IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2041 OF 1997

M/s. Engineers & Packers } Petitioner
versus
Additional Director General }
of Foreign Trade and Ors. } Respondents

Mr. Shailesh Naidu with Ms. Kavita Arvind Shah for the petitioner.

Ms. Neeta V. Masurkar with Mr. Advait M. Sethna for respondent nos. 1 and 2.

CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.

DATED :- APRIL 24, 2017

P.C. :-

1. This writ petition is pending in this court, after its admission, for a considerable period. The only contention raised before us by the petitioner's advocate is that had reasonable opportunity been granted to the petitioner to substantiate and prove its case, then, it would have pointed out that there was no occasion for invoking the powers that are conferred in the authorities.

2. The petitioner is a proprietary concern, *inter alia*, carrying on business of manufacturing metal containers from its factory at Mumbai. The first respondent is the Additional Director General

of Foreign Trade and the second respondent is the Deputy Chief Controller of Import and Export. They are exercising powers under the Foreign Trade (Development and Regulation) Act, 1992 and Import Control Order, 1955. The third respondent is the Union of India.

3. The order dated 7th October, 1997 passed by the Appellate Committee-I is challenged in this writ petition. That order modifies the earlier directions of 31st January, 1996 of the first respondent, *inter alia*, relating to penalty of Rs.15 lakhs imposed on the petitioner on the ground that the petitioner, who had been issued supplementary import licences for importing defective sheet cuttings as an actual user, had not utilised the goods as licenced. The actual user condition is thus breached and violated is the finding against the petitioner.

4. As already stated, in the course of the business, the petitioner required the defective M. S. Sheets as raw material. That was imported under the supplementary licence as per the policy of Government of India, prior to 1988. The petitioner being the actual user had obtained two supplementary import licences from the office of the Joint Chief Controller of Import and Export. That power is now vesting in the Director General of Foreign Trade. Both these licences were issued under the category of

actual user and the petitioner urged that it was required to import the goods under the said licences to be utilised for manufacturing certain items, namely, metal containers at the factory at Andheri, Mumbai. Under the aforesaid licences, it imported total 515.176 m.t. M. S. defective sheets, cutting and coil of CIF totally amounting to Rs.17,93,018/-. The details have been set out, according to the petitioner. The import was under various bills of entry for home consumption. There were other supporting and corroborating documents such as lorry receipts etc. A verification of the factory was carried out way back in 1987 and the Inspector did not find any irregularities in the records maintained by the petitioner.

5. Thereafter, an explanation was sought by the Directorate of Industry about the utilisation of the imported materials. Then, some correspondence took place and eventually, though the details, according to the petitioner, were furnished, there was a change in the import policy. The raw materials utilised by the petitioner came to be placed under Open General Licence regime. The petitioner, thereafter, received a letter of 11th April, 1989 from the Joint Chief Controller of Import, summoning it for a hearing. Since the proprietor was not in Mumbai, the date was sought to be postponed. In the meanwhile, the petitioner states

that, its sole proprietor visited the office of the concerned authority, but by the clarification provided, they were apparently not satisfied. Therefore, a show cause notice was issued seeking to cancel the registration of the petitioner. The petitioner also received a notice for personal hearing.

6. In the mean while, the petitioner also received a letter from the Ministry of Commerce, New Delhi, calling upon it to submit the documents to the Directorate of Industry in respect of the aforesaid import licences under intimation to that Ministry. The petitioner states that after having attended the office and submitting all the records, it was shocked and surprised to receive a communication alleging that there was no proof submitted. Accordingly, the petitioner was informed that a personal hearing will be held. The petitioner then relies upon the record of such personal hearing/visit and various proofs as and when called for were provided. Though the adjudication was postponed, eventually, the claim of the petitioner is that an *ex-parte* order was passed on 31st January, 1996 by the Additional Director General of Foreign Trade, Udyog Bhavan, New Delhi, whereunder, the petitioner was debarred from importing or receiving goods on import licence for a period of six months and penalty of Rs.15 lakhs was imposed. This order is at Annexure 'A'.

