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

Reserved on: 23.01.2020
Date of decision: 18.05.2020

\+ **W.P.(C) 3059/2018**

M/S KANAK EXPORTS THROUGH ITS PROPRIETOR MR. SATISH BANSAL ..... Petitioner

Through: Mr.Arvind Nigam, Sr. Adv. with Mr.Kishore Kunal and Mr.Prakash Choudhary, Advs.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr.Ripu Daman Bhardwaj, CGSC and Mr.T.P.Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner challenging the order dated 28.12.2017 passed by the respondent no.3 holding the petitioner as ineligible for receiving any benefit under the 'Duty Free Credit Entitlement' Scheme (hereinafter referred to as the DFCE).

2. In exercise of its powers under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Government of India notified the Export-Import (EXIM) Policy 2002-2007. The same was to come into force from April 01, 2002. An amendment to this Policy was notified on March 31, 2003 to come into force from April 01, 2003.

3. Paragraph 1.4 of the Policy spelled out the objectives of the Policy and is reproduced hereinunder:

"1.4 The principal objectives of this Policy are:

(i) To facilitate sustained growth in exports to attain a share of at least 1% of global merchandise trade.

(ii) To stimulate sustained economic growth by providing access to essential raw materials, intermediates, components, consumables and capital goods required for augmenting production and providing services.

(iii) To enhance the technological strength and efficiency of Indian agriculture, industry and services, thereby improving their competitive strength, while generating new employment opportunities, and to encourage the attainment of internationally accepted standards of quality.

(iv)To provide consumers with good quality goods and services at internationally competitive prices while at the same time creating a level playing field for the domestic producers."

4. Paragraph 2.34 of the Policy allows 'Third-party exports'. Paragraph 9.55 defines the term 'Third-party exports' as under:

"Third-party exports" means exports made by an exporter or manufacturer on behalf of another exporter(s). In such cases, shipping bills shall indicate the name of both the exporter/ manufacturer and exporter(s)."

5. Chapter-III of the Policy deals with 'Promotional Measures' which are to be undertaken to achieve the objective of the Policy.

6. Paragraph 3.7.1 of the Policy states that Merchants as well as Manufacturer Exporters, Service Providers, Export Oriented Units

(EOU's)/ Units located in the Special Economic Zone, etc., shall be eligible for recognition as 'Status Certificate'. Paragraph 3.7.2 laid down the requirement of average export performance level to be achieved by the applicant.

7. Paragraph 9.53 defines the term 'Status Holder' as under:

> *"Status Holder" means an exporter recognized as "Export House/Trading House by DGFT/ Development Commissioner or Star Trading House/Super Star Trading House" by the Director General of Foreign Trade."*

8. Paragraph 3.7.2.1 gave the 'Special Strategic Package for Status Holders'. This petition is primarily concerned with sub-paragraph (vi) of Clause 3.7.2.1 and is reproduced hereinbelow:

> *"**Special Strategic Package for Status Holders**"*
> *3.7.2.1 The status holders shall be eligible for the following new/special facilities:*
> *xxxxx*
> *(vi) Duty free import entitlement for status holders having incremental growth of more than 25% in FOB value of exports (in free foreign exchange) subject to a minimum export turnover of Rs. 25 crore (in free foreign exchange). The duty free entitlement shall be 10% of the incremental growth in exports. Such entitlement can be used for import of capital goods, office equipment and inputs for their own factory or the factory of the associate/supporting manufacturer/ job worker. The entitlement/goods shall not be transferable."*

9. Paragraph 3.10 gave the six 'thrust sectors' which would be given the necessary boost for achieving the objective of the Policy.

10. By Notification no.28 dated 28.01.2004, Paragraph 3.7.2.1 in Chapter III of the Exim Policy was amended. After sub-paragraph (vii), five Notes were inserted by way of an amendment. The same are reproduced hereinbelow:

> *"**Note 1** – - For the purpose of calculating the value of exports, the following exports shall not be taken into account, namely:-*
>
> *(i) Re-export of imported goods or exports made through transshipment;*
>
> *(ii) Export turnover of units operating under SEZ/EOU/EHTP/STPI Schemes or products manufactured by them and exported through DTA units;*
>
> *(iii) Deemed exports (even when payments are received in Free Foreign Exchange) and payment from EEFC account*
>
> *(iv) Service exports;*
>
> *(v) Supplies made by one status holder to another status holder;*
>
> *(vi) Export performance made by one status holder on behalf of other status holder will not be eligible for entitlement under the scheme. Supplies made or export performance effected by a non-status holder (Merchant exporter/Manufacturer with any export performance in 2003-04) to a status holder if the applicant as well as the non status holder have less than 25 per cent*

incremental growth over their respective previous years direct export turnover;

(vii) The exports made by an applicant within a group and the group to which it belongs has individually less than 25 per cent incremental growth of export.

