(5)

IN THE HIGH COURT OF DELHI

W.P. (C) NOS. 8043 OF 2003

A N D

6393 OF 1998, 8246 OF 2002, 1298, 2405, 3929, 5916, 6788, 7027, 7125, 7178 OF 2003, 2334, 2347, 2422, 3275-78, 3674, 3677, 3678, 3679, 3680, 4318, 4584, 6925, 8427-29, 8791, 9435, 9681, 13102, 13153, 13154, 14896, 16102, 16319 OF 2004.

Judgment Reserved On : 14.10.2004

Date Of Decision : 07.12.2004

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M/s. Gokaldas Images Ltd. (WP (C) 8043/2003)
All India Garment Exporters Common Cause Guild & Ors. (WP (C) 6393/1998)
M/s. J.J. Expo-Impo & Anr. (WP (C) 8246/2002)
M/s. Priya Exports Pvt. Ltd. (WP (C) 1298/2003)
M/s. Fascination India (WP (C) 2405/2003)
M/s. Fascination India (WP (C) 3929/2003)
M/s. Gokaldas Images Ltd. (WP (C) 5916/2003)
M/s. Mangla Exports Pvt. Ltd. (WP (C) 6788/2003)
Smt. Asha Masand (WP (C) 7027/2003)
M/s. Chandra Fabrics Pvt. Ltd. (WP (C) 7125/2003)
M/s. Mangla Exports Pvt. Ltd. (WP (C) 7178/2003)
M/s. Pioneer Export & Anr. (WP (C) 2334/2004)
M/s. Mangla Exports Pvt. Ltd. (WP (C) 2347/2004)
M/s. Kalamkari Designs Pvt. Ltd. (WP (C) 2422/2004)
M/s. Modesty Garments & Ors. (WP (C) 3275-78/2004)
M/s. Gokaldas Apparel Pvt. Ltd. (WP (C) 3674/2004)
M/s. Needle Point Garments Pvt. Ltd. (WP (C) 3677/2004)
M/s. Gokaldas Images Ltd. (WP (C) 3678/2004)
M/s. Gokaldas Apparel Pvt. Ltd. (WP (C) 3679/2004)
M/s. Sri Vinayaka Garments (WP (C) 3680/2004)
M/s. Unity Impex (WP (C) 4318/2004)
M/s. Jyoti Embroideries (P) Ltd. (WP (C) 4584/2004)
M/s. Jyoti Apparels (WP (C) 6925/2004)
M/s. Sawhney Brothers & Ors. (WP (C) 8427-29/2004)
M/s. Fascination India (WP (C) 8791/2004)
M/s. Hi-Image (WP (C) 9435/2004)
M/s. Hi-Image (WP (C) 9681/2004)
M/s. Gokaldas Images Ltd. (WP (C) 13102/2004)
M/s. Gokaldas Images Ltd. (WP (C) 13153/2004)
M/s. Personality Ltd. (WP (C) 13154/2004)

(6)

M/s. Lyra Industrial (WP (C) 14896/2004)
M/s. Kumar Overseas (P) Ltd. (WP (C) 16102/2004)
M/s. Onkar Harkin International (WP (C) 16319/2004)

PETITIONERS

through : Mr. Jayant Bhushan, Senior Advocate with Mr. Raja Chatterjee, Mr. Suhail Dutt, Mr. Manish Kr. Bishnoi, Mr Raghav Mathur and Ms. Deepa, Advocates.

-VERSUS-

Union of India & Anr

RESPONDENTS

through : Mr. P.P. Malhotra, A.S.G. with Mr. Sidharth Mridul, Mr. Gaurav Duggal, Ms. Maneesha Dhir, Ms. Poonam Singh, Mr. Arvind Sharma, Mr Rahul Kaushik and Mr. N. Lomesh, Advs. for Respdnt. No. 1 / UOI. Mr G.L. Rawal with Mr Kuljeet Rawal, Advocates for Respondent No. 2 / AEPC

CORAM:

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported in the Digest?

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

These writ petitions have been disposed of in terms of the orders passed in WP (C) No. 8043 / 2003

December 07, 2004
am

SANJAY KISHAN KAUL, J

(10)

IN THE HIGH COURT OF DELHI

\+ W.P. (C) NOS. 8043 OF 2003

A N D

6393 OF 1998, 8246 OF 2002, 1298, 2405, 3929, 5916, 6788, 7027, 7125, 7178 OF 2003, 2334, 2347, 2422, 3275-78, 3674, 3677, 3678, 3679, 3680, 4318, 4584, 6925, 8427-29, 8791, 9435, 9681, 13102, 13153, 13154, 14896, 16102, 16319 OF 2004.

