

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 12066 of 2017

PAREKH INDUSTRIES LTD

Vs

THE UNION OF INDIA & OTHERS

S C Dharmadhikari & Bharati H Dangre, JJ

Dated: February 20, 2018

Appellant Rep. by: Mr. Prakash Shah with Mr. Jas Sanghavi
Respondent Rep. by: Mr. Y R Mishra with Mr. Atul Singh for Mr. Naresh Thacker with Mr. Ranjeet Mahtani & Mr. Niraj Hande

Cus - FTP - Gold Replenishment Scheme - respondents not to insist on furnishing of a Fixed Deposit/Bank Guarantee by the petitioner and in lieu thereof accept Indemnity Bond: High Court [para 35]

Petition disposed of

JUDGEMENT

1. By this petition under Article 226 of the Constitution of India, the petitioner is seeking a writ of mandamus or any other writ, order or direction in the nature thereof directing the respondents and in particular respondent No.3, either by itself or through its officers, subordinates, etc., to forthwith deliver/release the outstanding quantities of replenishment gold pertaining to seven exports made by the petitioner under the Replenishment Scheme of the Foreign Trade Policy ("FTP" for short) 2015-2020 without insisting on any security whatsoever, and a further prayer of this broad relief is to direct action against respondent No.3 for failure to perform a statutory obligation which would include cancellation of its status as a Nominated Agency.

2. We do not think that the latter part of the prayer/broad relief sought by the petitioner should be considered for the alleged lapse on the part of respondent No.3. We leave it to the wisdom of respondent No.1 to take appropriate decision as far as this aspect is concerned.

3. However, we must at once clarify that what the petitioner is seeking is a benefit in terms of the policies which the competent authorities framed under the Foreign Trade (Development and Regulation) Act, 1992 ("FTDR Act" for short). Though the third respondent is a limited company, it is nominated in terms of the FTP and it performs statutory functions, as is claimed in the writ petition.

4. The FTP is also traceable to Section 5 of the FTDR Act. The Chapter 4 of the FTP, inter alia, provides for "Schemes for Exporters of Gems and Jewellery".

5. The petitioner places reliance upon para 4.32 r/w para 4.33 of the FTP and claims that the exporter of, inter alia, gold jewellery will be eligible to gold as an input from the Nominated Agency in advance or as replenishment after export, in accordance with the procedure specified in that behalf.

6. In terms of the aforesaid provisions of the FTP, the petitioner is entitled to replenishment of the gold used in the manufacture of gold jewellery, exported by the petitioner.

7. After setting out these paragraphs of the FTP, the petitioner has referred to a Notification dated 23-2-2017, amending para 4.34 (i) of the FTP.

8. It is stated that in terms of this amendment, after exporting the consignments of gold jewellery, the petitioner became entitled to receive 169 Kgs. of replenished gold.

9. The petitioner submitted seven applications to the third respondent for grant of replenished gold. All the proofs and supporting documents were also supplied and the petitioner awaited the fruits of the policy. They even addressed a reminder but the third respondent responded, inter alia, stating that the transaction under the Replenishment Scheme is currently under investigation by the Central Government Agencies. It, therefore, insisted that the petitioner provide a security, namely, Fixed Deposit/Bank Guarantee towards the customs duty which will be used as a cover for its liability. Then it was clarified that the third respondent is not liable for any change in the customs duty or incidental losses/gains.

10. The correspondence continued and in some of the letters the petitioner was called upon by the third respondent to submit documentary evidence, particularly proving that the petitioner has not availed Cenvat credit of the duty paid on the inputs used in the manufacture of gold jewellery.

11. The petitioner also clarified this aspect by pointing out that it has not availed of any Cenvat credit.

12. With all these clarifications, the petitioner was still not granted the replenishment and the insistence by the third respondent continued.

