IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

WEDNESDAY, THE 1ST DAY OF SEPTEMBER 2021 / 10TH BHADRA, 1943

WP(C) NO. 31060 OF 2013

PETITIONER:

POMSY FOOD PRODUCTS (P) LTD.
BAKESHIRE, K.S.PURAM, VAVUKAVU P.O., KOLLAM,
KERALA - 690 528, REP. BY ITS GENERAL MANAGER.

BY ADVS.
SRI.C.K.KARUNAKARAN
SMT.T.P.LEKSHMI VARMA

RESPONDENTS:

1 UNION OF INDIA
REP BY SECRETARY, MINISTRY OF COMMERCE & INDUSTRY,
UDYOG BHAWAN, NEW DELHI - 110 001.

2 DIRECTOR GENERAL OF FOREIGN TRADE
DEPARTMENT OF COMMERCE, UDYOG BHAWAN,
NEW DELHI - 110 001.

3 DEPUTY DIRECTOR GENERAL OF FOREIGN TRADE
V FLOOR, A BLOCK , KENDRIYA BHAWAN, KAKKANAD,
COCHIN - 681 037.

4 COMMISSIONER OF CUSTOMS
CUSTOM HOUSE, COCHIN - 682 009.

BY ADVS.
SRI.P.PARAMESWARAN NAIR,ASG OF INDIA
SMT.KAVERY S THAMPI

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 01.09.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

J U D G M E N T

The petitioner is a company registered under the provisions of the Companies Act, 1956. As a part of its business activities and to cater to the export market the petitioner availed the facility of an advance licence bearing No.01010015588 dated 31-03-2004 which enabled the petitioner to import raw materials and packaging materials without payment of duty and upon the condition that the petitioner would achieve a specified export obligation both in terms of value and in quantity. The petitioner states that due to circumstances beyond its control it could not achieve the export obligation within the specified time and therefore it requested an extension of the validity period which was rejected by order dated 22-01-2008 of the 2nd respondent. The petitioner thereupon preferred a review petition before the 1st respondent. Such a review petition is also provided for in terms of the provisions contained in a Foreign Trade Policy 2004-2009. When the review petition was pending an attempt was made to invoke the bank guarantee provided by the petitioner requiring the petitioner to approach this Court through W.P (C) No.8990/2008. The invocation of the bank guarantee was stayed by this court. Finally by Ext.P2 judgment dated 05-02-2013 the review petition was directed to be considered and disposed of. After the aforesaid judgment of this court,

the review petition was taken up for consideration and Ext.P4 communication was issued by the 2nd respondent informing the petitioner that the review petition had not been considered favourably. The review petition appears to have been considered by the Policy Relaxation Committee, the minutes of which have been produced as Ext.P5. The only relief was that granted to the petitioner as is evident from a reading of Ext.P5 is that the petitioner may opt to get its case regularised in terms of para 4.28 of the Handbook of Procedures accompanying the policy. It appears that following the rejection of the review petition the petitioner paid the entire duty amount of Rs.33,27,245/- on 27-08-2013 (evidenced by Ext.P8). Thereafter the petitioner was served with Ext.P9 notice requiring the petitioner to show cause as to why action should not be taken against it for failure to regularise the matter in terms of para 4.28 of the Handbook of Procedures as directed in the Minutes of the Policy Relaxation Committee which considered the review petition. The petitioner replied to the show cause notice through Ext.P10. It was informed that the duty amount had already been remitted and that the petitioner is waiting for information from the 4th respondent (the Commissioner of Customs) regarding any amount that is further payable. Possibly in response to this, the 4th respondent informed the petitioner that in addition to the duty amount of Rs.33,27,245/- paid, an amount of Rs.45,10,709/- is due as interest for the period up to 27-08-2013. It

is thus challenging Exts.P5, P9 & P11 that this writ petition has been filed.

2. I have heard Sri. C.K. Karunakaran for the petitioner and Ms Krishna, learned Central Government Counsel appearing for the respondents.

3. The principal contention of the learned counsel appearing for the petitioner is that Ext.P5 proceedings of the Policy Relaxation Committee shows that a decision on the petitioner's review petition was arbitrarily taken. He would further contend that at any rate, the petitioner is not liable for payment of any interest for the period during which the review petition was pending before the competent authority. In support of this contention the learned counsel has placed reliance on the judgment of the Supreme Court in ***Ram Chand and others v. Union of India and others; (1994) 1 SCC 44*** and ***Mohamad Kavi Mohamad Amin v. Fatmabai Ibrahim; (1997) 6 SCC 71*** and also the judgment of this Court in ***John v. Executive Officer; 1992 (1) KLT 562.*** The learned counsel appearing for the respondents would however submit that the terms and conditions upon which the advance licence is issued under the terms of the EXIM policy are very clear and categoric and that on failure to achieve export obligation, action, as contemplated by the policy had to be taken against the petitioner. Regarding the plea raised by learned counsel for the petitioner that the petitioner is not liable to pay interest for the period during which Ext.P1 review petition was pending before the 1st

respondent, it is submitted that interest is statutory and this court in the exercise of jurisdiction under Article 226 of the Constitution of India cannot waive statutory interest. I have considered the rival contentions.

