

Goenka and Goenka Vs. Uoi and ors

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Court : Delhi

Decided On : Nov-18-2013

Judge : V. K. Jain

Appellant : Goenka and Goenka

Respondent : Uoi and ors

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on:

13. 11.2013 Date of Decision:

18. 11.2013 WP(C) No.876 of 2008 GOENKA & GOENKA Through: Petitioner Mr. Raja Chatterjee, Ms. Runa Bhuyan, Ms. Rita Jha & Ms. Manisha P., Advs. versus UOI & ORS Through: + Respondents Mr. Kuljeet Rawal & Mr. Jagjit Singh, Advs. for R-3. W.P.(C) 1214/2008 BIRDY FASHION P. LTD. Through: Petitioner Mr. Raja Chatterjee, Ms. Runa Bhuyan, Ms. Rita Jha & Ms. Manisha P., Advs. versus UOI & ORS Through: + Respondents Mr. Amrit Pal Singh, CGSC with Mr. Roshal Lal Goel, Adv. Mr. Kuljeet Rawal & Mr. Jagjit Singh, Advs. for R-3. W.P.(C) 1216/2008 BIRDY FASHION P.LTD. Through: Petitioner Mr. Raja Chatterjee, Ms. Runa Bhuyan, Ms. Rita Jha & Ms. Manisha P., Advs. versus UOI & ORS Through: W.P.(C) No.876/2008&connected matters Respondents Mr. Kuljeet Rawal & Mr. Jagjit Singh, Page 1 of 18 Adv. for R-3. + W.P.(C) 1217/2008 GOENKA & GOENKA Through: Petitioner Mr. Raja Chatterjee, Ms. Runa

Bhuyan, Ms. Rita Jha & Ms. Manisha P., Advs. versus UOI & ORS Through: + Respondents Mr. Kuljeet Rawal & Mr. Jagjit Singh, Advs. for R-3. W.P.(C) 1218/2008 GO-GO INTERNATIONAL Through: Petitioner Mr. Raja Chatterjee, Ms. Runa Bhuyan, Ms. Rita Jha & Ms. Manisha P., Advs. versus UOI & ORS Through: + Respondents Mr. Amrit Pal Singh, CGSC with Mr. Roshal Lal Goel, Adv. Mr. Kuljeet Rawal & Mr. Jagjit Singh, Advs. for R-3. W.P.(C) 1219/2008 GO-GO INTERNATIONAL Through: Petitioner Mr. Raja Chatterjee, Ms. Runa Bhuyan, Ms. Rita Jha & Ms. Manisha P., Advs. versus UOI & ORS Through: W.P.(C) No.876/2008&connected matters Respondents Advs. for R-3. CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

Section 5 of the Foreign Trade (Development & Regulation), Act, 1992 provides for formulation and announcement of the Export and Import Policy by the Government of India and amendment of the said policy from time to time. Section 11 of the said Act provides that no export can be made except in accordance with the provisions of the said Act, Rules and Orders made thereunder, as also the Export and Import Policy for the time being in force. Pursuant to the aforesaid provision, the Government of India, vide notification dated 12.11.1999 announced the policy for allotment of entitlements for the year 2000-2004 in respect of the countries where the exports are covered by restraints under the provisions of Agreement on Textile and Clothing. Similar policy was notified by the Government for previous years as well. Under the said policy, export of garments and knit-wears to certain countries such as USA, Canada and European Union known as Quota Countries could be undertaken only on the basis of quota allotted to the exporters by the respondents - Apparel Export Promotion Council (AEPC) which was to function as Quota Administering Authority, in terms of the said notification. The quota for the export for each allotment was to be allocated under the following system at the rate indicated against each of them: System of Allotment Percentage of Annual Level (a) Past Performance Entitlement (PPE) System 70% (out of which HVE) (5%) (b) New Investors Entitlement (NIE) System (c) Non Quota Entitlement (NQE) System (d) First Come First Served (FCFS) System

