IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

FRIDAY, THE 16TH DAY OF JANUARY 2015/26TH POUSHA, 1936

WP(C).No. 959 of 2015 (T)

PETITIONER(S) :

M/S. UJWAL INTERNATIONAL LTD., REPRESENTED BY ITS PROPRIETOR
S.KUMARASWAMY,
66, 1ST 'R' BLOCK, RAJAJI NAGAR,
BANGALORE - 560 010 AND HAVING ITS BRANCH OFFICE AT 313,
3RD FLOOR, DARRGH SMAIL, CENTRE,
5TH CROSS ROAD, WILLINGDON ISLAND, COCHIN - 3.

BY ADVS.SRI.P.RADHAKRISHNAN (1)
SRI.MADHU RADHAKRISHNAN
SRI.NELSON JOSEPH
SRI.M.D.JOSEPH

RESPONDENT(S) :

THE COMMISSIONER OF CUSTOMS OFFICE OF THE COMMISSIONER
OF CUSTOMS CUSTOMS HOUSE, WILLINGTON ISLAND, KOCHI - 682 009.

BY ADV. SRI.SAIBY JOSE KIDANGOOR
BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL, S.C

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 16-01-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

Msd.

WP(C).No. 959 of 2015 (T)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1: TRUE COPY OF THE LICENCE ISSUED TO THE PETITIONER ALONG WITH APPROVAL TO WORK WITHIN THE JURISDICTION OF RESPONDENT.

EXT.P2: TRUE COPY OF COPY OF THE AUTHORIZATION LETTER ISSUED BY M/S.LTIE IN FAVOUR OF THE PETITIONER.

EXT.P3: TRUE COPY OF THE SHIPPING BILL SUBMITTED BY THE PETITIONER ON BEHALF OF M/S.LTIE.

EXT.P4: TRUE COPY OF THE INVOICE ISSUED BY M/S.LTIE SUBMITTED ALONG WITH EXT.P3.

EXT.P5: TRUE COPY OF BILL OF LADING SUBMITTED ALONG WITH EXT.P3.

EXT.P6: TRUE COPY OF THE LETTER SENT TO M/S. LTIE.

EXT.P7: TRUE COPY OF DOCKET NO.12498065 OF PROFESSIONAL COURIERS EVIDENCING DISPATCH OF ALL THE RELATED SHIPMENT DOCUMENTS M/S. LTIE.

EXT.P8: TRUE COPY OF THE INVOICE GENERATED BY THE COMPANY FOR THE SERVICES RENDERED IN SHIPPING THE CARGO INCLUDING CUSTOMS HOUSE SERVICES RENDERED BY THE PETITIONER.

EXT.P9: TRUE COPY OF THE SUMMONS SERVED ON THE EMPLOYEE OF THE PETITIONER.

EXT.P10: TRUE COPY OF THE ORDER DATED 23/12/2014 PASSED BY THE RESPONDENT.

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

[CR.]

P.R. RAMACHANDRA MENON J.

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W.P.(C) No. 959 of 2015

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Dated, this the 16th day of January, 2015

<u>JUDGMENT</u>

Correctness and sustainability of Ext.P10 order passed by the respondent Commissioner invoking the power and procedure under Regulation 23 of the Customs Brokers Licensing Regulations 2013, prohibiting the operation of the custom broker licence issued to the petitioner, virtually preventing him from carrying out such exercise in the Customs Station - at Cochin, is the subject matter of challenge in this writ petition.

2. The prime ground raised is that Ext. P10 is *per se* in violation of all the fundamental principles of natural justice, particularly, 'a*udi alteram partem',* in so far as no opportunity of hearing was ever given to the petitioner before the order was passed. The case narrated by the petitioner is that, they were given Ext.P1 licence by the competent authority at Bangalore and is authorised to

do business in different customs Stations, including at Cochin, as borne by the endorsement on Ext.P1 licence. Based on the said licence, the petitioner was transacting the business. It is stated that the petitioner was authorized by the company by name M/s Living Trends Imports and Exports [M/s LTIE] as borne by Ext. P2 issued in the year 2012 and on the strength of the said authorization, the petitioner was transacting the business by submitting shipping bills on behalf of the said company in the years 2012 and 2013; particulars of which are discernible from paragraph 2 of the writ petition.

3. In the course of further transactions on behalf of M/s LTIE, Ext. P3 shipping bill was submitted before the authorities of the Customs. Copy of the invoice is marked as Ext. P4 and Bill of lading is Ext. P5. It is stated that the position has been informed by the petitioner to the concerned company as well, as borne out by Ext. P6. The petitioner has also given the concerned docket number pertaining to the said company, as evident from Ext. P7. The case of the petitioner is that, all of a sudden, an employee of the petitioner was served with Ext. P9 summons on 01.12.2014 calling him for taking statement on that day itself. Accordingly, the statement under Section 108 of the Customs Act was recorded

and an order was passed vide Ext. P10 on 23.12.2014, which is impugned herein. By virtue of the said order, the petitioner has been virtually prohibited from carrying out the activities in the customs station at Cochin, which is totally wrong and unsustainable and hence the challenge.

