

Dsj Communications Vs. Union of India and ors.

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Court : Delhi

Decided On : Jul-30-2014

Judge : Vibhu Bakhru

Appellant : Dsj Communications

Respondent : Union of India and ors.

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

30. 07.2014 W.P.(C) 934/ 2010 DSJ COMMUNICATIONS Petitioner versus UNION OF INDIA & ORS. Respondents Advocates who appeared in this case: For the Petitioner : Mr Gaurav Agarwal, Mr Neel Kamal Mishra and Mr Jatin Zaveri. For the Respondents : Mr Akshay Chandra and Mr Raman Kumar for R-1 to 3. CORAM:HONBLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J1 The petitioner has filed this writ petition under Articles 226 and 227 of the Constitution of India seeking quashing and setting aside of a letter dated 21.01.2010 whereby the Directorate General of Foreign Trade (DGFT) had communicated the decision of the EPCG Committee, taken on 12.11.2009, inter alia, rejecting the request of the petitioner for extension of period for fulfilling its export obligations and also inclusion of an alternate export product for the purpose. The said letter dated 21.01.2010 (hereinafter referred to as the impugned

order) further informed the petitioner that the EPCG Committee had directed the Regional Authority to initiate action for recovery of customs duty with interest, forfeiture of Bank Guarantee and action under the Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act). The petitioner has further prayed that the respondent no.1 be directed to take up the matter of the export obligations of the petitioner afresh.

2. The relevant facts are summarized as follows:

2. 1 That the petitioner obtained an EPCG License (No.2133843) dated 25.01.1995 for import of capital goods of a total CIF value of `1,45,24,593/- with a condition to export Video Software worth US\$ 18,41,470/- within a period of five years/export obligation period and submit the prescribed documents towards fulfillment of their export obligation to the Regional Authority on expiry of the export obligation period. The petitioner failed to meet these obligations, hence a Show Cause Notice dated 27.02.2004 was issued to the petitioner. Thereafter, the Adjudicating Authority on 14.03.2006 proceeded to impose a fiscal penalty of `66,93,238/-, in addition to the payment of customs duty along with interest, for non- fulfillment of export obligation against the EPCG License No.2133843 dated 25.01.1994. 2.2 Aggrieved by the above mentioned order, the petitioner preferred an appeal. The said appeal was disposed of by the Addl. Director General of Foreign Trade by an order dated 08.06.2006, which held that the petitioners failure to fulfill its export obligations was due to circumstances beyond its control and that the petitioner was a sick industrial unit. The order dated 14.03.2006 was set aside and the matter was remanded to the Jt. DGFT for de novo consideration. Further, an extension was granted to the petitioner for 18 months from the date of endorsement of the licensing authority without composition fee and benefits of paragraph 5.4(i) of the then existing Foreign Trade Policy was extended to the petitioner. Apparently, this implied that subject to certain conditions, the petitioner was permitted to fulfill its export obligations by exporting an alternate export product, either by itself or through its group company. 2.3 The period for discharging the export obligations was extended by an endorsement on 13.09.2007 for a period of eighteen months therefrom. Concededly, the petitioner failed to export any product during the extended period and once again

approached the DGFT, by its letter dated 19.03.2009, seeking inclusion of an alternate export product as well as further extension of time, by 18 months, to meet its export obligations. This request was considered by the EPCG Committee on 12.11.2009 and was rejected. The decision of the EPCG Committee was communicated to the petitioner by the impugned order. The EPCG Committee held that the firm has already availed an E.O. Extension for fourteen and a half years and still could not make any export.

and accordingly, declined the petitioners request for extension of time and for inclusion of an alternate export product. The Committee also directed the Regional Authority to initiate immediate action for recovery of customs duty with interest, forfeiture of bank guarantee and action under FTDR Act and also for conducting a physical verification of imported machinery at the petitioners premises.