13. The petitioner demanded that either the gold be replenished or a sum of Rupees Six Crores with interest at 18% be paid to it in lieu thereof. The third respondent by a letter dated 10-4-2017 stated as under: -

"To

The Director
Parekh Industries Ltd
Prince House, 51/3
Marol Cooperative Indl Estate
M.V. Road, Andheri East Mumbai 400059

DIL/PM/PIL/368

dt 10.04.2017

Dear

Sirs/Madam

Replenishment Scheme Delivery of Gold

We are in receipt of your letter No PIL/002 dt 06.04.2017 and, at the cost of repetition, clarify as under:

(i) We have repeatedly been advising you to take delivery of gold following the procedure as laid down in FTP/HBP. However, you have not come forward to comply with the same which is the only reason why the release of gold remains "pending".

(ii) The release of gold can be done only in accordance with the DGFT Notification 40 dt 23.02.2017 (and other relevant paragraphs of FTP). Both the Nominated Agencies as well as the exporters are bound by the same.

(iii) The said Notification states that in case cenvat credit or input rebate has been availed, the exporter will be allowed duty free gold provided the exporter uses the duty free inputs to make dutiable goods.

(iv) The exporter, therefore, should first declare whether he has availed cenvat credit / input rebate or not, so that his request for duty free gold can be processed. All our other customers have done so (on stamp paper). You have yourself declared that you have not availed cenvat credit. Therefore, we are unable to understand why you hesitate to declare whether you have availed input rebate or not as provided in the Notification.

(v) The declaration of the exporter needs to be supported by copies of the excise invoices and relevant forms (i.e. ARE 1 / ARE 2) as submitted to the excise department. These documents are essential in order that we may determine whether the exporter is required to use duty free input to make dutiable goods. Therefore, these are not "irrelevant documents" as stated by you.

(vi) You have told us several times that you have claimed only the excise duty paid on finished product (i.e. 12.5%) but not claimed any input rebate (i.e. 9.35%). In fact, you have submitted to us a sample excise invoice on 3rd April

where a mention has been made about your filing ARE 2 to avail rebate. As ARE 2 is a combined statement of claim for both types of rebates, please submit us a copy of ARE 2 to establish that you have not availed the input rebate.

In case you submit the declaration that you have not availed cenvat credit or input rebate, duly supported by the documents as mentioned earlier, we can process your requests immediately as we have already done for all similar cases.

In case you submit the declaration for having availed cenvat credit or input rebate, we shall consider release of gold following the procedure as laid down in the aforesaid Notification.

In case you fail to submit the desired declaration within a week (with excise invoices and ARE 1 / ARE 2 in support thereof), we shall be constrained to conclude that you have failed to comply with the said DGFT Notification for which it will not be possible for us to process your requests for release of duty free gold thereafter.

2. We have restricted our clarifications/responses to the substantive issues relating to your transactions in question, and shall expect you to do so, in order that we may arrive at a reasoned conclusion in the matter.

Yours faithfully

Sd/-

Chief Executive Officer (Precious Metals)"

14. The petitioner's version is that this is undue harassment and contrary to the scheme.

15. The petitioner specifically urged that nothing of this is relevant for if that was relevant and germane to the scheme and to the FTP, respondent No.1 and the competent authorities under the Customs Act, 1962, as also the Central Excise Act, 1944 / the Cenvat Credit Rules framed thereunder would have taken up the matter, investigated it and raised a demand. The third respondent by misinterpreting and misreading the policy is foisting on the petitioner the terms and conditions contrary thereto. This is particularly clear from the stand of the third respondent as reflected in the letter of 10-4-2017.

16. Upon such a petition, after it being served, the reply of respondent Nos.1 and 2 is that such a Notification was indeed issued. However, the Nominated Agency has not acted contrary to it. The petitioner should have fairly stated that whether Cenvat credit on precious metal (gold, silver and platinum) as input has been availed of and gems and jewellery products are exported availing rebate, then, the replenishment of such precious metal shall be allowed provided that such inputs procured duty free are used in the manufacture of dutiable goods in the

factory/unit where the exported gems and jewellery products were manufactured. The sales/transfer of such duty free precious metal shall not be allowed.

17. Thus, the proof of export is not the only requirement but in addition the aforementioned condition should be fulfilled. That is why the first and the second respondents support the stand of the Nominated Agency.

