



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1733 OF 2001

1. Esjay International Pvt. Ltd. )  
a Company incorporated under the Indian Companies )  
Act, 1956, having its office at 48-A, Laxmi Industrial )  
Estate, Shankar Rao Naram Path, Lower Parel, )  
Mumbai-400 013 )
2. Sunil G. Jhangiani, Director, )  
residing at Laxmi Niwas, Bhulabhai Desai Road, )  
Mumbai-400 036 )..Petitioners

vs.

1. Union of India through Ministry of Textiles )
2. The Textile Commissioner having his office at New CGO's )  
Building, 48, New Marine Lines, Mumbai-400 020 )
3. Apparel Export Promotion Council, having its registered )  
office at 15, NBCC Tower, Bhikaji Cama Place, )  
New Delhi-110 066, and its Branch office at Bajaj )  
Bhavan, 12<sup>th</sup> floor, Nariman Point, Mumbai-400 021 )..Respondents

Mr. Zal Andhyarujina with Mr. D. Das, instructed by Mr. Anuj N. Narula for the petitioners.

Mr. Vinod Joshi for respondent Nos. 1 and 2.

Ms. K.P. Reshma Ravi for respondent No.3.

**CORAM: P.B. MAJMUDAR &  
R.M. SAVANT, JJ.**

**DATE: SEPTEMBER 21, 2011.**

**ORAL JUDGMENT: (Per R.M. Savant, J.)**

The issue that arises for consideration in the above petition is as to whether the petitioners are entitled to the benefit of clause 9 of Government Entitlement Policy, 1994-1996 on account of “force majeure”.

2. The petitioners by way of this petition under Article 226 of the Constitution of India are challenging the orders dated 20<sup>th</sup> June, 2000, 23<sup>rd</sup> June, 2000 and 13<sup>th</sup> October, 1996 passed by the Respondent Nos. 1, 2 and 3 respectively.

3. The factual matrix involved in the above petition can be conveniently stated thus:-

3. The petitioners are exporters and have been recognised by the Govt. of India as such since the year 1981. The petitioners have their manufacturing unit at GIDC, Sarigam in the State of Gujarat which they have established some time in the year 1993. By notification dated 4<sup>th</sup> September, 1993, the Central Government in the Ministry of Textiles

announced the quota policy framed for the period 1994-1996. On the petitioners applying to the Gujarat Electricity Board (“GEB” for short), the petitioners were given motive power connection of 80 HP on 18<sup>th</sup> November, 1994 and thereafter on 16<sup>th</sup> June, 1995 the petitioners were given 20 KV power for lighting in the factory and office. The GEB, it appears, imposed a power cut in respect of the industries at Sarigam for a duration of four hours a day and 48 hours a week whereby it is the case of the petitioners that the production at their factory got directly affected and as such was slowed down considerably. It is the case of the petitioners that the said power cut remained in force till November, 1995 which was certified as such by the Deputy Engineer of the GEB. In terms of the policy, the petitioners were to fulfil their export obligation as per the quota allotted to them by September, 1995. The petitioners applied for extension to fulfil their obligations, pursuant to which the petitioners were granted an extension as per the policy upto 31<sup>st</sup> December, 1995 on the petitioners giving an undertaking of 30 per cent of value of quota with remainder to be utilised after 30<sup>th</sup> September, 1995. It is the case of the petitioners that on account of the force majeure condition resulting from the power cut so imposed by the GEB, the petitioners could manufacture and ship only 87.01 per cent of the allotment for the said year in respect of their entitlement in PPE and NQ systems.

