. 54.57 lakhs and raw material of Rs. 87.91 lakhs for implementation of the project and availed the exemption since it is 100 % export oriented unit. With all the difficulties so faced, the petitioner could export to a tune of Rs. 68.09 lakhs between 1.4.1991 to 31.3.1996. Further, in view of the encouragement by the Government of India for the development of application of use of solar power in the country, the petitioner made efforts to develop domestic market. Therefore, the petitioner had filed an application on 12.3.1992 for debonding to enable domestic sale. Thereupon the second respondent herein/Appellate Committee, Government of India, as per their communications dated 4.6.1992, 29.12.1993 and 8.8.1995 permitted the petitioner to withdraw from 100% EOU scheme subject to following conditions;

(i) payment of duties under the Customs Act and Rules framed thereunder.

(ii) depositing a penalty of 10% of CIF value of capital goods,

(iii) obtaining fresh approval under the current Industrial Licencing Policy.

3. On submission of 23 Ex-bond bills of entry for assessment of duties under the Customs Act and Rules thereunder on 29.12.1995, the Assistant Commissioner of Excise passed an order on 5.2.1996 assessing the duties and penalty at Rs. 36,82,917/-. Aggrieved thereby, the petitioner has filed an appeal to the Commissioner (Appeals) Customs and Central Excise, Hyderabad, which was dismissed on a technical objection of non-compliance of pre-deposit for an appeal. Meanwhile, as per the letter dated 22.3.1996, the Development Commissioner, Visakapatnam Export Processing Zone, intimated the Excise Authorities and the petitioner that 10% penalty on CIF value of the imported capital goods for non fulfillment of export obligation was exempted and sought for necessary action for issue of final debonding letter after fulfilling the conditions.

4. Therefore, the case of the petitioner is that the total liability towards duty payable for debonding and withdrawal of 100 % EOU, since pending before the Assistant Commissioner of Central Excise, in terms of the order of the remand passed in Appeal by the CEGAT, where substantial questions affecting the rights and claims of the petitioner and the liability are involved. Further, in spite of the aforesaid checkered events, the first respondent viz., Ministry of Commerce, Director General of Foreign Trade Issued a show cause notice dated 16.5.1997 calling upon the petitioner to explain why penalty should not be levied u/s 4-I of the Act, 1947 read with Section 20(2) of the Foreign Trade (Development and Regulation) Act, 1992 (for short Act 1992) and other connected provisions of law on the ground that the petitioner failed to meet its export obligations and prescribed value addition of 21.5 %. To the said show cause notice, the petitioner submitted an explanation on 29.5.1997 pointing out all the aforesaid events including the factum of permission granted to it vide letters dated 4.6.1992, 29.12.1993 and 8.8.1995 for withdrawing from the export obligation and therefore the question of non compliance does not arise. However, without properly considering the said explanation and reasons given from a proper perspective, the orders dated 3.3.1998 were passed levying a penalty of Rs. 1 crore u/s 4 of Act, 1947 and Act, 1992.

5. Challenging the same, the petitioner earlier filed WP 10723 of 1998 which was disposed of by this Court as per the orders dated 11.6.1998, observing that since the petitioner has an effective alternative remedy of regular appeal before the second respondent and therefore directed for consideration of the appeal without objection on account of any delay and further directions not to take any steps for recovery in the meanwhile. Thereupon, the petitioner has filed an appeal before the second respondent and the said appellate authority CEGAT by orders dated 16.3.1999 allowed the appeal and remanded the matter back to the Assistant Commissioner of

Excise with directions to pass fresh orders. Accordingly, in terms of the said order of remand, the matter is pending before the said authority and no orders are passed.