3. The petitioner company stated that it could not perform its export obligation on account of mitigating circumstances as the petitioner company stated that it is engaged in publication of Dalal Street Journal and thus has vital information about the stock market. Due to its experience in this field the petitioner undertook, with the support of Doordarshan, to start a TV program and related software, based on the stock market and international finance market. The petitioner, on receiving Doordarshans in-principle consent to air its content on their forthcoming channel titled DD3 as well as the microwave link permission from the Ministry of Communication, Government of India, decided to import the capital goods worth US \$4,73,916/- required to telecast stock and financial market information. The capsules made for airing were also planned to be exported to other countries. The petitioner thereafter made heavy investments for hiring staff, building infrastructure and entering into agreements with various intermediaries on the basis of Doordarshans assurance. However the project was abruptly abandoned due to Doordarshan deciding against the introduction of the DD3 channel. The petitioner states that in the given circumstances the petitioner was unable to create and export video software on its own and thus, could not fulfill its export obligations. It is contended that the failure to do so, was beyond the control of the petitioner and the abandoning of the DD3 channel by Doodarshan and the consequent loss suffered made it impossible for the petitioner to make and export any Video

Software. Apparently, the petitioner also made a reference to the Board for Industrial & Financial Reconstruction under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

4. The learned counsel for the petitioner contended that the impugned order passed by the DGFT, rejecting the plea of the petitioner to meet its export obligations by exporting cut and polished diamonds in place of video software, is unfair and arbitrary. The petitioner averred that once Doordarshan had cancelled its plans to launch DD3, the petitioners export obligations were hit by an impossibility of performance and the law cannot compel the performance of the impossible, as per the maxim of impossibilium nulla obligatio est. Therefore, the petitioner submitted that its export obligation stood frustrated or discharged by the doctrine of frustration.

5. It is also contended on behalf of the petitioner that although, the Appellate Authority, by its order dated 08.06.2006, had accepted the plea that the petitioner could not fulfill its export obligations because of reasons beyond its control, it failed to give complete relief to the petitioner and only granted further time of 18 months to meet the export obligation by exporting some other products through its sister concern. It is further contended that the license granted to the petitioner was not endorsed for export of Cut and Polished Diamonds the alternate export product and therefore the extension of time granted by the Appellate Authority ought to commence from the date when the licence is endorsed and not from an earlier period.

6. The learned counsel for the respondent contended that the petitioner had not fulfilled its export obligation despite more than fourteen and a half years having passed since the original license was granted in its favour. It was argued that the impossibility of performance of contract and other reasons cited by the petitioner for failure to meet its export obligation are unfounded and not maintainable.

7. The respondent relies on para 106 of the Hand Book of Procedures Volume- I (01.04.1994) to aver that in case of a failure of a licensee to fulfill its export obligation or any other condition of the license within the stipulated period, legal undertaking and /or bank guarantee shall be enforced. This shall be without

prejudice to any other action that may be taken under the Foreign Trade (Development & Regulation) Act, 1992, its orders, rules and the Customs Act, 1962. Since the original export obligation period expired on 24.01.2000 and as the petitioner had not exported any goods, the bank guarantee was invoked to realize the duty amount and interest by a demand notice issued on 28.08.2002. It is, thus, submitted by the respondents that the invocation of the bank guarantee was not bad in law.

8. The petitioner had imported cameras and other equipment under the EPCG licence and was obliged to export Video Software equal to the CIF value of the capital goods imported by the petitioner. The export obligations were not conditional upon any project or any venture that was planned by the petitioner at the material time. Thus, in my view, failure of the venture, that the petitioner intended to pursue in conjunction with Doordarshan would not in any manner absolve the petitioner from complying with its export obligation. According to the petitioner, it invested in equipment and infrastructure in anticipation of producing content for a business channel DD3 proposed to be aired by Doordarshan at the material time. And, Doordarshan abandoning the said channel severely affected the financial health of the petitioner and resulted in the large investments made by the petitioner remaining non-productive. Apparently, abandoning the DD3 channel by Doordarshan, put paid to the plans of the petitioner to export programme capsules that were to be produced for airing on the said channel. Consequently, the petitioner suffered business losses and could not discharge its export obligations. The losses or profits made by an entrepreneur or its business plans going awry, cannot possibly be a ground that entitles a businessman to avail duty exemption/concession. In the normal course, the petitioner would be required to pay full duty on the equipment imported by it. Under the EPCG scheme the petitioner was exempt from paying full duty only on the condition that it would employ its assets to earn foreign exchange and export video software to the extent of the CIF value of its imports. This condition, admittedly, not having been met, the petitioner would be liable to pay the requisite duty and other levies.