4. In view of the non-fulfilment of the quota obligations by the petitioners, the petitioners were served with a show cause notice dated 10<sup>th</sup> September, 1996 addressed by the respondent No.3 i.e. Apparel Export Promotion Council (“AEPC” for short). The show cause notice was to the effect that the petitioners had not utilised the allotted quantity of quota and, therefore, the petitioners were liable to forfeiture of bank guarantee to the extent of an amount of Rs. 16,80,352/-. On receipt of the said show cause notice, the petitioners’ Export Manager represented against the said show cause notice and, apart from pointing out the discrepancies in the show cause notice, he ventured to furnish the correct data of the total export effected in the year 1995. The said show cause notice, it appears, was adjudicated upon by the AEPC and by an order dated 3<sup>rd</sup> October, 1996, the AEPC called upon the petitioners to pay a sum of Rs. 11,31,072/- on account of the fact that the petitioners had not fulfilled the terms and conditions as per the policy which has resulted in the breach of the undertaking in so far as the fulfilment of the export obligations were concerned.

5. Being aggrieved by the said order dated 3<sup>rd</sup> October, 1996, the

petitioners filed an appeal before the Respondent No.2 and the main ground of challenge to the said order dated 3<sup>rd</sup> October, 1996 was that the petitioners were prevented from utilising and entire quota and/or achieving 90 per cent utilisation thereof on account of the force majeure condition of the power cut imposed by the GEB. It appears that respondent No.2, before whom the appeal was filed, called upon the petitioners to submit a certificate from the GEB in respect of the alleged power cut as also called upon the petitioners to submit copies of the electricity bills for the period June 1995 to December, 1995. The petitioners, in compliance of the said requisition, by their letter dated 9<sup>th</sup> November, 1998 furnished the details of the power consumed by them in their factory at Sarigam during the period June, 1995 to December, 1995 and also furnished the certificate dated 28<sup>th</sup> October, 1998 issued by the GEB.

6. The appeal of the petitioners was considered by the respondent No.2 and after taking into consideration the relevant material which was produced by the petitioners, the respondent No.2 disposed of the said appeal by recording a finding that the petitioners had made more payment towards electricity during the latter part of the year i.e. 1995 compared to the electricity charges paid for the period between June,

1995 and September, 1995. The respondent No.2, therefore, concluded that the power cut on which the petitioners sought to rely upon cannot be said to have affected the production. The respondent No.2, therefore, by the order dated 23<sup>rd</sup> June, 2000 disposed of the said appeal filed by the petitioners.

7. Being aggrieved by the said order dated 23<sup>rd</sup> June, 2000 passed by the respondent No.2 herein, the petitioners filed a second appeal before the Second Appellate Committee constituted by the respondent No.1. The said Appellate Committee comprised of as many as four members. The substantial ground of challenge in the appeal filed before the Second Appellate Committee was that the petitioners have been wrongly denied the benefit of clause 9 i.e. force majeure on the premise that the payment of the electricity charges during the period September, 1995 to December, 1995 was higher than the charges paid for the earlier period. The petitioners challenged the said order on the ground that the respondent No.2 had erroneously taken into account the electricity charges paid for lighting provided to the office which supply, according to the petitioners, was not under any power cut. It was the specific case of the petitioners that the respondent No.2 had erroneously taken into account the charges paid without considering the actual unit

consumption of electricity which clearly indicated that in fact less power had been utilised by the factory of the petitioners during September, 1995 and December, 1995. The said appeal of the petitioners was disposed of by the Second Appellate Committee by its order dated 20<sup>th</sup> June, 2001. The Second Appellate Committee confirmed the findings recorded by the First Appellate Committee and observed that it had no reason to take a different view than the view taken by the First Appellate Committee in respect of the ground of force majeure made out by the petitioners. The appeal filed by the petitioners was accordingly rejected by the Second Appellate Committee.

8. After the said order was passed by the Second Appellate Committee, the respondent addressed a communication dated 6<sup>th</sup> July, 2001 by which they called upon the petitioners to pay an amount of Rs. 11,31,072/- within a period of seven days failing which the petitioners were threatened with coercive action as could be taken in terms of the policy. As indicated above, the orders passed by the Respondent Nos. 1, 2 and 3 are the subject matter of challenge in the above petition.

