

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**W.P.(C) 3897/1998 & CM 8206/1998**

Reserved on: 23<sup>rd</sup> September 2010  
Decision on: 8<sup>th</sup> October 2010

KASHMIRI LAL ..... Petitioner  
Through : Mr. G.L. Rawal, Sr. Advocate with  
Mr. Rajesh Rawal, Advocate.

Versus

UNION OF INDIA & ORS ..... Respondents  
Through : Mr. Neeraj Chaudhari CGSC with  
Mr. Khalid Arshad, Advocates for UOI.

**CORAM: JUSTICE S. MURALIDHAR**

1. Whether reporters of the local news papers  
be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

**JUDGMENT**  
**08.10.2010**

1. The challenge in this petition is to an order dated 4<sup>th</sup> June 1997 passed by the Additional Director General of Foreign Trade ('ADGFT') under Section 4-K of the Imports and Exports (Control) Act, 1947 ['IEC Act'] read with Section 20(2) of the Foreign Trade (Development & Regulation) Act, 1992 [the 'FTDR Act'] imposing a penalty of Rs.1 crore on the Petitioner for utilizing material imported duty free "for a value of Rs. 48,07,561/- otherwise than in accordance with the conditions of the said licence." The petition also challenges an order dated 1<sup>st</sup> May 1998 passed by the Appellate Committee dismissing the Petitioner's appeal and the consequential order dated 31<sup>st</sup> July 1998 issued by the Foreign Trade Development Officer asking the Petitioner to deposit the penalty amount

within 20 days.

2. While directing notice to issue in the petition on 12<sup>th</sup> August 1998, this Court restrained the Respondents from encashing the bank guarantee furnished by the Petitioner to the Respondents as a condition for grant of licence.

3. The Petitioner states that M/s Anil International made an application for grant of duty free licence and pursuant thereto a Duty Free Licence dated 30<sup>th</sup> October 1989 was issued to the said firm enabling it to import CRCA coils secondary grade restricted both by value and quantity. The maximum value that could be imported was Rs.50,00,000/- and the maximum quantity was 895.400 metric tonnes (MTs). The export obligation was that the Petitioner should export 814 MTs diesel engine parts and accessories of the value of Rs.75,00,000/-.

4. On 7<sup>th</sup> September 1993 a notice was issued to M/s Anil International having its address at 236, Industrial Area, Ludhiana under Section 4 (L) of the IEC Act asking it to show cause why penalty should not be imposed on the firm and its partners under Section 4(1)(i)(a) of the IEC Act read with Section 20(2) of the FTDR Act on the ground that the firm had failed to fulfil its export obligations in terms of the advance licence dated 30<sup>th</sup> October 1989. The notice stated that the Adjudicating Authority had reason to believe that the duty free imported goods valued at Rs. 50 lakhs had been utilized by the firm otherwise than in accordance with the conditions of the advance licence.

5. The firm replied on 6<sup>th</sup> October 1993 stating that its entire records of imports and exports with reference to the licence in question were in the custody of the Central Bureau of Investigation (CBI), New Delhi and, therefore, it was not possible for the firm to reply to the show cause notice. It requested that the notice be kept in abeyance and undertook to send a reply as soon as the records were received back from the CBI.

6. Further letters dated 24<sup>th</sup> January 1994, 28<sup>th</sup> November 1994 and 22<sup>nd</sup> July 1996 were sent to the firm asking it to reply to the show cause notice. The adjudication order dated 4<sup>th</sup> June 1997 of the ADGFT notes the fact that the last two mentioned letters dated 28<sup>th</sup> November 1994 and 22<sup>nd</sup> July 1996 sent to the firm were received back with the remarks “No such person was available at the address.” The subsequent communication dated 17<sup>th</sup> January 1997 requiring the firm to appear before the ADGFT for a personal hearing on 10<sup>th</sup> March 1997 “was also received back with similar remarks of the postal authority.”

7. It appears that in the absence of any one appearing on behalf of the firm, the ADGFT proceeded to pass the adjudication order dated 4<sup>th</sup> June 1997 on the basis of the records. It was noticed that the firm has been utilizing the licence almost in full as far as its imports were concerned leaving a balance of only Rs.1,92,439/- in terms of cif value and 10.780 MTs in terms of weight. It was observed that the firm had failed to intimate the date of clearance of the first consignment which was a mandatory condition of the licence. Further the firm had exported only one consignment for free on board (fob) value of Rs. 1,35,000/- as on 12<sup>th</sup>

December 1989. In the above circumstances, it was concluded that the firm had utilized the material imported duty free for a cif value of Rs. 48,07,561/- without fulfilling the export obligations. By the adjudication order dated 4<sup>th</sup> June 1997 the ADGFT imposed a penalty of Rs. 2 crores on the firm and Rs. 1 crore each on its partners, viz., the Petitioner herein and Smt. Neelam Handa, Delhi and required such amount to be deposited within six weeks.