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through : Mr. Jayant Bhushan, Senior Advocate with
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Mr. Manish Kr. Bishnoi, Mr. Raghav Mathur
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Mr. Sidharth Mridul, Mr. Gaurav Duggal,
Ms. Poonam Singh, Mr. Arvind Sharma,
Mr. Rahul Kaushik and Mr. N. Lomesh,
Advocates for Respondent No. 1 / UOI.
Mr. G.L. Rawal with Mr. Kuljeet Rawal,
Advocates for Respondent No. 2 / AEPC.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

(12)

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. The petitioners are garment exporters and seek to raise common questions of law. The petitioners are impugning the authority of respondent Apparel Export Promotion Council (for short, 'AEPC') to levy penalty for non-utilisation of the quota allotted to respective petitioners. The petitioners also seek to challenge the basis for calculation of the extent of utilization of the export entitlement.

2. The Foreign Trade (Development & Regulation) Act, 1992 (hereinafter to be referred to as, 'the said Act') came into force on 19.06.1992. The object was to provide for development and regulation of foreign trade and *inter alia* augmenting exports. . Section 5 of the said Act provides for the Central Government to formulate and announce the Export and Import Policy from time to time and to amend that Policy. Section 11 stipulates that no exports can be made except in accordance with provisions of the said Act, Rules and Orders made thereunder as also the Export and Import Policy for the time being in force. Sub-section (2) of Section 11 imposes a liability of penalty not exceeding Rs.1,000/- or five times the value of goods in case of violation of provisions of the said Act, Rules or Orders and the amount determined can be recovered as arrears of land revenue. The penalty imposed or confiscation made under the said Act is not to prevent the imposition of any other punishment arising under any other law for the time being in force (Section 12). Section 13 provides for the adjudicating authority for purposes of determination of penalty or

confiscation of goods. A person aggrieved by the decision made by the adjudicating authority is entitled to prefer an appeal before the competent authority in terms of Section 15 of the said Act.

3. The petitioner's contention, thus, is that the said Act itself provides for the complete mechanism for violation of provisions of the said Act, Rules, Orders, etc. and, thus, while formulating the Export and Import Policy, it cannot be said that Section 5 can authorize such mechanism separately under the Policy.

4. The additional plea raised in respect of this imposition of penalty is that such penalty amounts to compulsory exaction of money and the same cannot be inferred and must be by a specific authority.

5. The different writ petitions deal with different Export and Import Policies. The Export and Import Policy for 1992-97 provides for export of textile products subject to conditions as may be notified by the Government of India (for short, 'GOI') from time to time. Notifications were issued for appointment of appellate authorities. The position is similar for the Policy of 1994-96. The Garment Policy is separately notified taking into consideration that the exports are covered under the bilateral agreements.

6. The total quota being fixed for different garments for each country, AEPC is the quota administering authority to allot the quota. It may be noticed that this is an important function in as much as there is foreign exchange earning as a consequence of the export of garments and, thus, the quota has to be given with the object of maximum utilization since unutilized quota would result in the foreign exchange not being earned. There are

different systems of allotment - Past Performance Entitlement (PPE), Manufacture Exports Entitlement (MEE), Non-Quota Exporters Entitlement (NQE). Apart from these, there is also First Cum First Serve (FCFS) System. The importance of the utilization of quota is apparent from the fact that the Policy itself provides for a consequence of the exporter being liable for disqualification from getting entitlement in future in case he fails to utilize his export entitlement.

7. The Policy provides for utilization of the quota by 30th of September, which can be extended up to 31st of December. However this extension is subject to Earnest Money Deposit (EMD) / Bank Guarantee (BG). In case of such forfeiture, the appeal lies before the Textile Commissioner, Bombay. The aforesaid aspects have been referred to since the contention of learned senior counsel for the petitioners was that this is like an alternative system to the said Act, which cannot be so provided. A further submission was made that Section 11 of the said Act refers to contraventions of provisions of the Act, Rules and Orders, while non-fulfillment of export obligations may not amount to a contravention.