***Note 2** – The incremental growth of exports by an exporter shall not, directly or Indirectly, be transferred to any other exporters.*

***Note 3** – Government reserved the right in public interest, to specify the export products, which shall not be eligible for calculation of incremental growth/ entitlement. Similarly, the government may also notify the list of goods, which shall not be allowed for imports under the scheme.*

***Note 4** – These guidelines will be applicable to the exports made on or after 1.04.2003.*

***Note 5** – The entitlement will be in terms of duty credit."*

11. A Public Notice bearing no.40(RE 2003)/2002-2007 dated 28.01.2004 was also issued by the Directorate General of Foreign Trade (DGFT) making certain amendments in the Handbook of Procedures(Volume 1), *inter alia* inserting Paragraph 3.2.6 A, which reads as under:

"The scheme will be applicable to status holders who were also status holders as on 31.3.2003 and who had achieved minimum export turnover of 25 crores in the year 2003-04.

I. For direct as well as third party exports, the Export documents viz. Export Order, Invoice, GR Form, Bank

Realization Certificate should be in the name of applicant only. However for the third party exports, where goods have been procured from a manufacturer, the shipping bill should contain the name of the exporter as well as the supporting manufacturer.

II. Goods allowed to be imported under this scheme shall have a nexus with the products exported and a declaration in this regard shall be made by the applicant in Appendix 17D.

III. The licensing authority shall at the time of issuance of the duty free credit entitlement certificate endorse the name of the associate manufacturer/supporting manufacturer/ job worker on the certificate as declared by the applicant. Goods imported against such entitlement certificate shall be used by the status holder or his supporting manufacturer/job worker in proportion to the value of their direct contribution to the entitlement.

IV. The last date for filing of such applications shall be 31st December.

V. The duty free credit entitlement certificate shall be issued with a single port of registration. For each duty free credit entitlement certificate, split certificates subject to a minimum of Rs.5 lakh each and multiples thereof may also be issued. A fee of Rs.1000/-each shall be paid for each split certificate. However, a request for issuance of split certificate(s) shall be made at the time of application only and shall not be considered at a later stage.

VI. The duty free credit entitlement certificate shall be valid for a period of 12 months from the date of issue. The status holder shall within one month of the last imports made under this certificate or within one month of expiry of the certificate whichever is earlier, submit a statement of imports/utilization made under the certificate as per Appendix 17E, to the jurisdictional Regional Licensing

Authority who has issued the certificate with a copy to the jurisdictional excise authorities."

It further provided that:-

"2. In terms of Para 3.2.5 of Handbook of Procedures (Volume 1), the following items would not be taken into account for computation of entitlement and export performance under Duty Free Credit Entitlement Scheme for Status Holders:

a. Rough, uncut and semi polished diamonds

b. Gold, silver in any form including plain jewellery thereof

c. Food grains sourced from central pool maintained by FCI.

d. Items exported under free shipping bills

3. In terms of Para 3.2.5 of Handbook of Procedures (Volume 1) the following items would not be allowed for imports under Duty Free Credit Entitlement Certificate for Status Holders:

a. Agricultural products which fall under Chapters 1-24 of ITC (HS) Classification of Export and Import items."

12. By a subsequent Notification no.38/(RE 2003)2002-2007 dated 21.04.2004, Notes 6 and 7 were inserted in Paragraph 3.7.2.1., after sub-paragraph (vii) of the Policy and read as under:

*"**Note 6 -** The export of the following products and categories of products would not be permitted for counting entitlement under the Duty Free Entitlement Certificate for Status Holders.*

a. Rough, uncut and semi polished diamonds.

b. Gold, silver in any form including plain jewellery thereof

c. Food grains sourced from central pool maintained by FCI

d. Items exported under free shipping bills.

***Note 7 -** The following items would not be allowed for imports under Duty Free Credit Entitlement Certificate for Status Holders:*

Agriculture products, which fall under Chapters 1-24 of ITC (HS) Classification of Export and Import items."