4. The learned counsel for the petitioner points out that, as evident from the proceedings, steps have been taken against the petitioner on the basis of some complaint preferred by M/s LTIE. But before arriving at any inference, it was very much necessary to have served notice to the petitioner, to explain the facts and circumstances. If the petitioner was given an opportunity to substantiate the position, Ext. P2 authorization would have been brought to the notice of the respondent. It is stated that, as per Regulation 11 (a) of the Customs Brokers Licensing Regulations 2013, the respondent ought to have required the petitioner to produce authorization. The authority of the petitioner to have acted on behalf of the company – M/s LTIE in respect of the earlier transactions, by submitting shipping bills dated 26.09.2013 and 29.01.2013, is not under dispute. The learned counsel for the petitioner submits that Ext. P10 issued by the respondent is liable to be intercepted by virtue of the law declared on the point viz.

the Apex Court in **Swadeshi Cotton Mills Vs. Union of India [AIR 1981 SC 818],** Division Bench of the Bombay High Court as per the verdict dated 09.05.2013 in **W.P.(C) No. 1102 of 2013** and a Single Bench of the Culcutta High Court, vide the verdict dated 10.06.2014 in **W.P. No. 471 of 2014.**

5**.** Heard the learned standing counsel as well, who submits that a detailed counter affidavit is to be filed with regard to the factual position involved in this case. With regard to the legal position involved, the learned standing counsel submits that the proceedings taken by the respondent leading to Ext. P10 order are perfectly within the four walls of law and that the same is not assailable under any circumstances. It is pointed out that Ext. P10 is issued under Regulation 23, which does not contemplate any prior notice and that the three decisions relied on by the petitioners stand on a different footing. The learned standing counsel seeks to place reliance on the decision rendered by the Division Bench of this Court in **W.A. No. 1505 of 2014** on 28.10.2015, simultaneously adding that scope of 'suspension of licence' as envisaged under <u>Regulation 19</u> and scope of the 'prohibition' as envisaged under <u>Regulation No. 23</u> are entirely different. It is only by virtue of the imminent requirement to intercept further proceedings, because of filing of complaint, that the respondent was constrained to consider the matter and issued Ext. P10.

6. In view of the nature of dispute involved, particularly with regard to the authority of the respondent to have issued Ext. P10 and the scope of hearing, this Court finds that the issue is more a legal question and as such, the factual position does not require to be evaluated. Hence, no counter affidavit involving the merit of the case is necessary, as this Court does not propose to venture into such exercise.

7. With regard to the legal position, Regulation 23 has been invoked by the respondent for having issued Ext. P10. Regulation 23 reads as follows:

> **23**. **Prohibition** - Notwithstanding anything contained in these regulations, the Commissioner of Customs may prohibit any Customs Broker from working in one or more sections of the Customs Station, if he is satisfied that such Customs Broker has not fulfilled his obligations as laid down under regulation 11 in relation to work in that section or sections.

8. Other relevant provisions are with regard to revocation of licence, suspension of licence and the procedure to be followed; as given under Regulations 18, 19 and 20; which are also extracted

below for convenience of reference :

> "**18. Revocation of licence or impositon of penalty** - The Commissioner of Customs may, subject to the provisions of regulation 20, revoke the licence of a Customs Broker and order for forfeiture of part or whole of security, or impose penalty not exceeding fifty thousand rupees on a Customs Broker on any of the following grounds namely;-
>
> (a) failure of to comply with any of the conditions of the bond executed by him under regulation 8.
>
> (b) failure to comply with any of the provisions of these regulations, within his jurisdiction or anywhere else;
>
> (c)Committing any misconduct, whether within his jurisdiction or anywhere else which in the opinion of the Commissioner renders him unfit to transact any business in the Customs Station.
>
> (d) adjudicated as an insolvent;
>
> (e) of unsound mind; and
>
> (f) has been convicted by a competent court for an offence involving moral turpitude.
>
> Provided that the imposition of penalty or any action taken under these regulations shall be without prejudice to the action that may be taken against the

Customs Broker or his employee under the provisions of the Customs Act, 1962 (52 of 1962) or any other law for the time being in force.

19.Suspension of licence -

(1) Notwithstanding anything contained in regulation 18, the Commissioner of Customs may, in appropriate cases where immediate action is necessary, suspend the licence of a Customs Broker where an eqnuiry against such agent is pending or contemplated.