8. Learned senior counsel for the petitioners relied upon judgment of the Supreme Court in State of Madhya Pradesh & Anr. v. Thakur Bharat Singh, AIR 1967 SC 1170 to contend that all executive action, which operates to the prejudice of any person, must have authority of law.

9. Learned senior counsel also referred to minority judgment in U.P. Co-operative Cane Unions Federations v. West U.P. Sugar Mills Association & Ors. Etc., 2004 (5) SCALE 457 again to substantiate the same plea.

Learned senior counsel submitted that on this particular aspect, there is no discussion in the majority decision and by reference to paras 108 to 110 of the judgment submitted that reliance has been placed on Thakur Bharat Singh's case (supra).

10. Learned senior counsel for the petitioners referred to judgment of the Supreme in Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar & Ors., AIR 1992 SC 2038 where it was held that it is tax or fee, the same must be with authority of law being compulsory exaction of money and such power cannot be derived by intendment. In para 3 of the judgment, the Supreme Court observed as under:

> "3. It has been further indicated that whenever there is any compulsory exaction of any money from a citizen, there must be a specific provision for imposition of such tax and/or fee. There is no room for any intendment for imposition of compulsory payment. Whenever there is any compulsory exaction of money from a citizen, nothing is to be read and nothing is to be implied. ..."

It was further observed in paras 6 and 7 as under:

> "6. After giving our anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax r fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power. The facts and circumstances in the case of *District Council of Jowai*, (AIR 1986 SC 1930) are entirely different. The exercise of powers by the Autonomous Jantia Hills Districts are

controlled by the constitutional provisions and in the special facts of the case, this Court has indicated that the realisation of just fee for a specific purpose by the autonomous District was justified and such power was implied. The said decision cannot be made applicable to the facts of this case or the same should not be held to have laid down any legal proposition that in in matters of imposition of tax or fees, the question of necessary intendment may be looked into when there is no express provision for imposition of fee or tax. The other decision in *Khargram Panchayat Samiti's case* (1987 (3) SCC 82) also deals with the exercise of incidental and consequential power in the field of administrative law and the same does not deal with the power of imposing tax and fee.

7. The High Court has referred to the decisions of this Court in *Hingir's case* (AIR 1961 SC 459) and *Jagannath Ramanuj's case* (AIR 1954 SC 400) and *Delhi Municipal Corporation's case* (AIR 1983 SC 617) (supra). It has been consistently held by this Court that whenever there is compulsory exaction of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used. We are, therefore, unable to accept the contention of Mr. Goswami. Accordingly, there is no occasion to interfere with the impugned decision of the High Court. The appeal, therefore, fails and is dismissed with no order as to costs."

11. A reference was also made to judgment of the Division Bench of this Court in All India Garment Export Common Cause Guild v. U.O.I., 1989 (42) E.L.T. 167 (Del.) where a compulsory exaction in the nature of a premium for a particular category of garment entitlement was struck down, though the same related to the Garment Policy under the earlier Imports & Exports (Control) Act, 1947.

12. Learned senior counsel further referred to judgment of the Division Bench of this Court in DMA Nursing Home and Medical Establishment Forum v.

Union of India & Ors., AIR 2001 DELHI 471 where the conversion fee for permission for mix land use for nursing homes, guest houses and banks in residential areas was struck down being not having sanctioned by any statutory provision nor co-related to any specific service or cost.

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 15,0000, 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%.

15. It may, however, be noticed that there are number of policies in issue. In one of the policies in question, the word `*extended entitlement*' has been used in respect of this aspect and to that extent, the question will not arise in those cases.

16. In the end, learned senior counsel also contended that on certain individual facts, the matter in any case is liable to be remanded back for reconsideration assuming the petitioner does not succeed in the petition on account of the fact that when the decision is on wrong facts or there has been no appreciation of the *force majeure* clause, which could provide relief to the petitioner. In this behalf, learned senior counsel referred to judgment of the Supreme Court in M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidas and Co., AIR 1961 SC 1285 to bring forth the distinction between *force majeure* and *vis major*. It was observed in para 17 as under:

> "17. McCardie J. in *Lebeaupin* v. *Crispin*, 1920-2 KB 714 has given an account of what is meant by "*force majeure*" with reference to its history. The expression " *force majeure*" is not a mere French version of the Latin expression " *vis major*". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in " *force majeure*". Judges have agreed that strikes, breakdown of machinery, which, though normally, not included in " *vis major*" are included in " *force majeure*". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to " *force majeure*", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to " *force majeure*", and even if this be the meaning, it is obvious that the condition about "*force majeure*" in the agreement was not vague. The use of the word " *usual*" makes all the difference, and the meaning of the condition may be made certain by

evidence about a *force majeure* clause, which was in contemplation of parties."