13. By Notification no.40/(RE 2003)/2002-2007 dated 23.04.2004, a minor correction was made in the Notification No.38 (RE-2003)/ 2002-2007 dated 21.04.2004.

14. Adani Exports Ltd. filed a writ petition before the High Court of Gujarat, being Special Civil Application no.1676 of 2004, *inter alia* challenging the validity of the Notification no.28 as also the Public Notice no.40 dated 28.01.2004. The High Court by its judgment dated 23.07.2004, partly allowed the said Writ petition. The High Court concluded that the main purpose of the Notification dated 28.01.2004 was to prevent transfer of the export orders from one group company to another company belonging to the same group in order to show enhanced export performance of such another company and, therefore, it was clarificatory in nature. It further rejected the submission of the petitioner therein that the Notification or the Public Notice had the effect of the taking away of the vested right of the petitioner, stating that they merely

sought to exclude exports which were never intended in the first place to be covered by the Special Scheme; misuse of the said scheme by mere paper growth in exports is not to be countenanced.

15. It further held that the DGFT had no power to exclude exports of certain products as done by the Public Notice dated 28.01.2004, however, as the same effect was given by the Notification dated 21.04.2004 read with the Notification dated 23.04.2004, the same being retrospective in nature, were applicable for all exports made from April 01, 2003 and such exclusion was therefore, valid. The High Court, however, held the exclusion of the following exports from the benefits of the duty-free import entitlement for the exports Status Holder to be neither clarificatory nor in public interest and therefore, bad in law;

1) items exported under Free Shipping Bills; and

2) Gold, silver in any form including plain jewellery thereof, in so far as the import of capital goods and office equipment for the factory of the associate/supporting manufacturer/job worker shall be working.

16. The petitioner herein also filed a writ petition before the High Court of Judicature at Bombay, being Writ petition no.2397/2004, challenging the Notifications dated 28.01.2004 and 21.4.2004 as amended by the Notification dated 23.04.2004 as also the Public Notice dated 28.01.2004.

17. The Bombay High Court by its judgment dated 04.07.2005 partly allowed this writ petition. It upheld the validity of the Notification dated

28.01.2004 holding it to be clarificatory in nature, and set aside the Public Notice dated 28.01.2004 as being *ultra vires*. It further held that the Notifications dated 21.04.2004 and 23.04.2004 can have only prospective operation, which means that exports made by the exporters prior to April 21, 2004 in respect of the classes of goods covered by Notification dated 21.04.2004 were entitled to be taken into consideration for the purposes of determining the entitlement of duty free imports. The relief granted by the High Court in favour of the petitioner is reproduced hereinbelow:

> *"36. In the result the petition is partly allowed. Public Notice dated 28th January 2004 is quashed and set aside. As far as Notifications dated 21st and 23rd April, 2004 are concerned, it is declared that the said notifications will have only prospective operation and the exports made by the petitioners prior to the said notifications in respect of the classes of goods covered by the said notifications shall be liable to be computed for the purpose of determining the entitlement of the petitioners. No order as to costs."*

18. The judgment passed by the Gujarat High Court as also the Bombay High Court were challenged by the parties by way of Special Leave Petitions before the Supreme Court. The Supreme Court vide common judgment dated 27.10.2015 was pleased to dispose of these appeals *inter alia* holding as under:

> (A) The Notification no. 28(RE 2003)/2002-2007 dated 28.01.2004 was clarificatory in nature and was therefore, valid;

(B) Public Notice no.40 dated 28.01.2004 issued by the DGFT, so far as it excluded certain items from being taken into account for computation of incremental exports under DFCE, is ultra vires;

(C) Notification no. 38 and 40(RE 2003)/2002-2007 dated 21.04.2004 and 23.04.2004 respectively are not clarificatory in nature and have only prospective effect.