18. Then it is stated in this affidavit that the petitioner did not credit all the duty paid on inputs used in the manufacture of exported goods but claimed the rebate on duty paid on the inputs in the manufacture of exported goods. Therefore, in order to ensure that this condition is fulfilled, the Nominated Agency justifiably insisted on security from the petitioner. Eventually if that condition is found to be fulfilled, the security will be returned but if the petitioner fails to comply with this condition, then that security will be used by the Nominated Agency as a cover for the Bank Guarantee which has been submitted by the third respondent to the Customs authority. Since the importer of the goods (Nominated Agency) has to furnish a Bank Guarantee to the Customs in cases of duty free import and such securities are forfeited in cases of violation of the conditions attached with the import of duty free goods, that the insistence by respondent Nos.1 and 2. Therefore, the imposition of the condition is justified.

19. Then an affidavit is filed by respondent No.3. This affidavit is, firstly, stating that the petitioner has an alternate and equally efficacious remedy of an appeal. The third respondent has denied each and every statement and allegation in the petition. The petitioner ought to have approached the authorities and namely, the Director General of Foreign Trade ("DGFT", for short). He is the final authority, particularly on the implementation of the FTP. It is in these circumstances, unless the petitioner gets a clarification from the Director General of Foreign Trade, this petition should not be entertained.

20. Without prejudice, it is stated that the petitioner cannot claim a right of replenishment for no such right vests in it beyond the FTP or the scheme thereunder. It is in these circumstances that the imposition of a procedural condition is justified.

21. From paras 8 to 12 of the affidavit in reply, the status of the third respondent as a Nominated Agency is set out in great detail. After that, in paras 13 and 14, the requirement of furnishing a Bank Guarantee is justified and it is stated that it is in tune with the FTP.

22. From para 15, the salient features of the Replenishment Scheme are set out, and from para 17 the DGFT Notification dated 23-2-2017 with its details is referred.

23. In para 22, the nature of the transactions of the petitioner have been set out and it is submitted that the replenishment gold was not released for reasons

which are entirely relevant and germane and it is the petitioner who refused to comply with the Notification.

24. With these prefatory paragraphs, the petition is dealt with parawise and each of the paragraphs are dealt with and the contents or such of those which are contrary or inconsistent with the FTP, the scheme and the salient features of which are set out in the foregoing paragraphs of the affidavit, so also the role of the Nominated Agency, are denied. Not resting its case only with this affidavit of 12-2-2018, an additional affidavit has been filed on 17-2-2018 in which it is stated that the third respondent and the petitioner have entered into an agreement dated 17/2/2016. Any dispute arising between the petitioner and the third respondent and vice versa is governed by this agreement. That provides for a dispute resolution clause. In such circumstances, even the grievance redressal mechanism being set out therein, the petition should not be entertained.

25. It is then stated that the transaction of obtaining gold by the petitioner for the past period is under investigation by the Office of the Directorate of Revenue Intelligence (DRI), Ahmedabad Zonal Unit. The DRI by its email dated 23-2-2017 has directed the third respondent to produce documents submitted by certain exporters, including the petitioner, for procurement of gold under this Replenishment Scheme. The documents are in relation to exports for the period July, 2016 to January, 2017.

26. It is in these circumstances and because this email copy could not be inadvertently attached, that this further reply.

27. There are detailed submissions which have been made with regard to the complaint against the third respondent and lodged by the petitioner with the DGFT.

28. It is on the above materials that we have heard Mr. Prakash Shah, appearing for the petitioner, Mr. Mishra, appearing for respondent Nos.1 and 2 and Mr. Thacker, appearing for the third respondent. At the outset, Mr. Thacker, raising a preliminary objection to the maintainability of the petition submitted that the version of the petitioner, as set out in the petition and its correspondence, is completely one sided, apart from being false. That is a misleading picture given by the petitioner, particularly with regard to the involvement and role of the third respondent. Therefore, no relief be granted to the petitioner in this petition when the act is contrary to the FTP and the scheme. Mr. Mishra also supports this stand and submits that there is nothing erroneous or illegal in insisting on a guarantee/security.