Total (ii) 15% 5% 10% 100 Quantities that become available from time to time on account of surrenders, flexibilities or otherwise shall also be allocated under the First Come First Served (FCFS) System. The allotment of quota was to take place in two parts - each consisting of 50% of the allotment. The first part of the quota was valid from the date of allotment till 31st May of the year whereas the second part was valid till 30th September of the said year. In case of the allotment valid till 31st May, transfer could be allowed till the last date and the unutilized quota lapsed. In case of allotment valid till 30th September, transfer could be allowed till 20th September and the original quota holder or the transferee could get an extension till 31st December on payment of the Bank Guarantee (BG) and Earnest Money Deposit (EMD) at the specified rates. The BG submitted by the exporters while seeking extension of un-utilized quotas expressly guaranteed that the exporter shall abide by all the terms and conditions of the allotment mentioned in the notification dated 12.11.1999 issued by the Government of India, as amended from time to time and Policy Circular No.99/20 dated 16.11.1999 issued by AEPC, as amended from time to time on the Scheme for Export of Garments and Knit-Wears from India and also any other instructions and/or directions issued by AEPC and would produce proof of shipment of the goods in the manner and under the terms and conditions prescribed by AEPC. In the event of exporters failure to utilize the export entitlements, as stipulated in the said notification and circular or in the event of his failing to submit proof of shipment to prove such utilization in the prescribed manner and within a prescribed period, the guarantor was to pay the guarantee amount due and payable under the guarantee, without any demur and raising any further controversies, merely on the first written demand from AEPC. Any such demand made on the guarantor was to be conclusive as regards the amount due and payable by the guarantor as per the guarantee. The First Come First Serve (FCFS) Quota was introduced with a view to boost new exporters who did not have the confirmed quota in their hands so that they get an opportunity to undertake export of readymade garments to the quota countries.

3. Noticing that the exporters were not able to utilize 100% of the endorsed quota which resulted in loss of precious foreign exchange to the country, besides causing denial of such quota to the genuine exporters who were in a position to

undertake exports, and also to reduce wastage of quota which tarnishes the image of the country and affects bilateral agreement on account of such non-utilization, AEPC used to release additional quantities of quota so as to ensure optimum utilization.

4. In case the quota utilization was above 90%, AEPC did not forfeit any part of BG. There was proportionate forfeiture of BG in case the utilization was between 75% to 90% of the quota, whereas the entire bank guarantee was forfeited in case the utilization was less than 75%. Before forfeiting BG/EMD, the AEPC had to issue show cause notice to the exporter and it has been passing an adjudication orders after giving opportunity of reply and hearing to them. The order of adjudication could also be challenged before the prescribed Appellate Authorities. While applying for quota, as well as seeking its revalidation, the exporter give an undertaking to utilize the entire quota without fail.

5. In W.P(C) No.1218/2008, a show cause notice dated 26.6.2002 was issued to the said petitioner on account of non-utilization of FCFS quota for the year 2001. After considering its reply and finding failure to undertake export, the adjudication order dated 11.9.2002 was passed forfeiting a sum of Rs.2,31,377/-. Being aggrieved from the said order, the aforesaid petitioner filed an appeal claiming performance to the extent of 84.26%. The First Appellate Authority, considered the aforesaid claim, reduced the amount of forfeiture to Rs.6,79,48/-. The second appeal filed by the said petitioner was, however, dismissed vide order dated 4.10.2005. The petitioner filed a writ petition before the Karnataka High Court which came to be dismissed for want of territorial jurisdiction.

6. In W.P(C) No.876/2008, a show cause notice dated 22/26.5.1998 was issued to the petitioner for utilizing FCFS Quota for the year 1997 only to the extent of 69.63% and claiming shortfall in export to the extent of Rs.418941. Since neither any reply was filed by the said petitioner nor did it submit any proof of shipment of the goods, the aforesaid amount was forfeited. The first appeal as well as the second appeal filed by the said petitioner were dismissed vide orders dated 30.11.2000 and 23.11.2004 respectively noticing that no documentary evidence was produced by the said petitioner in support of its plea of force majeure. The

petitioner filed a writ petition before the Karnataka High Court which came to be dismissed for want of territorial jurisdiction.