19. The Supreme Court while answering whether the Notifications dated 21.04.2004 and 23.04.2004 had taken away any vested right of the petitioner herein and therefore was retrospective in nature, held as under:

> *"109) So far so good. The effect of the aforesaid discussion would be that if the Status Holders had achieved 25% incremental growth in exports, they acquired the right to receive the benefit under the Scheme, which could not be taken away. The pertinent and crucial question is as to whether these exporters/writ petitioners acquired any such right? Let us sharpen this question before we answer the same by formulating it in the following words:*
>
> > ***Whether, in the cases of these exporters, the exports shown by them can be treated as actual exports entitling them to avail the benefit of the Scheme?***
>
> *110) This issue would be inter-twined with other related issue, namely, whether the notification has retroactive operation or it is retrospective in nature. Both these aspects are to be dealt with simultaneously in order to provide suitable and right answer to the question posed. The case of the exporters, as noticed above, is that since they had already fulfilled the requirement of 'incremental growth in exports' which they were require to fulfill between April 01, 2003 to March 31, 2004, a vested right accrued in their favour to get the special incentive in terms of the scheme*

which, of course, was to be availed from April 01, 2004. The case of the Government, on the other hand, is that the benefit was to accrue to these exporters only from April 01, 2004 and before that it was withdrawn and, thus, no vested right accrued in their favour. It was also argued that in the policy, which provides special incentives to status holder, the term "incremental growth in export" was not defined/clarified at the time when the policy was issued. By the impugned notification, the blanks/gaps were filled and the term incremental growth in export was defined and it was clarified as to how the incremental growth in export is to be actually worked out. This was also done before the question of actual working out of the incremental growth in exports arose and hence, no retrospective effect.

111) An astute and penetrative examination of the record, with reference to the results of the investigation, which had prompted the Central Government to issue these Notifications, provides a very tidy answer to the question posed above is that the so-called targets achieved were only on paper through fraudulent means and, therefore, it cannot be said that any vested right accrued in favour of these exporters.

112) We have referred to such material in detail while upholding the contention of the Union that Notifications were issued in public interest to ensure that their misuse is not allowed. To recapitulate, the inquiry conducted by the Government revealed that there were exports of rough diamonds even though India is not a rough diamond producing country. These exports stopped the moment DFCE benefits in respect of rough diamond were disallowed. It was also found that cut and polished diamonds were imported, stored inside a bond and re-exported with artificial value addition. Many of these exporters exported to their own counterparts in Dubai and Sharjah and when this consignments reached those destinations, they were declared as scrap to avoid import duty. Following statistics given by the Government in

respect of so-called exports by these exporters makes out startling revelations:

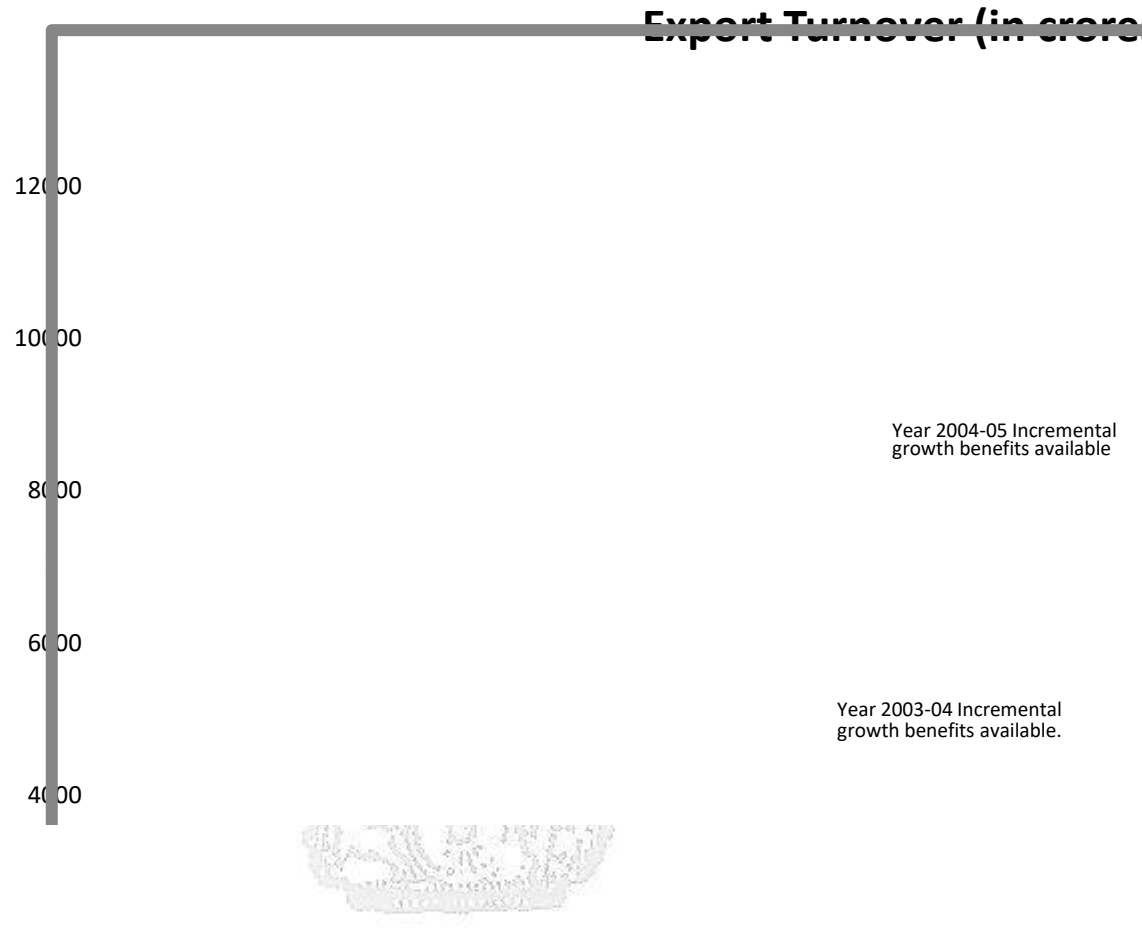
Growth exceeding 2000% for two petitioners came from 100% export of gold coins and plain jewellery