6. The petitioner further points out that it had entered into a revised memorandum of understanding on 13th September, 1998 and the Central Government as per letter dated 29.12.1993 waived the condition of the export obligation. It was also pointed out that a further show cause notice was given on 12.1.1995 by the Visakapatnam Export Processing Zone on similar lines, to which the petitioner has submitted its explanation on 2.2.1995. This was followed by letter dated 8.8.1995 by the Government of India revising the conditions of debonding. The Visakapatnam Export processing Zone, through its Development Commissioner by letter dated 22.3.1996 waived 10 % penalty. Later issued a revised show cause on 31.10.1996, for which again the petitioner has filed an explanation dated 13.11.1996. Thereupon, fresh orders dated 5.12.1996 and addendum to the orders was passed on 5.12.1996 itself. Later another show cause notice dated 11.10.1999 was issued by the Visakapatnam Export Processing Zone, for which, the petitioner submitted explanation dated 26.10.1999. It is to be noticed that the very same authority has issued a suo-moto debonding letter dated 2.1.2000 and the Joint Development Commissioner issued similar suo-moto debonding letter on 10.2.2000, which was again followed by a fresh show cause notice dated 17.1.2002, for which the petitioner submitted explanation on 19.2.002. The order of the Appellate Authority CEGAT dated 21.1.2003 whereupon the petitioner has submitted a letter dated 23.5.2003 enclosing challans in terms of another application filed by the petitioner dated 22.2.2003 before the Joint Commissioner for permission to destroy the excisable goods, the Commissipner granted remission vide order dated 14.10.2003 and destruction proceedings were issued on 21.12.2003. However, impugned orders are passed by second respondent on 4.5.1999 without considering several of the aspects including as to the factum of debonding and the effect thereof.

7. Therefore, the case of the petitioner in short is to the effect that having regard to the aforesaid checkered events and the factum of debonding and permission as granted, the petitioner cannot be held responsible nor can be made liable for any such penalties nor the very provisions u/s 4-I of the Act, 1947 has any application. In the circumstances, the petitioner challenges entire proceedings of levying the penalty as illegal and beyond the scope of the said provisions, hence, the writ petition.

8. In the counter affidavit filed on behalf of the respondents, apart from the usual denial in general, however there is no denial as to the afore mentioned checkered events as pointed out by the petitioner in the affidavit of the writ. The entire tenor of the counter affidavit, which has been sworn to by the Deputy Director General of Foreign Trade in the office of the Joint Director General of Foreign Trade, Hyderabad runs only to the effect that the petitioner had made exports worth Rs. 68.09 lakhs only as against the export obligation of Rs. 4067 crore and thus failed to achieve the

stipulated value addition of 21.5 % as per the permission given to him by the Ministry of Industries''. It is only due to such failure on his part, show cause notice was issued on 16.5.1997 and speaking orders were passed imposing penalty and the same was re-examined in detail in appeal and same was rejected rightly holding that the capital goods and material goods have not been utilized as intended. Further since there is non-performance and non utilization of import goods it squarely, runs contrary to the very objective for grant of export oriented status. The imposition of fiscal penalty is just and fair, particularly where the unit has sought debonding. It is further pointed out that even as per letter dated 8.8.1995 it was stipulated that the penalty imposed by the appropriate authority for non fulfillment of export obligation and value addition shall be paid by the petitioner before debonding, therefore, the petitioner cannot have any excuse of whatsoever nature to wriggle out of the liability for penalty. Therefore there are no merits and the writ petition is liable to be dismissed.

9. Heard in detail from both sides, Sri D. Prakash Reddy, learned senior counsel appearing for petitioner and Sir A. Rajashkar Reddy, learned Assistant Solicitor General on behalf of the respondents.

10. Taking into account all the varied submissions from both sides and on reading of the material on record, the point which emanates for consideration is as to whether on the facts and circumstances of the case, the provisions of Section 4-I of the Act, 1947 are applicable and the petitioner is liable for penalty.

11. For proper appraisal, it necessitates to read Section 4-I of the Act, 1947 which reads as follows;

4-I: Liability to Penalty: (1) Any person who,- (a) in relation to any goods or materials which have been imported under any licence or letter of authority, uses or utilizes such goods or materials otherwise than in accordance with the conditions of such licence or letter of authority; shall be liable to a penalty not exceeding five times the value of the goods or materials, or one thousand rupees, whichever is more, whether or not such goods or materials have been confiscated or are available for confiscation.

12. There cannot be any dispute as to the attraction of the aforesaid provisions. On a bare reading it provides for a penalty where there is a failure discharge the export obligation from any person using or utilizing such goods or materials otherwise than in accordance with the conditions of licence or later on authority. Considering aforesaid provisions in Taarika Exports and Another Vs. Union of India (UOI) and Another, the Supreme Court held that the plea of any such person to the fact that there is any incompatibility of compliance of obligation, cannot be a valid ground to avoid the liability. In that case, after issuance of a show cause notice to the petitioner for not exporting goods utilizing the benefits under Act, 1947 and Act 1992, within the stipulated time by the said petitioner who is engaged in export and

import activities under the Export and Import Code in pursuance of the licence granted to them, an explanation was given stating that the conditions under the licence were unrealized and therefore non fulfillment of the application is beyond their control. The said explanation was rejected by the authorities and imposed the penalty. Dismissal of the writ petition by the High Court and further appeal to the Supreme Court, it was held that such a plea cannot be entertained since it was found by the authority that there was- an infraction of the conditions imposed by the licence. Therefore in those circumstances, it was held that the imposition of the penalty is correct. This case stands dissimilar to the case on hand on facts.