9. On behalf of the respondents, an affidavit in reply, has been filed by one Ashok Hazra, Assistant Director in the office of the Textile

Commissioner. The policy as regards exports and the need for fulfilment of the quota by the exporters has been spelt out in the said affidavit. It has been averred in paragraph 6 that non-utilisation of the export quota is a serious matter as it not only affects the earning in foreign exchange but if the quota remains unutilised, then it has adverse effect and impact in the future bilateral agreements between the countries. It is the object of the Ministry that no quota is wasted and, therefore, towards that end a bank guarantee or a legal undertaking is obtained by the Ministry and for non-fulfilment of the quota, there is a forfeiture which the exporter has to suffer. It is averred in paragraph 7 of the said affidavit that the petitioners had given a Legal Undertaking (LUT) to the AEPC for the entire revalidated quantity. However, the petitioner Company was not able to utilise the entire revalidated quota nor the maximum permissible revalidated quantity i.e. 90 per cent of the revalidated quantity in all the systems till 31<sup>st</sup> December, 1995. It has further been averred in the said paragraph that as exporters, the petitioners were fully aware about the power cut imposed by the GEB since June, 1995 and it is only after considering the impact of such power cut the petitioners had gone for revalidation of export quota from 1<sup>st</sup> October, 1995. In so far as the order of the Second Appellate Committee is concerned, it has been averred in the said paragraph 7 that the Second Appellate Committee had gone

through the appeal and heard the representatives of the firm as well as the officers of AEPC i.e. Respondent No.3. Since the case of the petitioners was the same as before the First Appellate Committee, the Second Appellate Committee concluded that the grounds made out by the petitioners were not valid grounds which would amount to force majeure.

10. Heard the learned counsel appearing for the parties.

Submissions on behalf of the petitioners by learned Counsel Shri Andhyarujina.

11. The principal contention of the learned counsel for the petitioners Shri Andhyarujia is that once the authorities have not disputed the applicability of force majeure exemption to a situation of power cut, the respondents thereafter have arbitrarily in the case of the petitioners held that the power cut in question which the petitioners were affected was not a force majeure condition. The learned counsel submitted that in the absence of the term 'force majeure' in the policy, it was incumbent upon the respondents to uniformly interpret the force majeure condition under the policy and in support of the said submission relied upon the judgment of the Apex Court reported in AIR 1961 S.C.

1285 in the matter of *Dhanrajmal Gobindram vs. M/s. Shamji Kalidas and Co.* According to the learned counsel, paragraph 9 of the said report is material. That the cut imposed by the GEB was a fact and circumstance beyond the control of the petitioners and, therefore, constituted and satisfied the force majeure condition. That there was substantial compliance by the petitioners of their export obligation inasmuch as 87 per cent of the quota was utilised by the Petitioners on 31<sup>st</sup> December, 1995 and, therefore, it was a fit case for the respondents to exercise the discretion under clause 15 of the policy. That the order passed by the Second Appellate Committee is a cryptic order and no reasons have been mentioned for the dismissal of the appeal.

#### Submissions on behalf of the Respondents

12. That the power cut in question was known to the petitioners in June, 1995 itself and in spite of the same they had applied for revalidation of the quota in September, 1995 and, therefore, the petitioners are now estopped from contending that they were not able to fulfil their obligations on account of force majeure. That force majeure contemplates something happening suddenly which is not foreseen and which is beyond the control of the person. Such is not the case here as the petitioners were

very well aware of the power cut. That the circumstances were not such which handicapped the petitioners from fulfilling the export quota inasmuch as the power cut was in operation throughout the year and, therefore, the petitioners are disentitled to claim the benefit of clause 9 of the extant policy. Reliance was placed by the learned counsel for the respondents on an unreported judgment dated 11<sup>th</sup> November, 2002 of a learned single Judge of the Delhi High Court in Civil Writ Petition No. 7176 of 2002 wherein it has been held that if things do not turn up as expected and the labour problem did not get resolved, the same cannot be equated to a force majeure situation. That the petitioners have been given the benefit of having fulfilled 90 per cent of the quota by giving a rebate of Rs. 5 lakhs as the original amount claimed was Rs. 16 lakhs.