Firm	*Turnover 2002-03*	*Turnover 2003-04*	*% Growth*	*Share of Gold coins and Plain jewellery in total exports*
Rajesh Exports, Bangalore	*112*	*2372*	*2017*	*100*
Kanak Exports, Mumbai	*27*	*1070*	*3816*	*100*

For M/s Adani Exports, over 80% of export turnover came for diamonds and Supplies from status holders not meeting the minimum turnover and growth criteria

	Adani Exports Limited, Ahmedabad	*Exports (Crores)*
	Total exports for the year 2003-04 of which	*4657*
1	*Rough, and re-exported polished diamonds*	*2475*
2	*Supplies taken from status holders not meeting the minimum turnover and growth criteria*	*1316*
	Share of the above 2 categories in the total 81.4 % exports	

Export surge of 1135% for M/s. Adani Exports came in 2003-04 while for the past six years their exports were declining.



It is pertinent to note that except the above mentioned persons no other exporter in the country has challenged the said Notifications or the Public Notices dated January 28, 2004 and April 21, 2004 respectively.

It was also brought to the notice of the DGFT that some of the exporters have procured rough diamonds from local firms and exported the same by a 5% loss as they were confident of covering up the loss by receiving the 10% DFCE incentives offered by the Government. All these aspects are discussed in much details earlier and need not be repeated. We would like to recapitulate the following stark

features/practices which have surfaced on record as a result of investigation:

113) Mr. Adhyaru has successfully demonstrated that the following methods were found to be resorted to by these exporters to inflate their export turnovers:-

(i) Export of rough diamonds even though. India is not a rough diamond producing country. These exports stopped the moment DFCE benefits were disallowed.

Export of such rough diamonds earlier has never been part of the normal commercial operations and has taken place just to take advantage of the Scheme.

According to Gems and Jewellery Export Promotion Council, "India is not a rough exporting country. Rough diamonds which are unsustainable for cutting in India are re-exported." Such exports stopped the moment benefit was explicitly withdrawn.

(ii) In the present case also the respondent M/s Adani Exports Limited had stopped exporting the rough diamonds the moment the Notification was issued in January, 2004 and according to Gems and Jewellery Export Promotion Council, "Party has not exported rough diamonds during January/March 2004".

(iii) Cut and polished diamonds were imported, stored inside a bond and re-exported with artificial value addition. Few large firms including the petitioners exported these products to buyers directly related to them.

(iv) According to reliable information the same sets of diamonds were rotating and these never entered the Indian domestic territory or to the end consumers abroad. The value of such exports in the past two years may exceed Rs. 15,000 crores. Government has detailed report of the modus operandi of the firms involved.

(v) Most notorious misuse of the Scheme was carried out by few firms who exported Gold medallion and studded jewellery. Key firms included M/s Kanak Exports, M/s. Rajesh Exports Ltd. and M/s. Adani Exports Ltd.

(vi)Many of these exporters exported to their own counterparts in Dubai and Sharjah. Since the jewellery attracted 5% import duty at Dubai, the consignments which were declared as jewellery in India were declared as scrap in Dubai to avoid the import duty.