17. Learned counsel for the respondents have opposed the petition. On the issue of authority of law for imposition of the penalty, it was submitted that Section 5 of the said Act itself empowers the Central Government to issue from time to time Export & Import Policy by notification in Official Gazette and, thus, the Policy published in the Official Gazette is statutory in character. The provisions of Section 2 (h) of the said Act was referred to which defines " Order" to mean any Order made by the Central Government under Section 3 of the said Act. Section 3 of the said Act in turn empowers the Central Government to make provisions for development and regulation of foreign trade by facilitating imports and increasing exports through any Order published in the Official Gazette. It was, thus, submitted that the provisions of Sections 1 to 6 fall in Chapter II of the said Act, which deals with the power of Central Government to make Order and announce Export and Import Policy. Sections 7 to 9 fall in Chapter III dealing with importer-exporter code number and licence; while Section 11 falls in Chapter IV dealing with search, seizure, penalty and confiscation.

18. It was submitted on behalf of the respondents that the machinery provided for under the said Act under Section 11 serves a different purpose as the same relates to a stage after the export and import when there is contravention of the provisions. The Policy provides for certain pre-requirements, which is a stage prior to the export and by which the exporter becomes entitled to export. It was further submitted that this

issue is also linked to the very basic concept of providing for such regulation of export under the said Act, which is to augment the foreign exchange. Thus, what is sought to be imposed under the Policy is not really penalty, but performance guarantee.

19. In so far as the second issue is concerned, learned counsel submitted that the time within which the exporter has to utilise the quota has been stipulated as 30th of September whereafter it has to be surrendered. The exporter has, however, been given the option to get a new lease or life to make the export by grant of extension till 31st of December and nothing compels the exporter to seek such extension. Thus, while considering the extent of obligation met, it is only the extended quota beyond 30th of September to be utilised by 31st of December, which would have to form the basis to determine the percentage of performance. This is also in furtherance of the bilateral agreements to provide for optimum target to be met.

20. It was further submitted that most of the petitioners would be dealing with PPE and the Garment Export Entitlement Policy (GEEP) itself stipulates the conditions attached to such entitlement whereby the same has to be utilised by 30th of September and can be revalidated up to 31st of December if it is backed by EMD / BG. Such revalidation takes place for different entitlement certificates other than FCFS and that forms again a part of the Policy. The conditions for release of the BG / EMD are also stipulated whereby 90% performance entitles release of the EMD / BG. Thereafter, it is dependent on the percentage of performance.

21. Learned counsel for the respondents placed strong reliance on the judgment of learned Single Judge of this Court in M.K. Jain & Anr. v. Union of India & Anr., 2002 VII AD (DELHI) 513 to support the contention that it is for the Administrator of quotas to decide on the precise timing and manner of implementation of the quota to achieve a particular objective. The export of the quota items are matters of bilateral trade and the quota-administering authority is best equipped to decide how to fully utilise the quota.

22. Learned counsel also relied upon judgment of the Supreme Court in Directorate of Enforcement v. Deepak Mahajan & Anr., 1994 SC 1775 where the Supreme Court set down once again the cardinal principles for interpretation of law and statutes. In the said case, it was observed as under:

> " 24. Keeping in view the cardinal principle of law that every law is designed to further the ends of justice but not to frustrate on the mere technicalities, we shall deal with all those challenges in the background of the principles of statutory interpretations and of the purpose and the spirit of the concerned Acts as gathered from their intendment.
>
> 25. The concerned relevant provisions of the Acts with which we are concerned, no doubt, pose some difficulty in resolving the question with regard to the jurisdiction of the Magistrate authorising detention and subsequent extension of the same when the provisions of those Acts are narrowly and literally interpreted. Though the function of the Courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the Court to mould or creatively interpret the legislation by liberally interpreting the statute.