9. The contention that it was impossible for petitioner to perform its obligation, and thus applying the maxim of *impossibilium nulla obligatio est*, the petitioner was

absolved from paying import duty and other levies, is bereft of any merit. The said maxim has no application in the present case. The frustration of the venture, if any, as planned by the petitioner with Doordarshan, does not alter or affect the obligation of the petitioner to export goods/services of the requisite value and in the event of its failure to do so, to pay the applicable duties and interest thereon. The inability of the petitioner to effect exports cannot be mistaken with impossibility to do so. As I see it, the implication of the petitioners contentions are that failure to discharge an obligation for want of funds should result in extinguishment of the obligation and, resultantly, the petitioner should be permitted imports without paying any duty or by paying concessional duty because of its failure to make good its ventures. This contention is misconceived and meritless. Custom duty is a statutory levy and an incidence of import; the petitioner having imported the goods in question was liable to pay the same, however, the petitioner availed of an exemption/concession which was conditional. It would naturally follow that failure to meet the conditions would deprive the petitioner of the benefits of the exemption/concession. Even assuming that the failure on the part of the petitioner to meet its export obligations were for reasons beyond its control, the same would not entitle the petitioner for any remission in customs duty. The statutory levy is not conditional on business success or failure of the importer. The maxims *lex neminem cogit ad vana seu impossibilia* (the law compels no one to do vain or impossible things) or *impossibilium nulla obligatio est* (there can be no obligation to perform the impossible) have no application in the present case and in relation to a valid statutory levy.

10. It was further contended by the petitioner that although the Appellate Authority had granted an extension to the petitioner to perform its obligations, the Regional Authority had failed to endorse the licence. Therefore, the extension of 18 months granted by the Appellate Authority should be computed from the date of endorsement. This contention has been stoutly disputed as being baseless. The Appellate Authority's order of 08.06.2006 is quoted below:

ORDER

No.11/23/2006-07/ECA.I W.P.(C) 934/2010 (i) The Order-in-Original No.F-3/53/AM04/ECA.I dated 14.03.2006 passed by Jt. DGFT, Mumbai is set aside and the case is remanded back to the O/O. Jt. DGFT, Mumbai for de novo consideration. (ii) Extension in export obligation period is allowed for 18 months from the date of endorsement by the licensing authority without composition fee. (iii) The facility of Para 5.4(i) is also extended to the firm.

11. In terms of the said order, the period for performing the export obligation was extended by eighteen months and the petitioner was also granted the benefit of paragraph 5.4(i) of the then prevailing policy. It is expedient to refer to paragraph 5.4(i) of Foreign Trade Policy 2004-2009, which was applicable at the material time and the same is quoted below:

Export obligation 5.4 The following conditions shall apply to the fulfillment of the export obligation:(i) The export obligation shall be fulfilled by the export of goods capable of being manufactured or produced by the use of the capital goods imported under the scheme. The export obligation may also be fulfilled by the export of same goods, for which EPCG licence has been obtained, manufactured or produced in different manufacturing units of the licence holder/specified supporting manufacturer (s). When Capital Goods are imported for pre/ post-production or license is taken for import of spares, the license holder shall fulfill the export obligation by export of products manufactured from the plant / project to which the pre/ post- production capital goods/ spares are related. The import of capital goods for creating storage and distribution facilities for products manufactured or services rendered by the EPCG licence holder would be permitted under the EPCG Scheme. The export obligation under the scheme shall be, over and above, the average level of exports achieved by him in the preceding three licensing years for same and similar products except for categories mentioned in Handbook (Vol.1). Alternatively, export obligation may also be fulfilled by exports of other good(s) manufactured or service(s) provided by the same firm/company or group company/ managed hotel which has the EPCG licence. However, in such cases, the additional export obligation imposed under EPCG scheme shall be over and above the average exports achieved by the unit/company/group company/ managed hotel in preceding three years for both