(vii) As it was difficult for them to achieve the value addition prescribed by the Policy through craftsmanship, they added extra gold to get the value addition. However, in this process strangely enough per unit price of the gold exported was less than per unit price of gold imported.

(viii) Few exporters including petitioners have purchased exports of other firms to inflate their turnover. Contracts have been signed between the petitioners and other exporters that petitioner will provide marketing and other services and act as third party exporter. According to reports status-holders were purchasing exports made by other parties at a premium with a view to show incremental growth of 25% or more in exports without having actually achieved such growth.

114) In such a scenario, a sagacious approach with practical sense leads us to conclude that these writ petitioners/exporters had actually achieved the targets set down in the original Scheme and thereby acquired any "vested right". It was pernicious and blatant misuse of the provisions of the Scheme and periscopic viewing thereof establishes the same. Thus, the impugned decision reflected in the notifications dated April 21 and 23, 2004, did not take away any vested right of these exporters and amendments were necessitated by over-whelming public interest/considerations to prevent the misuse of the Scheme.

Therefore, we are of the opinion that even when impugned Notification issued under Section 5 could not be retrospective in nature, such retrospectivity have not deprived the writ petitioners/exporters of their right inasmuch as no right had accrued in favour of such persons under the Scheme. This Court, or for that matter the High Court in exercise of its writ jurisdiction, cannot come to the aid of such petitioners/exporters who, without making actual exports, play with the provisions of the Scheme and try to take undue advantage thereof. To this extent, direction of the Bombay High Court granting these exporters benefit of the Scheme for the past period is set aside".

20. The Supreme Court, thereafter, passed the following directions:

> *"116) Thus, appeals and transfer cases stand disposed of in terms of aforesaid answers provided by this Court to the various questions formulated. To put it precisely, the effect of the aforesaid discussion would be to uphold the decision of the Gujarat High Court, though on different ground, thereby dismissing the appeals of the exporters against the said judgment except to the extent indicated in para 114 above while the appeals of the Government are allowed. Likewise, appeals of the Union of India against the judgment of the Bombay High Court are allowed to the aforesaid extent and the appeals of the exporters/writ petitioners are dismissed."*

21. Feeling aggrieved of the above judgment, the petitioner herein preferred an application seeking review of the same, being Review Petition (Civil) No.1593/2016. Some of the averments made in the Review Petition are relevant to answer the contentions raised by the

petitioner in the present petition and are therefore, reproduced hereinunder:

> *"A. It is submitted that the Respondents did file pleadings in Kanak's Writ Petition before the Hon'ble Bombay High Court and in the Civil Appeals before this Hon'ble Court. Before the Hon'ble Bombay High Court, one Counter Affidavit/Reply in October 2004 was filed by the Union of India. No Counter Affidavit was filed in the Supreme Court on behalf of the Respondents in Kanak's Civil Appeal i.e. 658 of 2006. The only additional pleading filed before this Hon'ble Court by the DGFT in Kanak's case was Special Leave Petition (converted into Civil Appeal No. 554/2006).*
>
> *In not one of the pleadings filed by the respondents/DGFT is there a single allegation specific to Kanak Exports that it had not in fact exported the subject goods or that the exports were "only on paper" or that the exports were made by Kanak "through fraudulent means" or that Kanak had engaged in "pernicious or blatant misuse of the provisions of the Scheme."*
>
> *Absent any pleading in Kanak's Writ Petition or Civil Appeals, it was not open for any Court much less this Hon'ble Court to record findings with respect to Kanak Exports that the exports were "paper exports" or "fraudulent".*
>
> *xxxxxx*
>
> *B. It is submitted that the findings rendered with respect to paper exports or exports by fraudulent means in so far as Kanak is concerned are not supported by any evidence adduced by the UOI/DGFT in Kanak's case. There is no document placed on affidavit showing that a single export effected by Kanak was not genuine. In so far as Kanak is concerned, this, is a case of:*

• *No pleading*

• *No evidence*

in relation to genuineness of exports, but nevertheless denial of relief granted by the Bombay High Court.

xxxxxx

H. The statutory scheme provides a comprehensive machinery for separating genuine cases for receiving duty free entitlement certificates from cases that are not genuine. An evaluation of every application seeking DFEC is required to be processed by the DGFT. This is the stage at which non-genuine applications may be weeded out and the applicant denied the benefit. The issue before this Hon'ble Court was with respect to the validity of the circulars and notifications and their retrospective effect. Having laid down the law, it is an error apparent on the face of the record for this Court to have made a determination on factual aspects without there being any pleading or evidence."