29. After giving our anxious consideration to these submissions, we put it to Mr. Shah, appearing for the petitioner, as to whether the petitioner is ready and willing to give a security, as insisted upon by the respondent. The matter was adjourned to enable Mr. Shah to take instructions. Mr. Shah reverted back on the

adjourned date by stating that the petitioner would specifically indemnify respondent No.3 against all claims and which are lodged either with respondent Nos.1 and 2 or raised in appropriate proceedings before the appropriate forum. The third respondent would not be held liable but the petitioner would face the consequences arising out of the orders and directions in such proceedings. In other words, the petitioner shall indemnify respondent No.3 as against all claims raised on it, or against it, by the Central Government and the second respondent or any third parties.

30. On this stand of the petitioner being made known to the third respondent, Mr. Thacker says that in the garb of indemnifying the third respondent against all claims, the petitioner is avoiding its responsibility and obligation to fulfil the terms and conditions of the FTP and the Replenishment Scheme itself. This should not be permitted and no Indemnity Bond can be accepted in lieu of the specific term, namely, furnishing of security in the form of a Fixed Deposit or Bank Guarantee.

31. Alternatively, he would submit that if the course as suggested by the petitioner is permitted, that would become a precedent for all future cases.

32. After having heard both sides on this limited point, we do not see how the third respondent and which apprehends any action being taken against it by the competent authorities and particularly respondent Nos.1 and 2 can, in the facts and circumstances peculiar to this case, insist on the furnishment of a Bank Guarantee only. We have noted that Fixed Deposit or Bank Guarantee is a condition which has been insisted upon initially from the letter dated 27-1-2017, addressed by the third respondent. In that letter, the third respondent says that the petitioner has been supplied gold under the Replenishment Scheme till date. However, the transactions under the scheme are currently under investigation by the Central Government Agencies. In the circumstances, the third respondent would consider the supply of gold under the said scheme subject to the petitioner providing a Fixed Deposit/Bank Guarantee towards the customs duty. This will be used as a cover for the third respondent's liability under the Bond and the Bank Guarantee, except on duty free gold to be supplied to the petitioner. The third respondent stated that the security would be discharged on release of the Bond and the Bank Guarantee by the Customs authorities.

33. It was clarified that the third respondent supplies gold as replenishment of the quantity of gold jewellery exported and it has no relation to the percentage of customs duty of gold being sold in the market. As such the third respondent is not liable for any change in customs duty or incidental losses/gains.

34. We have also noted the stand of respondent Nos.1 and 2, as set out in the affidavit in reply and particularly referring to para 4.34 (i) of the Notification dated 23-2-2017.

35. We are of the firm view that in the facts and circumstances peculiar to the petitioner's case, particularly bearing in mind that in the past such replenishment has been granted to the petitioner, interest of justice would be served if the petitioner executes an Indemnity Bond, indemnifying respondent No.3 against all the claims that would be raised by the competent authorities in the Central Government and exercising powers under the Customs Act, 1962, the Central Excise Act, 1944 and the FTDR Act, 1992. In the event any claims and demands are raised on the third respondent, the petitioner should indemnify the third respondent against them. Meaning thereby, all consequences of such claims being raised or demands being enforced shall be borne entirely by the petitioner to the exclusion of the third respondent. The petitioner is ready and willing to execute such an Indemnity Bond and in the widest of the terms as noted by us. Once such an agreement is forthcoming from the petitioner, then in the facts and circumstances peculiar to this case, we direct the respondents not to insist on furnishing of a Fixed Deposit/Bank Guarantee by the petitioner and in lieu thereof accept this Indemnity Bond. To allay any apprehension of the third respondent, we direct and clarify that this order shall not be treated as a precedent in any future cases of the present nature. It is only in the facts and circumstances peculiar to the petitioner's case, as highlighted by us, and bearing in mind the past transactions that we have issued this direction. The writ petition is disposed of with a further clarification that in the event such a Bond, as directed above, is furnished, within a period of four weeks from the receipt thereof, the replenishment shall be made by the third respondent. There will be no order as to costs.