### Consideration

13. At the outset, it would be apposite to refer to the judgment cited by the learned counsel for the petitioners in the case of M/s. Dhanrajmal (supra). Paragraph 17 of the said report is material and is reproduced hereinunder.

“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 “force 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”.

A reading of the said judgment, therefore, discloses the perspective from which the term “force majeure” was looked at by the Apex Court. In the said case the Apex Court has held that the term “force majeure” is a term of wider import and that difficulties had arisen in the past as to what could legitimately be included in force majeure. The Supreme Court has referred to the fact that the Judges have agreed that strikes, breakdown of machinery, though normally not included in “vis major” are included in “force majeure”. The Supreme Court has, therefore concluded that where reference is to be made to force majeure, the intention is to save the performing party from the consequences of anything over which he has

no control. This, according to the Apex court, is the widest meaning that can be given to the term “force majeure”.

14. The next judgment cited by the learned counsel for the petitioner is the judgment of the Apex Court reported in AIR 1976 SC 1100 in the matter of *M/s. Northern India Iron and Steel Co. vs. The State of Haryana and another*. Though it is not a judgment directly on the issue of “force majeure”, the said judgment was cited in support of the contention that the power cut was beyond the control of the petitioners. Paragraph 9 of the said report is material and is reproduced hereunder.

“9. We are, therefore, of the view that the inability of the Board to supply electric energy due to power cut or any other circumstance beyond its control as per the demand of the consumer according to the contract will be reflected in and considered as a circumstance beyond the control of the consumer which prevented it from consuming electricity as per the contract and to the extent it wanted to consume. The monthly demand charge for a particular month will have to be assessed in accordance with sub-cl (b) of Cl. 4 of the tariff and therefrom a proportionate reduction will have to be made as per sub-cl. (f). We hope, in the light of the judgment, there will be no difficulty in working out the figures of the proportionate reduction in any of the cases and for any period. In case of any difference or dispute as to the quantum of the demand charge or the proportionate reduction, parties will be at liberty to pursue their remedy as may be available to them in accordance with law.”

15. The respondents have consciously incorporated the condition of “force majeure” in the export policy so as to give the exporters the benefit, if a situation so arises that the exporter is not able to fulfil his obligations for the reasons which are beyond his control. It would be apposite to refer to the meaning of the term “force majeure” in some of the legal dictionaries :

“Black’s Law Dictionary:

force majeure. [Law French “ a superior force”] An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g. Floods and hurricanes) and acts of people (e.g. Riots, strikes, and wars) – Also termed *force majesture*; *vis major*; *superior force*. Cf. ACT OF GOD; VIS MAJOR.

Webster’s 3<sup>rd</sup> New International Dictionary:

force majeure: (1) Superior or irresistible force. (2) an event or effect that cannot reasonably be anticipated or controlled – Compare ACT OF GOD, INEVITABLE ACCIDENT, VIS MAJOR”

It is in the said context that we would have to see whether the petitioners fulfilled the said condition. As held by the Apex Court in M/s. Dhanrajmal case (supra), and as can be seen from the dictionaries above, a “force majeure” condition is said to be something which is

unforeseen, unexpected and which happens suddenly and over which a person has no control. Things which immediately come to mind is the sudden failure of the power grid on account of which there is no electricity or a flash strike by the workmen. Now coming to the facts of the present case, it is required to be noted that the relevant time in question i.e. year 1995. A judicial notice would have to be taken of the fact that the Electricity Boards in some states with a view to conserve energy and with a view to see to it that there is equitable distribution of energy between different consumers i.e. Industrial, residential and commercial adopt the method of power cuts on particular dates which is popularly known as “staggering supply of electricity”. A prudent business man, therefore, ought to have taken notice of the said aspect and ought to have arranged his business accordingly, more so in the case of an exporter who has to fulfill his export obligation so as to avail of the benefits under the policy of the Government. In the instant case, the power cut was over a considerable period i.e. almost for a period of one year i.e. in the year 1995. It is not something which happened suddenly and which crippled the business of the petitioners for a short period of time. The power cut was consistently over a long period i.e. almost for a year and, therefore, the petitioners cannot be heard to say that the power cut happened so suddenly and without their knowledge so as to impact their export

obligations. The Second Appellate Committee therefore, was right in observing that the petitioners could have been made alternate arrangements like gensets, etc.