22. The Supreme Court, however, by its order dated 09.03.2016 was pleased to dismiss the Review Petition filed by the petitioner.

23. The petitioner, thereafter filed a revised application dated 21.11.2016 before the respondent, contending therein that out of the total exports of Rs.1070.35 crores made by the petitioner between 01.04.2003 to 31.03.2004, exports of Rs. 355.69 crores had become ineligible in view of the exclusion set out in Notification dated 28.01.2004, leaving the eligible exports at Rs.714.66 crores entitled for the benefit of the DFCE Scheme. In paragraph 3 of the said Application, the petitioner

summarized, what according to it was the effect of the judgment dated 27.10.2015 of the Supreme Court, in the following words:

> *"3. Thereafter, the Supreme Court has decided the issue by judgment dated 27th October, 2015 inter alia holding that:*
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> *• Notification dated January 28, 2004 is clarificatory (para 85),*
>
> *• Public Notice dated January 28, 2004 is ultra vires so far as it excludes four items (para 96),*
>
> *• Notifications dated April 21 & 23, 2004 are prospective (para 108),*
>
> *• If status holder achieved 25% incremental growth in exports, they acquired right to get benefit under scheme which cannot be taken away (para 109)*
>
> *• Vested rights do not accrue to those exporters whose exports are not genuine but only on paper through fraudulent means (para 111 r/w 114).*
>
> *The reminder is given to implement the judgement of the Hon'ble Supreme Court as after follow up, nothing has been done in respect of our pending application."*

24. The respondent no.3, however, by its Impugned Order/Letter dated 28.12.2017 has rejected the application of the petitioner relying upon the judgment of the Supreme Court and observing that in terms thereof, the petitioner is not eligible to any benefit under DFCE Scheme as claimed.

25. The learned senior counsel for the petitioner submits that the Impugned Order is liable to be set aside inasmuch as the Supreme Court, in its judgment dated 27.10.2015, was merely considering the validity of

the Notifications dated 28.01.2004, 21.04.2004 and 23.04.2004. The Supreme Court was not called upon to consider whether the petitioner is otherwise entitled to the benefit under the DFCE Scheme. Findings of the Supreme Court were also confined only to the determination of the validity of the above Notifications and the Public Notice and whether they could operate retrospectively with effect from 01.04.2003. While the Notification dated 28.01.2004 was held to be clarificatory in nature and therefore, applicable with retrospective effect, the Public Notice dated 28.01.2004 was held to be *ultra vires* and the Notifications dated 21.04.2004 and 23.04.2004 were held to be prospective in nature. The observations of the Supreme Court that a vested right is not created in favour of the exporter who, without making actual exports, plays with the provisions of the Scheme and tries to take undue advantage thereof, were general in nature and not specific to the petitioner herein. For the respondents to apply the same observations to the petitioner, they were to conduct an enquiry and only incase, after giving an opportunity of hearing to the petitioner, they come to the conclusion that the exports carried out by the petitioner were not eligible for the purpose of the Scheme, they could deny the benefit of the Scheme to the petitioner. He submits that in the present case, there is no such evidence of improper exports by the petitioner and in fact, the respondents have not carried out any investigation into the same. He further submits that the judgment of the Supreme Court cannot be interpreted like a statute and has to be read and understood as per its plain meaning. He places reliance on the judgments of the Supreme Court in ***Inderjeet Arya & Anr.***, MANU/DE/5778/2012; ***Bhavnagar University vs. Palitana Sugar Mill***

(P) Ltd., (2003) 2 SCC 111; and ***UP Electricity Board vs. Pooran Chandra Pandey***, (2007) 11 SCC 92.

26. The learned senior counsel for the petitioner further submits that the allegations of fraud have to be specifically pleaded along with the supporting material and cannot be based on mere presumptions and surmises. He places reliance on the judgments in ***Bishnudeo Narain vs. Seogeni Rai and Jagernath***, AIR 1951 SC 280; ***Tukaram Dhondiba vs. Andappa Genu Walekar***, 2012 (3) Mh. LJ 150; ***Sangramsinh Gaekwad vs. Shantadevi Gaekwad***, (2005) 11 SCC 314; ***Union Of India vs. Chaturbhai M. Patel***, (1976) 1 SCC 747; and ***Indian Bank vs. Satyam Fibres***, (1996) 5 SCC 550.