(2) Where a licence is suspended under sub-regulation (1), the Commissioner of Customs shall, within fifteen days from the date of such suspension, give an opportunity of hearing to the Customs Broker whose licence is suspended and may pass such order as he deems fit either revoking the suspension or continuing it, as the case may be, within fifteen days from the date of hearing granted to the Customs Broker.

Provided that in case the Commissioner of Customs passes an order for continuing the suspension, the further procedure thereafter shall be as provided in regulation 20.

20. Procedure for revoking licence or imposing penalty :-

(1) The Commissioner of Customs shall issued a notice in writing to the Customs Broker within a period of

ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the licence or impose penalty requiring the said Customs Broker to submit within thirty days to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defense and also to specify in the said statement whether the Customs Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs.

(2) The Commissioner of Customs may on receipt of the written statement from the Customs Broker, or where no such statement has been received within the time-limit specified in the notice referred to in sub regulation (1), direct the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, to inquire into the grounds which are not admitted by the Customs Broker.

(3) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall in the course of inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material to the inquiry in regard to the grounds forming the basis of the proceedings, and he may also put any question to any person tendering evidence for or against the Customs Broker, for the

purpose of ascertaining the correct position.

(4) The Customs Broker shall be entitled to cross-examine the persons examined in support of the grounds forming the basis of the proceedings, and where the Deputy Commissioner of Customs or Assistant Commissioner of Customs declines to examine any person on the grounds that his evidence is not relevant or material, he shall record his reasons in writing for so doing.

(5) At the conclusion of the inquiry, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall prepare a report of the inquiry and after recording his findings thereon submit the report within a period of ninety days from the date of issue of a notice under sub-regulation (1).

(6) The Commissioner of Customs shall furnish to the Customs Broker a copy of the report of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, and shall require the Customs Broker to submit, within the specified period not being less than thirty days, any representation that he may wish to make against the said report.

(7) The Commissioner of Customs shall, after considering the report of the inquiry and the representation thereon, if any, made by the Customs Broker, pass such orders as he deemed either revoking

> the suspension of the license or revoking the licence of the Customs Broker or imposing penalty not exceeding the amount mentioned in regulation 22 within ninety days from the date of submission of the report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs under sub regulation (5).
>
> Provided that no order for revoking the license shall be passed unless an opportunity is given to the Customs Broker to be heard in person by the Commissioner of Customs.

9. Admittedly, Ext. P1 licence has been issued to the petitioner by the authorities at Bangalore. In such situation, 'revocation of licence' or suspension under Regulations 18 and 19 can only be taken by the said authority at Bangalore. The learned counsel for the respondent submits that the dispute in this case is pertaining to the transaction pursued by the petitioner at the Customs station at Cochin and hence proceedings were initiated, invoking Regulation No. 23. The said regulation starts with a 'non-obstante clause' and as such, no specific opportunity of hearing is intended in such proceedings. But it is equally true, that the said order, which is stated as an interim measure cannot be permitted to exist for ever, which will adversely affects the rights and interest of the parties. The learned standing counsel asserts that Ext. P10

is only a provisional order and that steps have already been taken to issue notice and that the proceedings will be finalized at the earliest to cause the matter to be dealt with by the Licensing Authority at Bangalore, if further steps are necessary. The terminology used in Ext. P10 is very relevant, which is extracted below for convenience of reference :

> "In view of the above and in exercise of the powers conferred under Regulation 23 of the CBLR 2013, I hereby prohibit the operation of the Customs Broker M/s Ujwal International Limited, within the jurisdiction of this Commissionerate with immediate effect and until further orders. However all documents already filed prior to issuance of this order will be allowed to be completed."

10. With regard to the nature of challenge raised by the petitioner and denial of opportunity of hearing, the observation made by Apex Court in **paragraph 42** of the judgment reported in **AIR 1981 SC 818** (cited supra) is very relevant, which is extracted below :

> "42. In short, the general principle - as distinguished from an absolute rule of uniform application - seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post

decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional Stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short this rule of fairplay "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands". The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, to recall the words of Bhagwati, J., the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

11. The Apex Court observed that when the Rules are silent, the necessity to give opportunity of hearing has to be interpreted widely and to be read into it. The matter was considered by the Bombay High Court as well, with reference to Regulation No. 21 of Customs House Agent Licensing Regulations 2004. Regulation No. 21 referred to therein is similar to the Regulation 23 involved in the present case. After considering the position, the Bench observed in Paragraph 2 as follows :