26. In Maxwell on Statutes (10th Edn.) at page 229, the following passage is found:

> " Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumable not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence ... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

27. In Seaford Court Estates Ltd. v. Asher, 1949-2 All ER 155 at p. 164, Denning, L. J. said:

> "When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ... and then he must supplement the written word so as to give " force and life" to the intention of the legislature ... A Judge should ask himself the question how if the makers of the Act had themselves come across this ruck in the texture of it, they would have strengthened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

28. Though the above observations of Lord Denning were disapproved in appeal by the House of Lords in 1951 (1) All England Law Reports 839 (HL), Sarkar, J. speaking for the Constitution Bench in *M. Pentiah v. Muddala Veeramallapa*, 1961 (2) SCR 295 : (AIR 1961 SC 1107) adopted that reasoning of Lord Denning. Subsequently also, Beg, C.J. in *Bangalore Water Supply v. A. Rajappa*, AIR 1978 SC 548 approved the observations of Lord stating thus (at p. 552 of AIR 1978):

> " Perhaps with the passage of time, what may be described as the extension of a method resembling the " armchair rule" in the construction of wills, Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state."
>
> (Emphasis supplied)

29. It will be befitting, in this context, to recall the view expressed by Judge Frank in Guiseppi v. Walling, 144F (2d) 608 pp. 620, 622 (CCA 2d, 1944) which is quoted in 60 Harvard Law Review 370, p. 372 reading thus:

> " The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the Court, as best as they can, to fill in the gaps, an activity which no manner how one may label it, is in part legislative. Thus the Courts in their way, as administrators in their way perform the task of supplementing statutes. In the case of Courts, we call it `interpretation' or `filling in the gaps'; in the case of administrators we call it `delegation' or authority to supply the details."

30. Subba Rao, C.J. Speaking for the Bench in *Chandra Mohan* v. *State of Uttar Pradesh*, 1967 (1) SCR 77 : (AIR 1966 SC 1987) has pointed out that the fundamental rule of interpretation is that in construing the provisions of the Constitution or the Act of the Parliament, the Court " will have to find out the express intention from the words of the Constitution or the Act, as the case may be ..." and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory.

A.P. Sen, J. in *Organo Chemical Industries* v. *Union of India*, 1980 (1) SCR 69 : (AIR 1979 SC 1803) has stated thus (at p. 1817 of AIR 1979):

> " A bare mechanical interpretation of the words `devoid of concept or purpose' will reduce most of legislation of futility. It is a salutary rule, well established, that the

intention of the legislature must be found by reading the statute as a whole."

31. Krishna Iyer, J. has pointed out in his inimitable style in Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee, AIR 1977 SC 965. "To be literal in meaning is to see the skin and miss the soul of the Regulation."

It was, thus, submitted that object of the said Act as well as GEEP has to be seen and what has been done is in furtherance thereof.

23. Learned counsel further referred to the judgment of learned Single Judge of this Court in CWP No. 308/2002 titled 'Gopal Clothing Co. Pvt. Ltd. v. Union of India & Ors.' decided on 16.01.2002 where the following observations were made while dealing with the second aspect of calculating the default in compliance of the export obligations for the extended period:

" The learned counsel for the petitioner has relied upon para 8 A (F) li) (c) to contend that since the petitioner had fulfilled the export obligation to the extent of 75% in the entire year there was no reason to impose penalty upon the petitioner or to forfeit the earnest money deposit. In my view, the contention of learned counsel for the petitioner is without any basis inasmuch as the earnest money deposit was made only for the re-validation of the export quota beyond 30th September and not for the entire year. ..."

The appeal preferred against the said Order being LPA No. 61/2002 was dismissed on 22.01.2002.

24. I have considered the aforesaid submissions advanced by learned counsel for the parties.

25. In so far as the issue of levy of penalty is concerned, it has to be appreciated that what is sought to be done by the respondents is to encash

the EMD / BG for failure on the part of the exporters to fulfill the conditions for grant of the entitlement.

26. There is no dispute that the Export & Import Policy has statutory force in view of Section 5 of the said Act. The same is the position of GEEP. In respect of export of garments to quota countries, it has to be appreciated that there is a limited quantity of quota of such garments which can be exported. The object, thus, is to ensure so far as possible full utilization or the maximum utilization of the quota. Thus, various categories of entitlements have been created. PPE is a substantive percentage and the basis is the performance of exporter in the past. The object is that the exporter should be able to fulfill the obligations and is capable of doing so. Thus, when an exporter gets an entitlement, the same is with the conditions attached to such entitlement. The requirement is to fulfill the export obligations by 30th of September of the year concerned. If the exporter fails to fulfill the export obligations, he is required to surrender the entitlement so that the same can be made available to other exporters, who may utilise it for the remaining period of the calendar year up to 31st of December. This is in order to ensure full utilization.