7. In W.P(C) No.1214/2008, a show cause notice dated 2/3.7.2001 failing to utilize FCFS Quota for the year 2000 was also issued to the petitioner seeking to forfeit the amount of Rs.5,82,260/-. Another show cause notice dated 9.5.1996 on account of non-utilization of FCFS Quota was issued to the said petitioner seeking to forfeit a sum of Rs.3,56,745/-. The aforesaid notices were adjudicated vide two separate orders, the first one being dated 13.8.1996 and the other dated 19.7.2001. In the appeal filed by it, the petitioner claimed that they could not remove rectifiable discrepancy and on account of late receipt of fabric which also had weaving defects and therefore entire fabric was rejected and the order was cancelled by the buyer. The aforesaid contention, however, was rejected by the First Appellate Authority vide order dated 13.8.1996 noticing that utilization was only 62.23%. Disposing of the appeal vide order dated 22.3.2003, against the second order, the First Appellate Authority did not accept the contention of the petitioner that the goods were ready but the buyer postponed the order and rejected the appeal noticing that the quota utilized was only 58.13%. One of the second appeals filed by the petitioner was dismissed whereas the other second appeal was partly allowed vide order dated 30.9.2003. The petitioner filed a writ petition before the Karnataka High Court which came to be dismissed for want of territorial jurisdiction.

8. In W.P(C) No.1216/2008, a show cause notice dated 11.4.2005 was issued to the petitioner on account of non-utilization of quota for the year 2004 and seeking forfeiture of a sum of Rs.1,19,539/-. Since no reply was furnished, the Adjudicating Authority after considering the matter upheld forfeiture of the entire amount vide order dated 31.8.2005. In the first appeal, the petitioner alleged late receipt of quota for the second cut-off and also claimed that the buyer did not extend the shipment date and, therefore, they honoured the order by using PPE Quota. The said appeal, however, was dismissed vide order dated 23.11.2005. The second appeal filed by the petitioner came to be dismissed vide order dated 27.2.2006 since no one appeared for the petitioner and the plea taken in the appeal did not find favour with the Second Appellate Authority. The petitioner filed a writ petition

before the Karnataka High Court which came to be dismissed for want of territorial jurisdiction.

9. In W.P(C) No.1217/2008, a show cause notice dated 13/10.9.1999 was issued on account of non-utilization of PPE/PPT Quota for the year 1998. No reply to the said show cause notice was furnished and no one appeared on behalf of the petitioner for personal hearing. The Adjudicating Authority thereupon forfeited the amount of Rs.17,12,700/- vide order dated 26.11.1999. On receipt of application dated 28.10.2002 from the said petitioner seeking settlement of the forfeited amount in installments/ lumpsum in terms of the Circular dated 23.4.2011, the aforesaid amount was reduced to Rs.10,17,558/- The said petitioner preferred an appeal claiming non-utilization due to strike. But the same appeal came to be dismissed vide order dated 28.3.2002. The second appeal filed by the said petitioner was also dismissed vide order dated 14.9.2002 noticing that there was no evidence of the alleged strike. The petitioner filed a writ petition before the Karnataka High Court which came to be dismissed for want of territorial jurisdiction.

10. In W.P(C) No.1219/2008, a show cause notice dated 9.10.2001 was issued on account of non-utilization of FCFS Quota for the year 2000 and seeking forfeiture of a sum of Rs.26,79,276/-. The petitioner neither submitted any reply nor did it appear for personal hearing. The Adjudicating Authority thereupon passed an order forfeiting a sum of Rs.25,23,413/-. The First Appellate Authority did not find merit in the contention of the petitioner claiming go-slow activity of the concerned unit and short-realization due to change in the mode of shipment from sea to air and dismissed the said appeal vide order dated 7.10.2003. However, in the second appeal, the petitioner produced copy of the agreement entered into between the workers and the management in support of its plea of strike and full relief was, therefore, extended to it for the said strike period. The petitioner filed a writ petition before the Karnataka High Court which came to be dismissed for want of territorial jurisdiction.

11. Being aggrieved from the orders passed by AEPC as also the orders passed by the First Appellate Authority and the Second Appellate Authority, the petitioners

are before this Court seeking quashing of the orders passed by the Second Appellate Authority.