It is required to be noted that though the power cut was in force right from January, 1995 and the petitioners were to fulfil their export obligations by September, 1995, the petitioners applied for revalidation of their quota which was revalidated and an extension was granted to the petitioners upto 31<sup>st</sup> December, 1995. In the said circumstances, the petitioners ought to have taken appropriate steps so as to fulfil their export obligations. Having applied for revalidation in the teeth of the knowledge of the fact that there was a power cut, it is not open for the petitioners to now claim the benefit of clause 9 relating to “force majeure”. It is pertinent to note that though as per the revalidation, the obligation was to be fulfilled by 31<sup>st</sup> December, 1995. The petitioners did not do so and in fact completed its quota only in January, 1996. In the context of the aforesaid facts, the judgment cited by the learned counsel for the respondents of a learned single Judge of the Delhi High Court dated 11<sup>th</sup> November, 2002 in Civil Writ Petition No. 7176 of 2002 is relevant. In the said case, the labour problem commenced in the year 1995 and the petitioner in the said case had sought revalidation in October, 1996. However, there was no lock out or

complete cessation of activities at any time. The petitioners in the said case being fully aware of the labour problem and the business risk had got his quota revalidated. The learned single Judge has held that in case the things did not turn up as expected and the labour problem did not get resolved, the same cannot be equated to a force majeure situation. The facts in the said case before the learned single Judge of the Delhi High Court was, in our view, similar to the facts of the present case inasmuch as the petitioners were aware of the power cut at the time of the revalidation of the said quota and in spite of the same, got it revalidated and had not fulfilled its obligations even in the extended period. We are, therefore, of the view that the ground of power cut which is sought to be made out by the petitioners would not constitute a “force majeure” so as to come within clause 9 of the extant policy.

16. As regards the submission of the learned counsel for the petitioners Shri Andhyarujina that the order passed by the second Appellate Committee is a cryptic order and bereft of any reasons and is therefore, required to be set aside in the context of the said submission, it would be relevant to note that before the First Appellate Committee the petitioners had produced the material in support of their case as regards force majeure. The subject matter was in the form of the certificate issued

by the GEB and the consumption of energy by the petitioners during the relevant period. The First Appellate Committee, based on the said material and upon hearing the parties, recorded findings of fact in respect of the aspect of the consumption of energy by the petitioners. The matter was thereafter carried in appeal by the petitioners to the Second Appellate Committee. The Second Appellate Committee has confirmed the findings recorded by the First Appellate Committee by observing that it had no reason to differ from the said findings. In our view, it was not necessary for the Second Appellate Committee to go threadbare into the material produced by the petitioners before the First Appellate Committee since the Second Appellate Committee came to a conclusion that it agreed with the findings of the First Appellate Committee. Therefore, we do not find any substance in the said contention of the learned counsel for the petitioners. The AEPC as well as the First Appellate Committee having recorded a finding of fact and the same being confirmed by the Second Appellate Committee, the same does not warrant any interference.

17. It is also required to be noted that in terms of the policy guidelines, the respondents have given the benefit of rebate of Rs. 5 lakhs to the petitioners as originally the amount claimed as and by way of forfeiture was Rs. 16 lakhs. In that view of the matter, no case for

interdiction in our writ jurisdiction under Article 226 is made out. The writ petition is accordingly dismissed.

18. At this stage, the learned counsel for the petitioners applies for stay of the order. In the facts and circumstances of the case, we stay our order for a period of eight weeks on the condition that the petitioners keep the bank guarantee alive which has been furnished pursuant to the interim order passed by this Court on 26<sup>th</sup> November, 2001 and which is alive till today for a further period of 12 weeks from date.

**P. B. MAJMUDAR, J.**

**R.M. SAVANT, J.**