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%.

28. It will, thus, be seen that what is sought to be done is clearly in furtherance of the objects of the said Act as well as the Policy. Section 11 of the said Act would have no application in this field. Section 11 falls in Chapter IV of the said Act dealing with search, seizure, penalty and confiscation. The export has to be made according to the provisions of the said Act, Rules and Orders and penalties are provided for violating the same while making the export. Sub-section (2) of Section 11 refers to contraventions of the provisions of the said Act, Rules and Orders by a person who makes or abets or attempts to make any export. Thus, a mechanism has been set up under Section 11 of the said Act where exports are made or attempt to be made in violation of the same.

29. The aforesaid stage has not arisen when the issue of utilisation of the entitlement is in question. The condition imposed for grant of entitlement is, thus, a stage prior to the same and is a check to ensure that the exporter does export the garments. The procedure comes into play when no such export is made and not when there is a contravention while making the export. In my considered view, this is the true construction of the Policy read with the said Act.

30. This aspect has to be also considered on the larger issue for the very objective sought to be achieved under the said Act as well as under the Policy. The object is to maximise foreign exchange. As noticed above, garment export is peculiar in its nature because quotas are provided for

each country. The Government is well within its right to provide for full and maximum utilization of the quota and that is what has been done.

31. I fail to appreciate how it can be contended that there is no power to put such a condition for the grant of entitlement. The same has clearly a statutory force in view of the provisions of Section 5 of the said Act read with the Export and Import Policy and the GEEP. Thus, though there can be no dispute over the propositions, as enunciated in the various judgments cited by learned senior counsel for the petitioners on this issue, the fact of the matter is that there is no violation of any these principles. It has also to be appreciated that there must be free play with the Government, especially in matters of economic policy formulation and such economic policies are not subject to judicial review unless it is demonstrated that the same is contrary to any statutory provision or the Constitution. This issue is no more *res integra* in view of judgment of the Supreme Court in BALCO Employees Union (Regd.) v. Union of India, (2002) 2 SCC 333.

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 no 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.

33. Thus, on both the issues raised in the petitions, which are common, I find no merit in the writ petitions.

34. The matter, however, does not end at this since a chart of individual grievances have also been filed as to why the individual cases need to be remanded back to be determined on the facts of each case and the orders passed by the competent authorities and the appellate authorities are not in accordance with law. Learned senior counsel for the petitioners has emphasised on the distinction between *force majeure* and *vis major* as explained in M/s. Dhanrajamal Gobindram's case (supra). In fact, there is no dispute about the same. In appropriate cases, *force majeure* conditions have been taken as a basis for reduction or waiver of penalty. There are, however, some cases in which interference may be called for on this account because of lack of proper appreciation on the part of the competent authorities and the appellate authorities and in some of the cases, the same occurring on account of the inordinate delays in passing orders whereby the very basis of the arguments may have been forgotten. For example, learned senior counsel for the petitioners referred to WP (C) No.8043/2003 to contend that wrong facts were noted and the *force majeure* principle was considered only at the first appellate authority stage.

35. Now, it would be appropriate to deal with individual cases to determine where certain factual pleas call for interference.

i. WP (C) No. 8043/2003 : This is a case where the appellate authority heard the appeal on 20.03.1997 and the order was passed 4 years later on 07.05.2002. The plea of *force majeure* has been declined. There is some inconsistency on facts, which have arisen and, in my considered view, merely on account of this inordinate delay, the same appears to have happened and on that account, the impugned order of the appellate authority needs to be set aside and the matter remanded back for reconsideration on merits by the appellate authority.

ii. WP (C) No. 13102/2004 : In this case, the matter has been considered by the appellate authority and the second appellate authority after the order was passed by the competent authority. A grievance is sought to be made in the synopsis that two different orders were passed by the competent authority. The subsequent order only amended the quantification of penalty and, thus, the same cannot be faulted. Moreover, there is no specific grievance made in the grounds of the petition on this aspect. The appeal order, in fact, finds that AEPC has given benefit of proportionate relief on overall performance and, thus, upheld the penalty. In my considered view, these facts do not call for any interference by this Court.

iii. WP (C) No. 9435/2004 : This is a case where admitted performance of the exporter was only 9.87%. The only plea raised is of cancellation of order on account of World Trade Centre attack while revalidation had occurred afterwards in October, 2001. On the given facts, in my considered view, this is not a case to call for any order of remand for fresh hearing.