> 2. Regulation 21 does not exclude the requirement of complying with the principles of natural justice. As a matter of first principle, even when a statute or statutory regulations is silent in regard to compliance with the principles of natural justice, natural justice is to be read into the provision. However, it is equally well settled that in a case where urgent action is required, particularly in public interest, it may not always be appropriate or efficacious to furnish a pre-decisional hearing. Where immediate action is required, the authority can be directed to give an opportunity to the person who is affected by the order an opportunity of a hearing after passing a pro-tem order for a limited period. In the case of a suspension. Reguation 20 (2) contemplates immediate action being taken, where it is required, after which an opportunity has to be given to

> the agent whose licence is suspended within fifteen days from the date of the suspension, In our view, Regulation 21 has to be so interpreted so as to balance the requirement of fairness to the Customs House Agent on the one hand, which would warrant compliance with the principles of natural justice together with the need, on the other hand to protect the public interest essentially where immediate action is warranted. Hence, where immediate action is warranted, to prevent a customs house agent from carrying out activities which are prejudicial, a prohibitory order can be passed under Regulation 21 for a limited period, During that period an opportunity of hearing can be afforded in compliance with the principles of natural justice, Where immediate action is necessary, a pre decisional hearing can be dispensed with if such a hearing will defeat the requirement of public interest in the orderly and proper functioning of the Customs Station. On the other hand, where immediate action is not required, a prohibitory order can await compliance with the requirements of natural justice. Ordinarily, a pre decisional hearing must be the rule. Dispensation is to be an exception.

12. The crux of the observations is that, when the regulation is silent with regard to compliance, principles of natural

justice have to be read into. However, it has also been observed that, in the matter of paramount emergent situation, particularly in public interest, it may not always be necessary to grant 'pre-decisional hearing' with regard to the proceedings under Regulation No. 21 [like Regulation 23 involved herein] and that such action however has to be restricted to be in operation <u>for a limited period,</u> to safe guard the interest of the parties concerned. It is also made a mention that, a 'pre-decisional hearing' must be the rule and its dispensation is an exception. The scope of the provision was considered by a Single Bench of the Culcutta High Court as well. Considering the facts of the particular case involved therein, it was observed that the impugned order was passed without affording an opportunity of hearing, as the allegation indicated in the impugned order did not reveal that it was so emergent and exceptional, and whether where the order of prohibition was inevitable.

13. With regard to the scope of the judgment of the Division Bench of this Court, it is seen that the challenge involved in the said case, was mainly with regard to the order of '<u>prohibition'</u> issued under Regulation 23 by the Customs of <u>Cochin</u> and also the order of '<u>suspension'</u> issued by the concerned authority in Mumbai. The learned Single Judge only intercepted the suspension order

issued from Mumbai, to the extent it was applicable to the Cochin Station. After considering the matter, the Division Bench observed that the order passed by the authorities of the Mumbai Customs was very much after giving an opportunity of hearing to the party concerned and that there was no case for the writ petitioner that any principle of natural justices were violated. Hence the challenge raised by appellants/department was upheld and the interim order passed by the learned Single Judge was intercepted, however making it clear that party to the writ petition was at liberty to avail statutory remedy, by virtue of the enabling provision under the Regulations.

14. With regard to the contention raised by the respondent referring to the alternative remedy available to the petitioner under Regulation No. 21 and that interference needs not be made by this Court, the question is, whether the power has been exercised arbitrarily by the respondent and whether the impugned order has been issued in conformity with Regulation No. 23 or is there any malafide exercise of power. The undisputed facts reveal that some complaint was preferred against the petitioner by the concerned Company – M/s LTIE. It is stated that the power given to the petitioner, vide Ext. P2, was revoked by the concerned company

and they were doing operation through another Company by name 'Amity Logistics'. Further pursuant to Ext. P9 summons issued to the Assistant Manager of the petitioner's Company (who was the authorized representative of the petitioner company to submit all necessary proceedings before the respondent) a statement was taken under Section 108 of the Customs Act. It was after considering the facts and figures, that Ext. P10 order was issued to meet the need of the hour and the petitioner was prohibited from operating, until further orders.

15. After hearing both the sides, this Court finds that the course pursued by the respondent is not liable to be branded as arbitrary or illegal. However, it is to be made clear that operation of the said order has to be limited for a definite period, in view of the observations of Apex Court and the Division Bench of the Mumbai High Court as mentioned already.

In the said circumstances, operation of Ext. P10 order passed by the respondent is limited to be in force for a period of 'six weeks'. The petitioner is set at liberty to file objection, if any, also producing copy of the relevant documents within two weeks and the matter shall be finalized, taking appropriate steps and pass necessary orders in tune with relevant provisions of law, after hearing, within one month thereafter. The right of the petitioner to continue to operate will depend upon the orders to be passed by the respondent. It is made clear that the petitioner will be at liberty to challenge the order to be passed by the respondent, in accordance with law, if it goes detrimental to the rights and interests of the petitioner.

Sd/-

P. R. RAMACHANDRA MENON,
(JUDGE)

kmd