

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar and Agha Faisal, JJ.**

CP D 1257 of 2017 : Abdul Qadeer Khan Durrani vs.
State Bank of Pakistan & Others

For the Petitioner : Mr. Ijaz Ahmed Zahid, Advocate

For the Respondents : Mr. Noman Zahid, Advocate
Mr. M. Younus, Advocate
(for the Respondent No. 3)

Mr. Hasan Mandviwala
Advocate
(for the Respondent No. 4)

Mr. Iqbal Hussain Bangash
Joint Director, SBP
Mr. Faraz Khan Jadoon
Law Officer, SBP
(for the Respondent Nos. 1 & 2)

Date of Hearing : 20.02.2019 & 19.04.2019

Date of Announcement : 31.05.2019

JUDGMENT

Agha Faisal, J: The present petition has assailed the order dated 22.11.2016 (“**Impugned Order**”) delivered by the State Bank of Pakistan (“**SBP**”) upholding the imposition of a monetary penalty upon the petitioner, upon the premise that the petitioner had fraudulently induced the extension of a concessional finance facility thereto by submitting false representations.

2. The facts significant to this controversy are that the petitioner is reportedly an exporter and has been utilizing the Export Finance Scheme (“**EFS**”) of the SBP. The eligibility criteria of the EFS requires an applicant to submit a certification stipulating that the total amount of overdue bills at the time of availing the said facility is not more than five percent of the previous year’s export performance of the said applicant. Upon a post facto inspection it was gleaned by SBP that the petitioner did not conform to the eligibility criteria and notwithstanding the said fact

had submitted certification to the contrary, in reliance whereof the concessional finance under the EFS was extended thereto. In such regard a fine was imposed in November, 2015 by the SBP, which fine in turn was recovered from the petitioner by the respective banks. The petitioner challenged the recovery of the penalty amount therefrom before this Court in Suit 842 of 2016 (“**Suit**”), which in turn was disposed of the said proceedings vide order dated 02.09.2016, operative constituent whereof is delineated as follows:

“Be that as it may, we are not resolving this controversy in these proceedings as to whether the amount has been repatriated after the cut of date as it is claimed that it requires adjudication at proper forum. The plaintiff insisted that their account be restored hence this suit is disposed of as under:

1. That the plaintiff shall provide a bank guarantee to the extent of the amount of which the penalty was imposed.
2. Once such bank guarantee is provided to the defendant bank, they shall restore the account of the plaintiff forthwith.
3. The State Bank of Pakistan is directed to adjudicate the issue of penalty on account of late repatriation of the amount as it is claimed by the plaintiff that it is not so and that the plaintiff were not heard at the time of imposing penalty earlier and it is not to be recovered from the plaintiff as the penalty in fact was imposed upon the defendant only.

Though the law is clear in this regard however since the plaintiff requires adjudication in this regard and they would like to be heard by the authority, let proceedings be initiated after notice to the defendants as well as the plaintiff as they so desire. The adjudication shall commence soon after the service of notice and be concluded preferably within ten week sand may also decide the fate of the bank guarantee provided by the plaintiff. Earlier decision in this regard shall not influence the proceedings.

The suit stands disposed of alongwith pending applications.”

The SBP undertook the proceedings, in compliance of the directions of this Court vide the aforesaid order, and came to the conclusion that the basis and the quantum of the penalty sought to be recovered from the petitioner was in due consonance with the prescribed rules and regulations, thus, delivered the Impugned Order. Aggrieved by the Impugned Order, the petitioner preferred the present petition.

3. Mr. Ijaz Ahmed Zahid, Advocate set forth the case for the petitioner and submitted that the Impugned Order was an unbridled exercise of discretion, which did not qualify upon the test of reasonableness. It was further submitted that even if there was a finding of culpability then it was imperative that the SBP and the banks be adjudged to be contributories in such regard. Learned counsel submitted that the details of all exports and export finance activity is available with the banks and the SBP and it is only upon verification of such record is EFS extended to an applicant. Learned counsel also argued that the quantum of the finance advanced under the EFS is determined upon consideration of this very record. Learned counsel also argued that it is this very record, and nothing maintained by the petitioner, that was inspected to reveal the very basis of the fault being apportioned to the petitioner and since this record was always in the custody of the banks / SBP, therefore, the petitioner could not be penalized for the inefficiency of the banks / SBP. With regard to the certificates under scrutiny it was submitted that the same were obtained by the banks from the petitioner in blank and therefore the petitioner was not responsible for the consequences in such regard. As a fallback argument it was submitted that even if a penalty was to be levied in this regard it would be in respect of entering a wrong entry and not for utilization of the scheme on the basis of fraudulent or deliberate documents.

4. Mr. Hasan Mandviwala, Advocate appeared on behalf of the respondent No.4 bank and submitted that the eligibility criteria for the EFS clearly prescribed that an applicant could only avail the scheme if the aggregate of the export bills overdue was not more than five percent of the previous year's performance. Learned counsel submitted that an applicant was required to furnish the requisite certification and it was only in reliance upon the petitioner's misrepresented certification that he was allowed the facility. Per learned counsel the petitioner had been consistently misrepresenting the issue of outstanding overdue bills and in such regard the bank had sent letters of caution to the petitioner. In conclusion it was argued that the petitioner's default is apparent from the record and therefore the Impugned Order does not suffer from any infirmity, hence, ought to be maintained and upheld. Mr. S. Noman

Zahid, Advocate represented the respondent No.3 bank and adopted the arguments advanced by Mr. Mandviwala.