4. Exhibit P5 minutes of the Policy Relaxation Committee show that the petitioner had admitted before the authority concerned that they had made zero exports within the original validity of the advance licence authorisation. The minutes would also record that one extension of 6 months had been granted by the 3rd respondent. The import in question took place in the year 2004. The Policy Relaxation Committee considered that the problems projected by the petitioner for failure to meet the export obligation were from February 2005 to April 2006 and that even before that period i.e., from March 2004 to February 2005 no exports for meeting the obligation under the subject advance licence was effected by the petitioner. The Committee also noticed that the export obligation period had been extended up to 30-09-2008 at the request of the petitioner and even during this period no exports have been affected. It is, for this reason, the Committee felt after 9 years there was no reason to consider the request for extension of the export obligation period. It, therefore, directed that the petitioner could apply for regularisation under clause 4.28 of the Handbook of Procedures which has been issued in terms of para 4.24 of the Foreign Policy. A reading of para 4.28 of the Handbook of

Procedures shows that the case of the petitioner is not covered under clause 4.28 (i) or 4.28 (ii). The case of the petitioner, on admitted facts, will fall under clause 4.28 (iii). Clause 4.28 deals with the situation where the export obligation has been fulfilled in value terms but there is a shortfall in the terms of quantity and clause 4.28 (ii) deals with the situation where the export obligation is fulfilled in quantity but there is a shortfall in value. Both situations contemplated by clauses 4.28 (i) and 4.28 (ii) provide separate methods for calculation of the amount payable for regularisation. Clause 4.28 (iii) provides that where the export obligation is not fulfilled both in terms of quantity and value the amount payable will be as the amount calculated under clauses 4.28 (i) and 4.23 (ii). A combined reading of clauses 4.28 (i), (ii) & (iii) leads to the conclusion that the petitioner will have to pay interest also if it intends to regularise its default in terms of clause 4.28. From the facts as pleaded in the writ petition, it appears that the petitioner never applied for regularisation in terms of clause 4.28 of the Handbook of Procedures. The facts being as above I cannot accept the arguments of the learned counsel for the petitioner that Ext.P5 suffers from any vice warranting interference with it in the exercise of the power of judicial review under Article 226 of the Constitution of India.

5. The next question is whether the delay in disposal of Ext.P1, should result in an order relieving the petitioner of the liability to pay interest as

demanded in Ext.P11. Interest under the Customs Act is statutory. There can be no waiver of such interest unless such waiver is provided for in the provisions of the Customs Act itself. The decisions cited at the bar by the learned counsel for the petitioner lay down the principle that statutory power must be exercised within a reasonable time. There can be no quarrel with that proposition. However, the failure on the part of the statutory authority to exercise power vested in it cannot automatically result in an order that the petitioner should be relieved from the payment of interest for any period of unreasonable delay in exercise of statutory power. The petitioner admittedly paid the amount due on account of failure to meet the export obligation only on 27-08-2013. The advance licence was issued in 2004 and the export obligation period was 18 months from the date of issue. Even accounting for the 6 months extension granted by the original authority, the period of export obligation would have expired in 2006. The petitioner was able to import materials without payment of customs duty only in terms of the advance licence. The petitioner, on failure to meet the export obligation, was required to pay customs duty on the imported material. The export obligation period having ended in the year 2006 (even after the extension) the petitioner was bound to pay customs duty in the year 2006. The petitioner has paid the customs duty only in the year 2013. The petitioner could have opted to remit customs duty under protest. It did not do

so. It waited for the result on Ext.P1 application for review and thus enjoyed the benefit of money payable to the Customs Department on account of its default. Interest, it is well settled, is compensation for money retained. Therefore, the petitioner cannot claim any exemption from the payment of interest. I must also note that on account of the interim order in W.P (C) No.8990/2008, even the invocation of the bank guarantee was interdicted. Though the petitioner complains of unreasonable delay in the disposal of Ext.P.1 review petition, it did not attempt to get an order from this Court in W.P (C) No.8990/2008 to have the review petition heard. It continued to enjoy the interim order until the matter was finally disposed of, through Ext.P.2 judgment dated 8.2.2013. A similar question arose for consideration ***Voltas Ltd. v. State of A.P.*, *(2004) 11 SCC 569***, and it was held: -