7. Being aggrieved and dissatisfied with this order, the petitioner first requested for a personal hearing before the same authority again by letter dated 20th February, 1996. Since there was no response to that communication, the petitioner invoked section 15 of the Act of 1992 by filing an appeal before the Appellate Committee. The Appellate Committee entertained the appeal by a conditional order. Thereafter, the petitioner complains that, the impugned order dated 7th October, 1997 holds that the documents submitted by the petitioner indicate that it has been involved in the manufacture, but there are no further documents to corroborate the utilisation of the imported material.

8. It is this conclusion which is challenged before us on merits. Though the penalty has been scaled down to Rs.5 lakhs, what the petitioner complains is that even this penalty is not recoverable.

9. Apart from relying upon several grounds in the petition, what Mr. Naidu emphasises is that the petitioner has produced all the relevant records. The contemporaneous documents would reveal as to how the compliance has been made. However, once the petitioner is complaining that principles of natural justice have been violated, then, this is a fit case where the impugned order should be set aside.

10. Ms. Masurkar, on the other hand, justifies the conclusion and submits that despite several opportunities being granted, the petitioner has failed to avail of the same. These are purely delaying tactics. On merits, the petitioner has no case. Hence, the petition be dismissed because it is a gross abuse of the process of this court.

11. Since this petition is pending for long time, we have perused the record carefully. What we find is that the petitioner has been relying upon certain documents and equally there is a compilation tendered on the record of this case.

12. The petitioner has throughout been justifying its stand by relying on these documents, some of which carry the endorsement of the respondents themselves. It is, therefore, apparent that it is this court which is called upon to now satisfy itself whether there is a compliance made with the requirement of actual user allegedly. Thus, the alleged requirement of actual user whether has been satisfied or not.

13. From the order at Annexure 'A', itself, it is apparent that in the order (order-in-original), the authority has proceeded on the footing that the petitioner has failed to avail of the opportunity of personal hearing. It is stated that the petitioner was provided

such opportunity on 18th September, 1995 and 27th October, 1995, but the petitioner's sole proprietor/representative failed to turn up on medical ground. There is no documentary evidence supplied such as medical certificate etc. There is a further finding that the petitioner also failed to furnish any written reply to the show cause notice. It is observed in para 5 that there has been no response from the petitioner up to the date of the issuance of the order. That is why the Additional Director proceeds on the footing that the petitioner is not interested in expeditious finalisation of the show cause notice. This is a justification provided for proceeding ex-parte.

14. As far as the order of the Appellate Committee is concerned, what we find is that it is a short and cryptic order. Firstly it refers to the facts of the case very briefly. Then, it says that the petitioner-appellant appeared and reiterated the argument that he has been visiting the office of the Deputy Chief Controller, Import and Export with all documents of receipt, consumption, stock register and sales figures. However, he has been unable to produce any document regarding linkage of the goods imported, its actual use and consequent sale. Then, there are no convincing reasons for non appearance before the first respondent. That is why a conclusion is reached that the violation of actual user

condition is established beyond doubt. Since the petitioner is a small scale unit, the penalty has been brought down.

15. We find that when voluminous documents were relied upon to prove and establish that there is no breach or violation of the alleged condition, then, it was incumbent upon the appellate authority, which is the final fact finding authority, to have gone into the record. It was its bounden duty to have rendered complete finding consistent with the materials on record. It is an appellate authority and exercising appellate powers. In these circumstances, a cryptic finding does not serve the ends of justice. The order is virtually unreasoned and even does not take into account that there was medical reason which prevented the petitioner from attending the office and the personal hearing.

16. As a result of the above discussion and without this court being required to go into the factual aspects, we set aside the order passed by the Appellate Committee. The order dated 7th October, 1997 being set aside, the matter shall stand restored to the file of the Appellate Committee at New Delhi. The petitioner shall appear before this committee on 25th May, 2017. If the petitioner fails to attend, then, the impugned order shall stand confirmed and without any interference of this court. If the petitioner does attend and with all the records, the Appellate

Committee shall pass a speaking order after duly hearing the petitioner as expeditiously as possible and in any event by 31st July, 2017. All contentions on merits of the case are kept open.

17. With the aforesaid directions, the writ petition is disposed of. There would be no order as to costs.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**