5. Mr. Iqbal Hussain Bangash, Joint Director (IH & SME Finance Department) State Bank of Pakistan appeared to present the case of the SBP. It was submitted that the petitioner was ineligible for the EFS facility yet submitted false documents in order to obtain the relevant financing on concessional rates. It was demonstrated from the record that since the culpability of the petitioner was determined in respect of fraudulent conduct and misuse of the EFS facility hence the apportionment of the penalty and the quantum thereof was in due accordance with the law. It was contended that the petitioner has never denied his ineligibility for the EFS facility and yet challenged the rightful imposition of the penalty on unmerited hyper-technical grounds simply in an effort to circumvent the due process of the law. The Additional Director argued that the fraud of the petitioner was apparent from the record and the matter had already been adjudicated in accordance with law and upon directives issued by this Court in the Suit, hence, the Impugned Order ought to be upheld and this Court may be pleased to dismiss the present petition forthwith.

6. We have considered the arguments advanced before us and have also appreciated the record to which our surveillance was solicited. It is apparent from the Impugned Order that the same is predicated upon the finding of misrepresentation of the petitioner, contained in its certification, perpetrated to obtain the concessional rates/advances pursuant to the EFS. It is considered appropriate to confine this determination to whether the rationale employed in the Impugned Order is supported by the uncontroverted record available on file.

7. The present deliberation may be initiated by reference to the pertinent content of Circular 8 of 2011, issued by the SBP in respect of the EFS, wherein it is prescribed as follows:

“ Export Finance Scheme (EFS) – Linkage of Overdue Export Proceeds with Export Finance Scheme

This refers to SMFED Circular Letter No.6 dated February 24, 2011 on the captioned subject.

2. In order to streamline the procedure for availing finance under EFS by exporters who have overdue export proceeds, the following instructions will come into effect from October 01, 2011:

- a) An exporter shall be eligible to avail financing under EFS Part-I and/or Part-II, if the total amount of overdue export bills at the time of availing the facility is not more than 5% of the previous year's export performance shown in EE-1 statements, duly verified/finalized by concerned SBP BSC office(s). Henceforth, exporters availing only the EFS Part-I facility are also required to submit the prescribed EE-1 statements.
- b) In case the overdue export position of an exporter is greater than 5% of the previous year's exports, the exporter will not be entitled to avail the EFS facility till such time that the overdue position is reduced to the 5% benchmark level.

3. To meet the above criteria of financing under EFS, the following guidelines are to be followed:

- i) Each exporter will be required to give a Certificate on a prescribed Form (enclosed herewith) showing consolidated position of overdue export bills outstanding against all bank(s) {as per the record of Foreign Exchange Operations Department (FEOD)}, as a percentage of the total exports of the preceding year finalized in EE-1 statements. The Certificate will be submitted through the bank to the concerned SBP BSC office on a six monthly basis by 31st March & September 30, each year. The certificate will remain valid up to the next six months. Process of submission of the certificate would commence from September 2011.....
- vi) Any misreporting/misstatement shall attract imposition of fine on bank/exporter at the rate prescribed under the Scheme.....

(Underline added for emphasis)

8. The eligibility criteria is apparent from the forgoing and it is also clear that an applicant is required to submit the relevant certification in order to demonstrate the eligibility for the EFS. We have seen the pro forma of the certificate which is required to be submitted by an applicant / exporter when applying to avail the EFS, copy whereof is available at page 701 of our file. We have also noted from the record certificates issued by the petitioner dated 28th August, 2012, 25th February, 2013, 18th June, 2013, 27th August, 2013, 1st October, 2013, 31st October,

2013, 5th November, 2013, 8th November, 2013, 26th November, 2013, 27th November, 2013, 29th November, 2013, 5th December, 2013, 18th December, 2013, 21st March, 2014, 26th May, 2014 and 25th June, 2014 respectively wherein it has been consistently certified and confirmed that at the relevant time the total amount of overdue of export proceeds stand at “0.00 percent” of last year’s export value reported. In all these certificates, in addition to the confirmation certification, there is also a column which is required to be filled in seeking the total overdue export proceeds as a percentage of total export and the said column has been consistently filled in by the petitioners by stating “0.00 percent”. It is, thus, apparent that the petitioners have certified and confirmed that not only is there no overdue of export proceeds which is not only less than the five percent eligibility criteria but furthermore that there is no overdue of export proceeds at all. This is not an omission or mistake in terms of reporting, but is an active representation certifying the absence of any overdue export proceeds. The aforesaid certificates have admittedly been issued by the petitioner and the representation contained therein is entirely that of the petitioner, therefore, findings of the SBP contained in the Impugned Order appear to be squarely supported by the record available before us.

9. We now address the fallback / alternate argument of the petitioner regarding the invocation of the incorrect heading for imposition of the penalty. In this regard it is observed that the penalty imposed is under the category which prescribed a fine for misuse of the utilization of the EFS on fraudulent and tampered documents. We do not concur with the argument that the fine could have been for a wrong entry and not under the aforesaid classification as it is demonstrated from the Impugned Order that it was the misrepresentation perpetrated by the petitioner, to avail the EFS facility for which the petitioner was otherwise ineligible, that gave rise to the imposition of the penalty. No justifiable argument has been advanced before us to dispel the applicability of the category invoked by the SBP for the imposition of the fine.

10. In view of the reasoning and rationale herein contained, we are constrained to observe that no case has been made out warranting the exercise of Constitutional jurisdiction of this Court in favour of the

petitioner, hence, the present petition, along with pending applications, is hereby dismissed.

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