27. The learned senior counsel for the petitioner submits that in the present case, neither the Impugned Order nor the counter affidavit has made any reference to any investigation that was carried out by the respondents or any adverse material having been established against the petitioner.

28. The learned senior counsel for the petitioner further submits that the respondents, by issuing Trade Notice dated 08.05.2017, themselves have rightly understood the effect of the judgment of the Supreme Court as requiring the respondents to carry out a detailed investigation by the Zonal Committees into the allegation of misuse of the Scheme and only where an exporter is found to have misused the Scheme in the investigation of the Revenue Department, take proceedings for making recoveries, if any, from such exporters or deny the benefit of the Scheme

to such exporter. He submits that in view of the Trade Notice dated 08.05.2017, the respondents were obligated to carry out such investigation to determine the eligibility of the petitioner for the benefit under the Scheme.

29. The learned senior counsel for the petitioner finally submits that in reply to an application under the Right to Information Act, 2005, it was revealed that in fact, such benefit of the Scheme has been given to M/s Adani Export Ltd. in spite of the observations made by the Supreme Court in the above referred judgment and no recovery proceedings have been initiated against it. He submits that this itself shows the understanding of the respondents of the Supreme Court judgment as not acting as a complete bar on the consideration of the application of the petitioner or M/s. Adani Export Ltd. for benefit under the Scheme. He submits that to deny the petitioner of the benefit of the scheme would therefore, be discriminatory.

30. The learned counsel for the respondents, on the other hand, submits that the petitioner is, in fact, seeking to reagitate the relief denied to it by the Supreme Court. He submits that the petitioner cannot be allowed to seek the relief which had been denied by the Supreme Court.

31. I have considered the submissions made by the learned senior counsels for the parties.

32. The Supreme Court in its judgment dated 27.10.2015 had *inter alia* considered the letter dated 13.10.2003 addressed by the Joint Secretary, Govt. of India, Central Board of Excise and Customs, addressed to the

DGFT as also various other contemporaneous letters/Circulars/Minutes of Meeting leading up to the issuance of the Notifications dated 21.04.2004 and 23.04.2004. It also took note of the counter affidavit filed by the Union of India, giving details of the *modus operandi* used by the exporters in inflating their exports to claim benefit of the DFCE Scheme.

33. In the counter affidavit, specific reference was made by the respondents to the petitioner herein to contend that the petitioner has shown an exponential growth in its exports of 3816% against the National Growth of Export of merely 18%.

34. I have already quoted in detail the findings of the Supreme Court, which would clearly show that the Supreme Court was particularly considering the case of M/s Adani Export as also the petitioner herein. For both these firms, the Supreme Court found them to have resorted to blatant misuse of the provisions of the Scheme and set aside the direction of the Bombay High Court granting relief to the petitioner under the said Scheme.

35. The petitioner in fact, filed a Review Petition seeking review of the said judgment, which was also dismissed by the Supreme Court. In the Review Petition, the petitioner had categorically contended that the finding of the Supreme Court that held the petitioner as having resorted to paper transactions was not justified as the respondents had not placed any material on record against the petitioner to prove the same. Relevant paragraphs of the Review Petition have been quoted hereinabove. The Review Petition was, however, dismissed by the Supreme Court.

36. The petitioner certainly could not have been allowed to re-agitate its eligibility under the Scheme in the guise of a fresh/revised application after the judgment of the Supreme Court and subsequent dismissal of its Review Petition.

37. As far as reliance of the petitioner on the Trade Notice dated 08.05.2017 is concerned, the same also cannot help the petitioner inasmuch as it is clearly applicable to exporters other than those against whom material had already been placed by respondents before the Supreme Court of their disentitlement under the Scheme, including the petitioner herein.

38. As far as seeking parity with M/s Adani Export Ltd. is concerned, there can be no equality achieved in the violation of law. There is no right stipulated under Article 14 of the Constitution of India in the negative. Therefore, merely because the respondents have granted some relief to M/s Adani Export Ltd. or have not made any recoveries from it, cannot entitle the petitioner, by itself, to claim benefit under the DFCE Scheme in spite of the clear and categorical judgment of the Supreme Court holding it to be not entitled for the same.

39. In view of the above, the petition is dismissed. The petitioner shall pay a cost of Rs.1 Lac to be deposited in 'PM CARES' Fund within a period of four weeks of this judgment.

NAVIN CHAWLA, J

MAY 18, 2020/RN