iv. WP (C) No. 9681/2004 : The writ petition was filed prior to the decision in appeal filed by the petitioner before the second appellate authority only on account of the apprehension of encashment of BG / EMD and on the general proposition raised in other connected writ petitions. This is a case of FCFS quota and the ground is stated to be inability to ship the goods due to non-supply of fabrics. Before the competent authority, a plea for non-supply by the fabric manufacturer on account of criminal riots at Ahmedabad was taken while before the first appellate authority when documents were asked to be submitted on account of the said fact, the exporter took the stand that the buyer in USA had advised him to postpone delivery on account of September 11 attack. This itself shows inconsistency. In any case, the matter is before the second appellate authority and thus, in my considered view, does not call for any interference by this Court.

It may also be noticed that on the first date of hearing, a plea was sought to be advanced that a person other than the person, who had heard the matter, had passed the order. Though there was nothing on record, learned senior counsel for the petitioner stated that the said allegation was made with sense of responsibility and the Order dated 31.05.2004 records that in case this allegation is found to be false, the writ petition is liable to be dismissed with exemplary costs. Moreover, in the factual written synopsis, not even a plea about this is sought to be agitated clearly showing that this plea has no basis. I, thus, consider it appropriate to

burden this petitioner with costs of Rs.3,000/- to be paid to the respondents.

v. WP (C) No. 9397/2004 : Though the factual detail has been given about this matter; in response, the respondents has stated that there is no such writ petition and this fact is correct.

vi. WP (C) No. 3674/2004 : The only grievance made is that only a short notice was given for hearing of the second appeal and the order of the first appellate authority was delayed. It, however, has to be noticed that cogent reasons have been recorded by all the authorities and the petitioner failed to produce documentary evidence. This matter, in my considered view, also calls for no interference.

vii. WP (C) No. 16319/2004 : The plea of the petitioner is cancellation of the order due to September 11 attack. The quota is stated to be revalidated in October, 2001 after the said incident and it is a case of nil utilisation of the quota during the extended period, whereas the time was till 31st of December to fulfill the export commitment. No ground, in my considered view, is made out for interference in this case.

viii. WP (C) No. 3677/2004 : The petitioner sought waiver on account of electricity cut by the Government. The plea raised by the petitioner is that the second appellate authority passed the order on 16.02.2004 without any notice to the petitioner. The matter was stated to be heard ex-parte on 30.12.2003 when the representative of the petitioner was stated to be appearing in matters of sister concern. The order of the second appellate authority is cryptic. There is no response in the counter affidavit on this

aspect. I, thus, consider it appropriate to set aside the order of the second appellate authority and remand the matter back for reconsideration by the said Committee.

ix. WP (C) No. 3679/2004 : The appellate committee has passed an order on 02.12.2002 while the appeal was heard on 08.07.1998. An allegation has also been made that the coram is different from the one which had taken up the appeal and the pleas have not been considered. This inordinate delay of 4½ years in passing the order, in my considered view, itself entitles the petitioner to the relief of setting aside the order and remanding the matter back for reconsideration by the appellate authority.

x. WP (C) 6925/2004 : The petitioner has filed the present petition aggrieved by the order of the first appellate authority. The remedy of appeal before the second appellate committee was available, but it appears that this writ petition was filed on account of the larger issue. In my considered view, the petitioner should approach the second appellate authority first for redressal of its grievances. Ordered accordingly.

xi. WP (C) No. 2422/2004 : The grievance made is that the petitioner could not ship any goods in the end of December because they were expecting an embargo on category 26. This plea has found to be unsustainable as there was no embargo. Thus, the matter, in my considered view, calls for no interference.

xii. WP (C) No. 3680/2004 : The plea is of delay by the first appellate committee in pronouncing the orders. The hearing took place on 26.11.1997 while the orders were passed in July, 2000. The case of the

petitioner on *force majeure* did not find favour with the first appellate authority or the second appellate authority. The question posed was whether this matter should be remanded back or this Court itself should consider the matter on the basis of the evidence to be filed by the petitioner, which was produced before the first appellate authority and a direction was, thus, passed that in order to enable this Court to consider the matter, the evidence produced before the first appellate authority should be filed on record. This Order was passed on 15.03.2004. Thereafter, the matter has been listed on 05.05.2004, 06.05.2004, 28.07.2004 whereafter it was finally heard on 14.10.2004 and judgment was reserved. No such evidence, as was relied upon by the petitioner before the first appellate authority, was filed before this Court over a number of months. I see no reason why this Court should, thus, interfere in exercise of jurisdiction under Article 226 of the Constitution with the orders of the appellate authority despite there being an element of delay in passing of orders by the first appellate committee.