12. The impugned orders have been assailed by the petitioners on the following three grounds: i. Quotas are allotted by individual countries for each category. For example, if USA is allotting quota of one lakh pieces to India then the Quota Issuing Authority in India cannot issue quota for more than one lakh pieces. As per Garment Export Entitlement Policy, the said allocation is distributed in various hands and though there can be variation of each quantity against each head, the total quantity cannot exceed the quantity allocated by the importing country. AEPC, however, has been allocating excess quota and such act of AEPC being ultra vires the Garment Export Entitlement Policy, it has no right to impose penalty in terms of the said policy; ii. For the purpose of computing quota utilization, AEPC is calculating the percentage of extended quantity alone, i.e., the quota extended up to 31st December of the year and is not taking into consideration the quantity exported during the whole of the year as a result, if a person exports say 900 pieces prior to 30th September, takes extension for 100 pieces and then exports 50 out of those 100 pieces up to 31st December, his utilization is taken as 50%, resulting in forfeiture of his EMD/BG, whereas had if the exporter exports 900 out of 1000 pieces from 30th September to 30th December, his EMD/BG is released in full even though in the first case, the exporter has exported 950 pieces out of 1000 and in the second case, he has exported 900 out of 1000 pieces. This interpretation of AEPC, according to the petitioner, leads to absurd result and is not borne out from the policy. In this regard, it is also submitted by the petitioners that if the shortfall in export is up to 11%, the country does not lose the quota which is carried over to the next year and, therefore, the shortfall has to be assessed as the percentage of entitlement of the whole year and not for the extended period alone. iii. It was lastly submitted by the learned counsel for the petitioners that in the absence of shortfall in quota utilization for the country as a whole, levy of penalty would amount to unjust enrichment of the Government.

13. As regards the first contention, the case of the respondents is that there has been historical gap between the quota issued and the quota actually utilized by the exporters. Noticing that the exporters were unable to utilize the entire quantity

endorsed to them and non-utilization results in loss of foreign exchange, besides depriving quota to the genuine exporters who are in a position to make exports, AEPC has been releasing excess quota to the exporters. A perusal of the affidavit filed before Karnataka High Court in WP No.43683 of 2004, a copy of which has been filed by the petitioners, would show that despite the FCFS Quota, issued by AEPC in the years 2001, 2002 and 2003 being 130%, 149.08% and 120% respectively, the actual quantity utilized in the aforesaid year was only 91.68%, 88.44% and 98.57% respectively. The aforesaid statement of quota utilization would show that in the past, even after releasing substantial additional quota, the targeted utilization of 100% could not be achieved by the exporters. One can easily visualize to what extent the utilization would have been had AEPC not released any additional quota to the exporters in the aforesaid years. Considering the past experience, it can be hardly be disputed that release of additional quota to the exporters was always in the public interest. The extension of time granted to the exporters for utilizing the second part of the quota up to 31st December is only a concession given to the exporters who are otherwise expected to utilize the first part up to 31 st May and the second part up to 30th September of the year. The aforesaid extension granted to the exporters has no linkage with the quota released by AEPC to the exporters and is given on a specific undertaking give by the exporters to utilize the said quota up to 31st December of the relevant year. As noted earlier, the exporter, while obtaining such extension unequivocally and unconditionally guarantees to utilize the said quota and furnish proof of shipment of goods to AEPC. He also agrees unconditionally that in the event his failing to utilize the export entitlement and furnish its proof to AEPC, he would pay the amount of EMD/BG, without any demur and without raising any controversy with respect to the demand raised by AEPC on account of such a default. Nothing prevents the exporters from surrendering the quota which he could not utilize till 30th September and he is under no obligation to seek extension from AEPC on the condition of furnishing BG/EMD which is liable to be forfeited in case of default being committed by them. Having failed to utilize the quota up to 30th September and taken extension for utilization of the said quota on or before 31st December subject to the condition that the EMD/BG furnished by him shall stand forfeited in the event of default being committed by him, the exporter cannot challenge the

imposition of penalty in terms of the EMD/BG furnished by him on the ground that AEPC had issued more than the quota available to it for issuance in a particular year. The exporters do not suffer, in any manner, on account of AEPC issuing excess quota to them. This is not the case of the petitioner that they could not fulfil their export obligation on account of AEPC having issued excess quota in the year concerned. Therefore, whether AEPC releases excess quota to the exporters or not is not the concern of the petitioners. In case, they fail to utilize the quota during the extended period, they are required not only in terms of the policy, but also in terms of their agreement with AEPC to pay the amount of penalty, as stipulated in the policy of the Government.

14. In LPA No.1120/2005 titled M/s Gokaldas Images Ltd. Vs. Union of India and Anr., decided on 09.02.2009, the appellants, inter alia, contended that since AEPC had over-allotted the quota, levy of penalty was unjustified as non/under utilization had caused no loss and the policy itself was abandoned. Rejecting the contention, the Division Bench held as under:

3. The second contention of the appellants has no merit and was not raised before the learned Single Judge and has no basis and foundation in the pleadings. Even otherwise, it is not possible to accept the said contention that AEPC had abandoned the Garment Export Entitlement Policy by over-issue of quota to exporters. The appellants and other exporters were issued quota and they had exported garments on the basis of the said quota under the Policy. The appellants had also furnished and given bank guarantees or had deposited earnest money in terms of the Garment Export Entitlement Policy. Abandonment as such requires mental intention and conscious decision. Garment Export Entitlement Policy was statutory in character. We cannot accept the contention of the appellants that the Garment Export Entitlement Policy was abandoned..