the original and the substitute product(s) /service (s) even in cases where the average is exempt for the substitute product (s)/ service (s) as given in para 5.7.6 of the Handbook (Vol 1). The incremental exports to be fulfilled by the licence holder for fulfilling the remaining export obligation can include any combination of exports of the original product/ service and the substitute product (s)/ service (s). The exporter of goods can opt to get the export obligation refixed for the export of services and vice versa. The licensee can also opt for the refixation of the balance export obligation based on 8 times of the duty saved amount for the CIF value in proportion to the balance Export obligation under the scheme. The guidelines for the re-fixation of export obligation is given in para 5.19 of the Handbook (Vol 1). The aforesaid facilities shall only be available to manufacturer exporters/ service provider on all the licences where export obligation period including extended export obligation period is valid on the date of application. In this regard, exports made only on or after submission of application for alternate item and/ or re-fixation of the export obligation based on duty saved amount will be taken into account for fulfillment of export obligation.

12. It is plainly evident that under the aforesaid policy an importer of capital goods could fulfil its export obligation by export of other goods manufactured or services provided by the company or group company which had the EPCG licence. This benefit was extended to the petitioner by the order passed by the Appellate Authority and in addition, the licence period was extended. The respondent has produced a copy of the licence amendment sheet which bears the endorsement:

THE EXPORT OBLIGATION PERIOD OF THIS LICENCE IS EXTENDED FOR 18 MONTHS FROM THE DATE OF ENDORSEMENT I.E. 13.09.2007 AS PER

ORDER
GIVEN IN

ORDER
IN APPEAL BY DGFT, NEW DELHI.

13. The petitioners contention that since the aforesaid endorsement did not mention that the petitioner could export Cut and Polished Diamonds, the endorsement for extension of period ought to be counted from the date when the licence is endorsed with respect to such goods, is clearly an afterthought and cannot be accepted. It is material to note that even during the extended period i.e. 13.09.2007 to 12.03.2009, the petitioner did not effect any exports. Further, there is neither any communication on record nor any material to show that while the petitioner was ready and willing to comply with the requirement of the policy, it was impeded in doing so for want of the requisite endorsement. After the extended period for fulfilling the export obligations had expired, the petitioner once again, by its letter dated 19.03.2009, sought a further extension of time to effect the exports and for inclusion of Cut and Polished Diamonds as an alternate export product. This request was rejected by the impugned order.

14. Although, a period of fourteen and a half years has lapsed, since the petitioner imported the capital goods, the petitioner has failed to show any significant exports. In the given circumstances, the decision of the respondents to reject the petitioners plea for further extension cannot be faulted. The EPCG Committee in its meeting held on 12.11.2009 had considered the fact that the petitioner had not made any exports during the past fourteen and a half years and thus, their submission that they would fulfill the export obligations were not convincing. The denial of petitioners request to include an alternate export product of Cut and Polished Diamonds and grant a further extension was thus rejected and in my view, rightly so. It is also material to note that even in cases of sick companies the Foreign Trade Policy did not envisage an extension of period beyond twelve years and in the instant case, the petitioner had not made any exports.

15. The decision of the respondent is neither arbitrary nor unreasonable nor contrary to any law. Thus, no relief can be granted to the petitioner under Article 226 of the Constitution of India.

16. Accordingly, the petition is dismissed as being devoid of any merit. VIBHU BAKHRU, J JULY30 2014 RK