xiii. WP (C) No. 5916/2003 : The grievance of the petitioner is that the quota could not be utilised due to power cut and the appeal was heard on 05.11.1998 by the first appellate authority while the order was passed in January, 2000 and signed on 15.11.2000. There is undoubtedly delay on the part of the first appellate committee in passing the order but the matter has also been considered by the second appellate committee and the petitioner had failed to file necessary documentary evidence. Thus, I see no reason to interfere in this case.

xiv. WP (C) No. 3275-78/2004 : No specific factual plea has been raised in the written synopsis and only the general principles were raised, which stand decided against the petitioner in the present judgment.

xv. WP (C) No. 16102/2004 : The plea is frequent power failure in Okhla Industrial Area and the printing job at Jodhpur being affected due to cold weather and less sunshine. No documentary evidence was produced and the findings were, thus, correctly arrived at by the first appellate committee and the second appellate committee rejecting the plea of the petitioner. Thus, the matter, in my considered view, calls for no interference.

xvi. WP (C) No. 4584/2004 : The plea raised is of non-utilisation of quota due to delayed delivery of processed fabrics due to closure of unit because of excise duty. It has been stated in the response that the quota was of the year 1998 and the change in policy came into being only in 1999 or in the end of December, 1998. Thus, I find no reason to interfere with the findings of the appellate committee.

xvii. WP (C) No. 13154/2004 : The petitioner has pleaded frequent court / customs strike and load shedding by the electricity authority. Documentary evidence was not produced and additional pleas were sought to be added before the second appellate committee, which has considered all the matters and rejected the same which, in my considered view, do not call for any interference.

xviii. WP (C) No. 2347/2004 : The petitioner was allotted consignment under category 1A to Canada and the plea is that overall utilisation for the year

2000 was 59.6%. The respondents have set out that this is a case of held up consignment and benefit could not have been extended in terms of para 13-B of the Policy since there was no unallocated balance available on the date of application for which benefit was sought by the petitioner. Thus, the matter, in my considered view, does not call for any interference.

xix. WP (C) No. 7178/2004 : The petitioner has pleaded that fabricator of the garments suffered fire in the godown. The response is that the disputes were pending between the petitioner and their suppliers since May/June, 1996 while the revalidation of quota in question was in 1998. All these aspects have been considered by the appellate committee and, in my considered view, do not call for any interference by this Court.

xx. WP (C) No. 3678/2004 : This is a case of delay of 3 years by the first appellate committee in deciding the matter and, in my considered view, on that account alone the impugned order needs to be set aside and the matter remanded back to the first appellate committee to pass a fresh order on the appeal.

xxi. WP (C) No. 7125/2003 : The petitioner has pleaded that the printing and dying work was to be completed by M/s. Meher Prints by 31.11.2000, but the factory was closed and sealed on 25.11.2000 in pursuance to directions of the Hon'ble Supreme Court and by that time, it was too late for the petitioner to make arrangements. The appellate authorities have considered this aspect as the quota was obtained on 18.11.2000 and the orders for closure of units in non-conforming areas were passed much prior to that date. The forfeited amount was reduced on account of overall

performance of the petitioner as 76.92%. Thus, I find no reason to interfere with the said findings.

36. There is no factual matrix / pleas given in respect of any of the other petitions, which would require individual case to be considered.

37. Before parting with the matter, it must be noticed that the judgment was reserved on 14.10.2004 and the chart of the factual matrix of the cases had to be filed on 26.10.2004. There has been inordinate delay in filing the same as this was filed only on 27.11.2004, which has unnecessarily delayed the judgment in the matter. Due care should have been taken to submit the factual matrix in time, especially in view of the new regime which is likely to come in respect of the export of garments from 01.01.2005 and the matter required expeditious disposal.

38. The writ petitions are disposed of in the aforesaid terms leaving the parties to bear their own costs.

39. Registry is directed to give separate writ petition nos. in respect of each of the petitioners in WP (C) Nos. 6393/1998, 8246/2002, 1298/2003, 2334/2004.

December 07, 2004
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SANJAY KISHAN KAUL, J.