> *"15. Reliance was placed upon the case of J.K. Synthetics Ltd. v. CTO [(1994) 4 SCC 276] wherein the question was whether an assessee was liable to pay interest. The assessee had not included the amount of freight charged in respect of sales of cement, as part of price and filed returns on that basis. The assessee also paid tax on that basis. However, ultimately on adjudication it was held that freight was part of the price and that tax had to be paid even on this element. The assessee thus paid the tax. The question was whether the assessee was liable to pay interest on this payment. In this context, this Court held as follows: (SCC pp. 292-93, para 17)*

"17. Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than 15 days. The requirement of Section 7(1) is undoubtedly a statutory requirement. The prescribed return must be accompanied by a receipt evidencing the deposit of full amount of 'tax due' in the State Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2-A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of 'tax due' shown in the return. When Section 11-B(a) uses the expression 'tax payable under sub-sections (2) and (2-A) of Section 7', that must be understood in the context of the aforesaid expressions employed in the two sub-sections. Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which becomes due ex hypothesi on the turnover and taxable turnover 'shown in or based on the return'. The word 'payable' is a descriptive word, which ordinarily means 'that which must be paid or is due, or may be paid' but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2-A) and 11-B of the Act leaves no room for doubt that the expression 'tax payable' in Section 11-B can only mean the full amount of tax which becomes due under sub-sections (2) and (2-A) of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to visit him with the liability to pay interest under clause (a) of Section 11-B. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages

> *the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible."*
>
> *16. It was submitted that this authority shows that a liberal interpretation had to be given and that the assessee should not be made liable for interest amounts. In our view this authority is against the appellants. This authority shows that the tax becomes due on the date the returns are filed. In J.K. Synthetics case [(1994) 4 SCC 276] the assessee had paid the tax which the assessee thought was payable. In this case the appellants were not exempted from paying tax. All that happened was that payment of tax was deferred. Thus the appellants collected tax from the customers but were not paying the same over to the Government. The concession of deferral did not mean that the payment had not become due. Payment became due with the filing of the returns. The deferral was granted as payment had become due. The appellants knew that it was due but due to the concession granted under the Scheme, they were not paying the same."*

On the authority of ***Voltas Ltd. (supra),*** the petitioner is not entitled to any relief, in the facts and circumstances of this case.

6. There is yet another aspect of the matter, this court in the exercise of jurisdiction under Article 226 of the Constitution of India cannot waive the payment of interest, which is statutory. Such relief, if at all it can be granted, will be a relief in equity. It is well settled that equity cannot operate against statutory law. in ***Madamanchi Ramappa v. Muthaluru Bojjappa***; ***AIR***

1963 SC 1633 it was held : -

> *"What is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law."*
>
> [Also see ***P.M. Latha v. State of Kerala, (2003) 3 SCC 541***]

For all these reasons the writ petition fails. It is accordingly dismissed.

Sd/-
GOPINATH P.
JUDGE

AMG

APPENDIX OF WP(C) 31060/2013

PETITIONER EXHIBITS

EXHIBIT P1 : TRUE COPY OF THE REVIEW PETITION DATED 29.02.2008

EXHIBIT P2 : TRUE COPY OF THE JUDGMENT DATED 05.02.2013 IN WPC NO.8990 OF 2008

EXHIBIT P3 : TRUE COPY OF THE ARGUMENTS NOTES DATED 13.05.2013

EXHIBIT P4 : TRUE COPY OF LETTER DATED 04.06.2013

EXHIBIT P5 : TRUE COPY OF THE MINUTES OF THE MEETING OF THE POLICY REVIEW COMMITTEE DATED 14.05.2013

EXHIBIT P6 : TRUE COPY OF THE LETTER DATED 29.06.0213 OF THE PETITIONER ADDRESSED TO THE 3RD RESPONDENT

EXHIBIT P7 : TRUE COPY OF LETTER DATED 24.06.2013 ADDRESSED TO THE 4TH RESPONDENT

EXHIBIT P8 :TRUE COPY OF THE LETTER DATED 02.08.2013

EXHIBIT P9 : TRUE COPY OF THE LETTER DAETD 02.08.2013

EXHIBIT P10 : TRUE COPY OF THE LETTER DATED 27.08.2013

EXHIBIT P11 : TRUE COPY OF THE LETTER DATED 29.08.2013

EXHIBIT P12 : TRUE COPY OF THE LETTER DATED 28.11.2013