

**SUPREME COURT OF INDIA****Bench: Justices Abhay S. Oka and Ujjal Bhuyan****Date of Decision: 13<sup>th</sup> May 2024**

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6394 OF 2024

(Arising out of Special Leave Petition © No. 4974 of 2021)

**M/S. EMBIO LIMITED ...APPELLANT(S)****VERSUS****DIRECTOR GENERAL OF FOREIGN TRADE & ORS. ...RESPONDENT(S)****Legislation:**

Article 226 of the Constitution of India

Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992  
("FT Act")Section 3(1)(o), 18 of the Sick Industrial Companies (Special Provisions) Act,  
1985 ("SICA")**Subject:** Appeal challenging the imposition of a penalty on the appellant for failing to meet the export obligations under a licence, following the amalgamation and corporate restructuring of the appellant.**Headnotes:**

Civil Law – Challenge to penalty imposed for non-fulfillment of export obligations – Appeal against High Court’s dismissal of Writ Petition and Writ Appeal challenging a penalty imposed under Section 11(2) of the FT Act – Supreme Court found that the penalty was erroneously imposed as the obligation related to non-export rather than any unauthorized export or import activity – Held, the imposition of penalty was outside the scope of Section 11(2), as it strictly applies to contraventions involving unauthorized exports or imports – Orders and penalty set aside – Liberty given previously to file a fresh writ was upheld, dismissing the reasoning of lower courts that no such liberty was reserved – [Paras 1-14].

Decision: The Supreme Court allowed the appeal, setting aside the impugned judgments of the Karnataka High Court and the Order-in-Original imposing the penalty – Held that the demand for penalty could not be sustained under the provisions of Section 11(2) of the FT Act, which does not cover failures to meet export obligations – No orders as to costs. [Para 14]

Referred Cases: None.

## **J U D G M E N T**

### **ABHAY S. OKA, J.**

- 1.** The appellant filed a Writ Petition under Article 226 of the Constitution of India before the Karnataka High Court, challenging the order imposing a penalty of Rs. 23,38,882/— under the provisions of Section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992 (for short, 'the FT Act'). The said Writ Petition was dismissed. By the impugned judgment, a Writ Appeal against the order of the learned Single Judge was dismissed.
- 2.** The appellant was formerly known as Emmellen Biotech Pharmaceuticals Limited, which amalgamated with Karnataka Malladi Biotics Limited based on an order of the Bombay High Court dated 24<sup>th</sup> March 2009.

### **FACTUAL ASPECT**

- 3.** A few factual aspects will have to be set out. Karnataka Malladi Biotics Limited (for short, 'Karnataka Biotics') obtained an Export Promotion Capital Goods Licence (for short, 'the licence'), which enabled it to import certain capital equipment at a concessional rate of customs duty. Under the licence, Karnataka Biotics was permitted to import capital goods worth Rs. 23,38,882/- equivalent to US\$ 64,987 CIF value, subject to the condition of the appellant exporting the finished goods worth US\$ 2,59,948 and earning an equivalent amount in a freely convertible foreign currency within five years from the date of the licence. Karnataka Biotics imported goods as permitted under the licence and commenced commercial production. However, the Board for Industrial Finance and Reconstruction (for short, 'BIFR'), in its meeting dated 11<sup>th</sup> August 1999, declared Karnataka Biotics as a sick unit under Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA'). The said company submitted a rehabilitation proposal to the operating agency. As Karnataka Biotics had enjoyed the benefit of concessional duty, a demand notice was issued by the Commissioner of Customs on 3rd April 2002, making a demand for the differential duty of Rs. 5,38,525/- from Karnataka Biotics. As the said company could not pay the demanded amount, a sum of Rs. 4,86,800/- was recovered by enforcing the bank guarantee furnished by the said company.

4. On June 3, 2003, the BIFR sanctioned Karnataka Biotics' rehabilitation scheme under Section 18 of SICA. On July 16, 2004, the third respondent passed an Order-in-Original imposing a penalty of Rs. 23,38,882/— on Karnataka Biotics for non-fulfilment of export obligation under the licence. An appeal preferred before the appellate authority against the said demand was dismissed, and a review filed before the Central Government was rejected.

5. In 2007, a Writ Petition was filed by the Karnataka Biotics before the High Court of Karnataka to challenge the demand for penalty. On 24<sup>th</sup> March 2009, Karnataka Biotics amalgamated with Emmellen Biotech Pharmaceuticals Limited under the orders of the High Court. Accordingly, a certificate of incorporation for the change of the name of Emmellen Biotech Pharmaceuticals Limited to M/s Embio Limited (appellant herein) was issued. The Writ Petition filed by Karnataka Biotics was allowed by a learned Single Judge of the Karnataka High Court. The respondents challenged the same by filing a Writ Appeal. A Division Bench of the High Court disposed of the appeal by granting permission to withdraw the Writ Petition with the liberty to file a fresh Writ Petition, presumably in view of the amalgamation.

6. The present appellant filed a Writ Petition before the High Court of Karnataka. The learned Single Judge dismissed the Writ Petition by the order dated 14<sup>th</sup> November 2017. One of the grounds of dismissal was that Karnataka Biotics had withdrawn the earlier Writ Petition without reserving any liberty to reagitate the same issue. By the impugned judgment, a writ appeal preferred by the appellant against the order of the Single Judge was dismissed on the ground that Karnataka Biotics had withdrawn the earlier Writ Petition without reserving any liberty to reagitate the issues involved.