8. The Petitioner states that he came to know of the above order only when it was served upon him on 7<sup>th</sup> June 1997. It is pointed out that at no point in time was any separate show cause notice issued to the Petitioner. The Petitioner then appealed to the Appellate Committee Cell. In his appeal, the Petitioner pointed out that a deed of partnership of the firm M/s. Anil International was executed on 9<sup>th</sup> August 1985 in which profit sharing ratio between Mrs. Neelam Handa and the Petitioner was 25:75. Prior to being inducted as a partner in M/s. Anil International, the Petitioner was serving M/s Sona Steel Industries, a sole proprietorship concern of Mr. R.P. Handa, the husband of Mrs. Neelam Handa. It is stated that the entire funds for the partnership including the share of the Petitioner were arranged by Mr. R.P. Handa. The premises of the firm at 236, Industrial Area-1, Ludhiana was also owned by Mr. R.P. Handa. The Petitioner claims to have been trapped by Mr. Handa into becoming a partner of M/s Anil International. He stated that his retainership charges continued to be paid by M/s Sona Steel Industries. Since the Petitioner was an employee with Mr. Handa he was signing all papers under the direction of Mr. Handa.

9. In his appeal, the Petitioner stated that another partnership deed was executed on 2<sup>nd</sup> April 1991 and the constitution of the firm was changed. Mr. R.P. Hnada became one of the partners and the profit sharing ratio was as under:

1. Petitioner	20%
2. Mrs. Neelam Handa	40%
3. Mr. R.P. Handa	40%

10. Ultimately the Petitioner was removed from the partnership and a deed of dissolution of partnership dated 9<sup>th</sup> August 1991 was executed. Apart from enclosing the above documents with the memorandum of appeal, the Petitioner pointed out that he had never received any notice from the ADGFT and that in any event he was not a partner of the firm after 9<sup>th</sup> August 1991. He submitted that the time for meeting the export obligations was extended by the DGFT up to 31<sup>st</sup> December 1992. Consequently no proceedings could have been initiated even against the firm prior to that date. Long prior to that date the Petitioner had ceased to be a partner of M/s. Anil International.

11. It may be mentioned that as a pre-condition to his appeal being considered the Petitioner was asked to furnish a bank guarantee in the sum of Rs. 1 crore. This was complied with. The Appellate Committee, by a cryptic order dated 1<sup>st</sup> May 1998, rejected the Petitioner's appeal with the following reasoning:

“We have gone through the appeal in great detail and have also examined the findings of the Adjudicating Officer. The findings regarding violation of the licence conditions are clearly

established. It emerges that the defaulting persons have been deft in manipulating the facility of import licence almost bordering on a criminal intent. There is no point of law or facts which deserved fresh scrutiny and the guilty parties must suffer the consequences of serious misuse of import licence. The appeal is rejected. The financial bond offered should be forfeited against the recovery amount. The office of the DGFT should take further steps for recovery of the amount without delay.”

12. Thereafter the Petitioner was issued the impugned recovery notice dated 31<sup>st</sup> July 1998.

13. Mr. G.L. Rawal, the learned Senior counsel appearing for the Petitioner points out that the fact that no prior show cause notice was issued to the Petitioner before the adjudication order was passed, is not in dispute. He referred to the judgments in *S.L. Kapoor v. Jagmohan AIR 1981 SC 136* and *J.T. (India) Exports v. Union of India 2001 (78) ECC 677 (Del)* to urge that without a show cause notice and an opportunity of being heard, no adjudication order could have been passed against the Petitioner. He further points out that since the time for fulfilling the export obligation had been extended up to 31<sup>st</sup> December 1992, no action could have been taken against the firm itself till the expiry of that time limit. The Petitioner admittedly had retired from the partnership firm on 9<sup>th</sup> August 2001 itself. Consequently when the liability accrued to the firm, the Petitioner was no longer a partner and, therefore, even in terms of Section 32(3) read with Section 72 of the Partnership Act, 1932 (‘PA’) no liability could be fastened on the Petitioner.