13. Further coming to the facts of the present case, as stated there is no serious dispute on the part of the respondents both in the counter affidavit filed in reply to the writ nor even during the course of arguments on behalf of the respondents about the factum of issuance of licence to the petitioner and the events which lead to present situation. There is no dispute nor any explanation forthcoming on behalf of the respondents as to why the delays as pointed out by the writ petitioner since inception even at the stage of grant of the licence could not be avoided and as to how the petitioner can be held responsible. The delay as pointed out is virtually runs to almost 54 months from 20.8.1986 to final approval by IDBI on 20.2.1991. The petitioners cannot be blamed on this account. There is no dispute to the fact that the party at the other end viz., ECD sold itself to M/s. Cannon a multinational company of Japan and a new establishment under the name and style "United Solar Systems Corporation exist in the year 1991. Further the said new company in parallel sought to establish another unit on the same lines as that of the petitioner''s Phase-I in the land situate at border of Mexico and tried to take advantage of NAFTA agreements and fresh agreements of goods between US and Mexico. There is thus a total remission on the part of the said new company at the other end which has lead the petitioner to opt for alternatives apart from pursuing exports to the extent possible. Even this fortuitous circumstances are not within the bounds of the petitioner. The petitioner admittedly exported to a tune of Rs. 68.09 lakhs, no doubt far below the original quantity. However, the respondents have acted upon the application filed by the petitioner on 12.3.1992 seeking for debonding for the purpose of domestic sale and the second respondent did issue such permission from 4.6.92, 29.12.93 and 8.8.1995 permitting withdrawal of 100% EOU scheme and, yet the proceedings were initiated for imposition of penalty and nothing on any of these aspects appears to have been taken into consideration. Even the later proceedings would show that the petitioner was given waiver of condition regarding export obligation as per the proceedings of the Government of India dated 21.12.1993 followed by further waiver at different levels. There exists a debonding letter which has been issued suo-moto both by the Development Commissioner, Visakapatnam Export Processing Zone on 2.1.2000 and Joint Development Commissioner on 10.2.2000. The effect of these proceedings and permission granted vide proceedings dated 4.6.92, 29.12.93 and 8.8.1995 permitting withdrawal

of 100% EOU scheme and the circumstances leading thereto are apparently not kept in view, before invocation of the aforesaid provisions u/s 4-I of the Act, 1947. From these and the permission granted by the concerned authorities it amply shows that the petitioner cannot be found fault with any such failure nor there is any intentional lapse or latches on his part. The acts of the .company at the other end changing its very nature and petitioner finding himself at the odd end would only show that there is no such failure or any intention on the part of the petitioner as such to violate any of the conditions on his own. Therefore, it cannot be said that the authorities can straightaway invoke the provisions u/s 4-I of the Act, 1947 and impose the penalty. Surprisingly these aspects were not kept in view before the order of penalty is thrust against the petitioner. Especially where there is no denial as to these events, the respondents cannot shut their eyes and invoke such onerous provision. It is well established that while interpreting any provision contemplating imposition of penalty, is on the face of it a penal in nature, cannot be lightly invoked exercised without giving due adherence to the core facts and circumstances of the case. It cannot be said as an open and shut case of clear violation of the petitioner. There are ample reasons which had to led to present imbroglio. The respondents are well within the knowledge of these circumstances and they themselves did act on the application of the petitioner for debonding and allowing domestic sale and authorities cannot wholly disown. This is not a case, where the petitioner himself on his own account without the knowledge of the authorities, used or misdirected the materials. Unless an act of violation is directly attributable to the person, penal liability cannot be extended. Each case has to be considered on its own merits and circumstances. Therefore, we are of the view that the entire impugned action since inception by invocation of provisions of Section 4-I of the Act by the authorities is, totally arbitrary and illegal, apart from being unsustainable in the facts and circumstances of the case.

14. In view of the aforesaid reasons, the petitioner cannot be made liable for the penalty as imposed under the impugned proceedings. Hence, the entire proceedings are liable to be set aside. Accordingly, the impugned proceedings dated 3.3.1998 and 4.5.1999 are set aside and the writ petition is allowed. In the circumstances there shall be no orders as to costs.