### **SUBMISSIONS**

7. The learned senior counsel appearing for the appellant has invited our attention to the rehabilitation scheme of Karnataka Biotics sanctioned by the BIFR, which provides for waiver of the custom duty of Rs. 33.30 lakhs on account of non-fulfilment of the export obligation on the part of the Karnataka Biotics and interest accrued thereon. He submitted that as there was a duty waiver, there was no question of imposing any penalty. Secondly, he submitted that both the learned Single Judge and Division Bench completely ignored that while Karnataka Biotics was permitted to withdraw the earlier Writ Petition, a liberty was granted to file a fresh one. He pointed out to the

order of the Division Bench of the Karnataka High Court in this regard. He invited our attention to the Order-in-Original passed by the 3rd respondent imposing a penalty of Rs. 23,38,882/- under Section 11(2) of the FT Act. The learned senior counsel would submit that non-fulfilment of export obligation under the licence is not a ground under Section 11 (2) of the FT Act to impose a penalty. He submitted that the order imposing penalty under Section 11 (2) of the FT Act was completely illegal.

8. The learned counsel appearing for the respondents submitted that under the scheme of rehabilitation of Karnataka Biotics, there was no clause granting a waiver of penalty which could be imposed on the ground of non-fulfilment of export obligation under the license. Learned counsel submitted that there was a contravention of the terms of the licence, and therefore, the respondents were well within their powers to impose the penalty. Learned senior counsel appearing for the appellant relied upon various decisions of the High Courts of Gujarat and Delhi to support his contentions.

#### **CONSIDERATION OF SUBMISSIONS**

9. At the outset, we may note that the first error committed by the Division Bench and learned Single Judge was by recording a finding that the first Writ Petition filed by Karnataka Biotics was withdrawn without seeking a liberty to file a fresh Writ Petition. We may note here that on 9<sup>th</sup> February 2007, the first Writ Petition was filed by Karnataka Biotics. On 24<sup>th</sup> March 2009, there was an amalgamation of Karnataka Biotics. Even after the amalgamation, the Writ Petition filed in the name of Karnataka Biotics was prosecuted. The order dated 13<sup>th</sup> December 2013 passed by a Division Bench of Karnataka High Court records that an application was moved by the respondent in the appeal seeking permission to withdraw the Writ Petition by reserving liberty to file a fresh petition on the same cause of action by impleading proper parties. The Division Bench permitted withdrawal of the main Writ Petition by expressly granting liberty to file a fresh Writ Petition on the same cause of action within one week from receipt of a copy of the judgment. The grant of liberty has been recorded explicitly in paragraph 4 of the order of the Division Bench. The present appellant filed a fresh Writ Petition not within one week but after six months of the said order. As liberty was reserved to file a fresh petition, the Writ Petition filed by the appellant could not have been dismissed on the ground that while withdrawing the earlier Writ Petition, liberty to file a fresh petition was not granted. Perhaps both the learned Single Judge and

Division Bench have ignored clause 4 of the order of the Division Bench dated 13<sup>th</sup> December 2013.

- 10.** The predecessor of the appellant was granted the licence for the import of capital goods under the concessional custom duty subject to the condition that they would export the final product and earn foreign exchange equivalent as mentioned in the licence within five years from the date of the licence. In view of the grant of the licence, Karnataka Biotics was allowed to clear the imported capital goods at a concessional rate of 15 per cent. For non-payment of the balance customs duty demand, the customs authorities issued a show cause notice. Pursuant to the said notice, the bank guarantee furnished earlier by Karnataka Biotics was encashed. We have carefully perused the sanctioned rehabilitation scheme of Karnataka Biotics under SICA. Various reliefs and concessions were noted in the scheme. It provided for a waiver of payment of specific amounts. The relevant waiver clause reads thus:

“(ii) To waive the customs duty payable of Rs. 33.30 lakhs payable on account of nonfulfillment of export obligation and Rs.44.40 lakhs towards interest accrued up to May 31<sup>st</sup> 2002.”

Thus, on its plain reading, a customs duty waiver was granted.

- 11.** We have perused the Order-in-Original passed by the third respondent, which levied the impugned penalty of Rs. 23,38,882/—. The Order-in-Original records that Karnataka Biotics did not comply with the export obligation under the license granted under the FT Act. Therefore, the penalty was imposed specifically under Section 11 (2). Thus, the waiver granted under the rehabilitation scheme is of no assistance to the appellant as it was only of the customs duty.
- 12.** Section 11 of the FT Act reads thus:

**“11. Contravention of provisions of this Act, rules, orders and foreign trade policy.—**(1) No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the foreign trade policy for the time being in force.

**(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy, he shall be liable to a penalty of not less than ten**

**thousand rupees and not more than five times the value of the goods or services or technology in respect of which any contravention is made or attempted to be made, whichever is more.**

.....  
.....”

**(emphasis added)**

Sub-Section (2) applies when any import or export is made in contravention of any provision of the FT Act, Rules, and orders made thereunder or the foreign trade policy.

**13.** In the present case, there is no allegation made by the respondents against the appellant's predecessor of making or attempting to make any export or import in contravention of the FT Act, any Rules or orders made thereunder, or the foreign trade policy. Under the license granted to the appellant's predecessor, there was an obligation to export finished goods by earning foreign exchange equivalent to USD 2,59,948 within a period of five years. The allegation is of the failure to abide by the obligation to export the finished goods within a period of five years. So, there is no allegation of attempting to make an export or import, which is covered by Section 11 (2). There is no allegation against the appellant or its predecessor of making an export or import in contravention of the export and import policy. Section 11 (2) is a penal provision. It must be strictly construed. Thus, the demand for penalty cannot be sustained. Hence, we set aside the impugned judgments and orders of the learned Single Judge and Division Bench. We also set aside the Orderin-Original dated 16<sup>th</sup> July 2004 (Annexure P-3) by which the impugned penalty was imposed.

**14.** Accordingly, the appeal is allowed with no orders as to costs.

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