14. Appearing for the Respondents, Mr. Khalid Arshad, the learned Advocate submitted that the liability under Section 32 PA of a retired partner would cease only if there was a public notice of the retirement given by such partner. In the instant case, there was no such public notice given by the Petitioner of the date on which he ceased to be a partner in M/s Anil International. It is submitted that in the absence of such notice the Petitioner's liability as a partner of Anil International continued even after his retirement. Reliance is placed on the judgments in *Syndicate Bank v. R.S.R. Engineering Works 2003 (6) SCC 265*; *Income Tax Officer v. Arunagiri Chettiar (1996) 9 SCC 33* and *DCM Shriram Industries v. Indo Organics 2003 (67) DRJ 256*.

15. As regards the issuance of show cause notices to the Petitioner as a partner of Anil International, the impugned adjudication order dated 4<sup>th</sup> June 1998 itself reveals that all notices were issued only to the firm and not to the individual partners. Given the context in which the firm got reconstituted and the Petitioner admittedly ceased to be a partner with effect from 9<sup>th</sup> August 1991, there was no question of the service of notice on the firm being construed to be a sufficient service of notice on its partners. With the last two communications dated 28<sup>th</sup> November 1994 and 22<sup>nd</sup> July 1996 being received back in the office of the ADGFT with the remarks "no such person was available at the address" it was plain that not only the firm but none of its former partners were served notices. The subsequent notice of hearing dated 17<sup>th</sup> January 1997 was also returned unserved. There is no satisfactory explanation for the non-service of show cause notices upon the Petitioner before the impugned adjudication order

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dated 4<sup>th</sup> June 1997 was passed. On this short ground the impugned adjudication order dated 4<sup>th</sup> June 1997 should be held to be unsustainable in law. The Appellate Committee seems to have completely overlooked the above position which was squarely raised by the Petitioner in the memorandum of appeal.

16. As regards the liability of the partner continuing in terms of Section 32 PA, it requires to be noticed that the liability of the firm arising out of its failure to meet its export obligations got attracted only after 31<sup>st</sup> December 1992. This was because the time for fulfilling the export obligations was extended till that date. In other words, if the firm had been able to fulfil its export obligations between 9<sup>th</sup> August 1991 when the Petitioner ceased to be a partner of M/s Anil International and 31<sup>st</sup> December 1992, the extended date, there would be no continuing liability attached to the firm, much less to its partners. Therefore, the crucial date for determining as to when the liability accrued to the firm for failure to meet its export obligations was not earlier than 31<sup>st</sup> December 1992. Consequently, it cannot be held that with reference to the failure by the firm to meet its export obligation, there was a continuing liability attached even to the Petitioner who ceased to be a partner of the firm with effect from 9<sup>th</sup> August 1991. No liability with the firm having been accrued as of that date, there was no question of fastening on the Petitioner any continuing liability in terms of Section 32 PA.

17. The decision in *Income Tax Officer v. Arunagiri Chettiar* is distinguishable on facts. There a communication was sent on 23<sup>rd</sup>

February 1972 by the Income Tax Officer to the Respondent that he was jointly and severally liable for the arrears due from the firm for the assessment years 1962-63 and 1963-64. The defence of the Respondent was that he ceased to be a partner of the firm on 19<sup>th</sup> April 1963 and was therefore not liable. Negating this contention, it was held that Section 25 PA did not make distinction between a continuing partner and an erstwhile partner and, therefore, the liability of the firm which was already accrued while the Respondent was still a partner would attach to him even after he retired as partner. In the present case no liability accrued to the firm during the time the Petitioner was its partner. Therefore, the above decision is of no assistance to the Respondents. The facts in *Syndicate Bank* as well as in *DCM Shriram Industries v. Indo Organics* were also different and those decisions are also of no help to the Respondents.

18. The Appellate Committee does not appear to have considered any of the submissions made by the Petitioner in his appeal. However, considering that the present petition has been pending in this Court for twelve years, little purpose would be served in remanding the matter to the Appellate Committee at this stage. The Petitioner has been able to satisfactorily demonstrate that the impugned order dated 4<sup>th</sup> June 1997 of the ADGFT is bad in law for want of prior show cause notice to him and further that the Petitioner having ceased to be a partner in M/s Anil International with effect from 9<sup>th</sup> August 1991 and with no liability having accrued as of date to the partnership firm in respect of the non-fulfillment of export obligation, no penalty could possibly be imposed on the Petitioner.

19. For the aforementioned reasons, the impugned order dated 4<sup>th</sup> June 1997 passed by the ADGFT and the order dated 1<sup>st</sup> May 1998 of the Appellate Committee are hereby set aside. The bank guarantee furnished by the Petitioner will stand cancelled.

20. The writ petition is disposed of in the above terms with costs of Rs. 5,000/- which will be paid to the Petitioner by Respondent No.1 within four weeks. Pending application also stands disposed of.

**S. MURALIDHAR, J.**

**OCTOBER 8, 2010**

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