15. As regards the second contention, it would be seen from a perusal of the policy that it is only the second part of the quota valid till 30th September, which can be extended up to 31st December of the year on payment of EMD/BG at the specified rates. There is no extension of the first part of the quota which is valid till 31st of May. Therefore, for the purpose of computing the quota utilization, AEPC is

required to take into consideration only the export undertaken after such extension and not the export undertaken during the whole of the year. The extension of time to fulfil the export obligation being confined to quota valid till 30th September of the year, AEPC is fully justified in not considering the exports against the quota which was not the subject matter of extension. The view taken by AEPC in this regard is fully justified not only under the policy of the Government, but also under its contractual obligations with the exporter.

16. A similar contention was rejected by this Court in *Gokaldas Images Ltd. Ors. vs. Union of India and Anr.* 116(2005) DLT47. The contention of the petitioners in that case finds mention in para 13 and 14 which reads as under:

13. The second issue raised by learned senior counsel for the petitioners is about the methodology to determine utilization of the export entitlement. This aspect becomes important as in terms of the Policy if the exporter has utilised 90% of the export obligation, the issue of encashment would not arise. As noticed above, the obligations have to be complied by 30th of September, but the quota can be revalidated beyond the said date till 31st of December on furnishing of EMD/BG. The methodology adopted is to consider the ratio of the target achieved by the exporter in proportion to the unutilised quota for which extension was sought. It is the submission of the petitioners that while working out such default, it should be proportionate to the total entitlement of the petitioner and not restricted to the extended quota.

14. To illustrate the aforesaid issue, e.g., the quota is of 1,00,000 and 15,000 remains unutilised till 30th of September, extension can be sought for the same subject to furnishing of EMD/BG. Out of this remaining 15,000, if 10,000 is utilised by 31st of December, according to AEPC, the encashment is liable to take place since the default is of 66% being $10,000/15,000$. However, if the contention of the petitioners was to be accepted, this default would be $10,000/1,00,000$, which would be within the permissible limit of 10%.

The view taken by the Court on the aforesaid plea is contained in para 27 and 32 which read as under:

27. However, the same exporter is given a further chance to fulfill the export obligations by seeking extension of the time-period up to 31st of December. It is when such extension is granted that the same is made subject to certain conditions as per the very terms of the original entitlement. The exporter, with open eyes, accepts the same. In order to ensure due compliance and utilisation of the export entitlement, the BG/EMD condition is put. The same is not utilised or encashed if the exporter performs at least to the extent of 90%.

32. The second plea of the petitioners also has to fail because it is based on a premise as if the exporter has a right to export till 31st of December. This is not so. The entitlement is given to export up to 30th of September. The exporter has a right to surrender the unutilised quota, but if chooses to seek extension of time till 31st of December to perform its obligations, naturally, the performance has to be judged on the touch-tone of the performance after 30th of September and not by including the performance for the prior period. This is the methodology adopted by the respondents while determining the performance of the exporter dependent on the extended quota and rightly so.

Thus, this issue is no more *res integra*.

17. I find no merit in the last contention of the petitioners as well. As noted earlier, despite releasing additional quota to the exporters, the Government could not achieve the desired results and, therefore, imposing penalty on the defaulting exporters in terms of the undertaking given by them to AEPC sub-serves a valid public interest. In the absence of such penalty, there may be further shortfall in the quota utilization as there would be no pressure on the exporters to achieve the desired target. In any case, there is no material before the Court to show that in the years in which there was shortfall in utilization of second part of the quota on the part of the petitioners, the country was able to achieve 100% or at least 89% capacity utilization. The plea taken by the petitioners, therefore, is liable to be rejected.

18. For the reasons stated hereinabove, I find no merit in the writ petitions and the same is hereby dismissed. Interim order, if any, stand vacated. No order as to costs. NOVEMBER 18 2013/rd/bg V.K. JAIN, J.

