In the High Court of Judicature at Madras

Dated: 15.12.2016

Coram

The Honourable Mr.JUSTICE RAJIV SHAKDHER

Writ Petition No.37796 of 2016
& WMP No.32392 of 2016

M/s.Sowparnika Shipping Services,
New No.206, Old No.230, Second Floor,
Thambu Chetty Street, Mannady,
Chennai - 600 001
represented by its Proprietor
Shri.K.V.Prabhakaran

.... Petitioner / Petitioner

Vs.

1. The Commissioner of Customs, Chennai
VIII Commissionerate, Custom House,
No.60, Rajaji Salai, Chennai - 600 001.

2. The Deputy Commissioner of Customs
(Inquiry Officer), Room No.G-117,
1st Floor, Custom House,
No.60, Rajaji Salai, Chennai - 600 001.

.... Respondents/ Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari calling for the records of F.No.CHN/R-498/CBS, leading to issuance of Show cause notice under Regulation 20 of Custom Broker Licensing Regulations, 2013 dated 18.10.2016, as the same is contrary to law and the provisions of the Custom Broker Licensing Regulations, 2013 and restrain the 2nd respondent from proceeding with the Inquiry under the Customs Brokers Licensing Regulations, 2013.

For Petitioner : Mr.S.Krishnanandh

For Respondents: Mr.A.P.Srinivas

O R D E R

1. This is a Writ Petition filed to assail the Show Cause Notice dated 18.10.2016 (in short SCN), issued by respondent No.1.

2. Briefly, the ground taken in the Writ Petition to assail the SCN is that, it is beyond the time prescribed under the Customs Broker Licensing Regulations, 2013 (in short the 2013 Regulation). The relevant Regulation, which has been relied upon for this purpose is, Regulation 20(1).

3. Notice in this petition was issued on 01.11.2016. To date, no counter affidavit has been filed in the Writ Petition, despite opportunity having been given. As a matter of fact, on 01.11.2016, Mr.Srinivas, had entered appearance on behalf of the respondents.

4. I may have, in other circumstances, given further time to file a counter affidavit, but, since, the issue raised in the Writ Petition is covered against the respondents, no purpose would be served in indulging the respondents by giving further time to file a counter affidavit.

5. Even otherwise, the facts, which are necessary, for disposal of the present Writ Petition are not in dispute.

5.1. The petitioner was engaged as a Customs House Clearing Agent for an entity by the name, M/s.Rubicon Mineral Process. It appears that, the consignment, which was sought to be exported by M/s.Rubicon Mineral Process with the help of the petitioner, was intercepted by the Directorate of Revenue Intelligence, Chennai (in short, the DRI), based on the intelligence report received in that behalf.

5.2. The interception of the consignment by the DRI revealed that what was attempted to be done was to illegally export red sanders, an item, qua which export was prohibited. Therefore, the intercepted consignment, which was covered under shipping bill No.1326995, dated 28.02.2014, was confiscated.

5.3. To be noted, the allegation both against the exporter, (i.e., M/s.Rubicon Mineral Process) and the CHA, (i.e., the petitioner) was that, they had described the subject goods as 1440 bags of Potash Feldspar 200 mesh, whereas, what was being exported, as indicated above, was red sanders.

5.4. It is, in this background, that both the exporter, (i.e, M/s.Rubicon Mineral Process) and the petitioner, in his capacity as the CHA, were issued a SCN dated 22.09.2014. The record shows that the petitioner did file a reply to the SCN, which is dated 14.10.2014.

5.5. Ultimately, the SCN came to be adjudicated upon vide order dated 29.05.2015.

6. I am informed by the learned counsel for the petitioner that an appeal has been preferred by the petitioner against the order dated 29.05.2015.

6.1. I may only note that vide order dated 29.05.2015, a penalty in the sum of Rs.5.00 lakhs has been imposed on the petitioner. It is, perhaps, for this reason, that an appeal has been preferred by the petitioner.

7. In so far as the present petition is concerned, as indicated above, the grievance lies in the action taken thereafter, by respondent No.1, in issuing the SCN dated 18.10.2016.

7.1. Via the said notice, respondent No.1 called upon the petitioner to show cause as to why the licence issued to him ought not to be revoked and the security deposited by him ought not to be forfeited or, penalty ought not to be imposed in terms of Regulation 18 of the 2013 Regulations.

8. Being aggrieved by the issuance of the said SCN, the petitioner has moved this Court by way of the instant Writ Petition.

9. The Writ Petition was presented in this Court on 25.10.2016. The petitioner, clearly, lost no time in approaching the Court for grant of appropriate relief.

10. As indicated above at the very outset, the gravamen of the petitioner's argument is that the impugned SCN, which has been issued for revocation of the licence and for other consequential orders/directions, is, clearly time barred.

10.1. In this behalf, the petitioner has relied upon, as adverted to above, on Regulation 20(1) of the 2013 Regulations. In support of the submissions, the petitioner relies upon the following judgments.

i) A.M.Ahamed & Co. V. Commissioner of Customs (Imports), Chennai - 2014 (309) E.L.T. 433 (Mad)

ii) Masterstroke Freight Forwarders P. Ltd., V. Commissioner of Customs (I), Chennai - 2016 (332) ELT 300 (Mad.)

iii) Sunil Dutt V. Commissioner of Customs (General), NCH - 2016 (337) ELT 162 (Del.)

iv) Impexnet Logistics V. Commissioner of Customs (General) - 2016 (338) ELT 347 (Del.)

v) Overseas Air Cargo Services V. Commissioner of Customs (General), New Dekgu - 2016 (340) ELT 119 (Del.)

11. On behalf of the petitioner, Mr.Krishnanandh, has advanced arguments, whereas, on behalf of the respondents, Mr.A.P.Srinivas has made submissions.

12. The arguments of the learned counsel for the petitioner proceeded in line with the averments made in the Writ Petition. The broad ground taken to assail the SCN has already been indicated hereinabove.

13. Mr.A.P.Srinivas, learned counsel appearing on behalf of respondents, on the other hand, while not disputing the facts set out above, says that the judgment of the learned single Judge in Master Stroke is pending in appeal before the Division

Bench. It is, therefore, the learned counsel's submission, that this Court should stand over the matter till a decision is taken in the appeal.

14. I have heard the learned counsel for the parties and perused the record. According to me, the judgments cited before me by the learned counsel for the petitioner covers the issue raised in the present Writ Petition.

15. To be noted, in Master Stroke, a learned single Judge of this Court has clearly ruled that the period of 90 days provided for issuance of SCN is mandatory.

16. The relevant observations made in that behalf by the learned single Judge, which are contained in paragraph 50 of the judgment are extracted below.

> "....50. It is also to be noted that every act of breach by the Broker would entitle the authorities to initiate proceedings from the date of knowledge of the offence. It is only if the time limit is strictly followed, swift action can be initiated against the Customs Brokers and the authorities can also be made accountable. The Regulations only contemplate initiation of proceeding by issuance of notice within 90 days. While, making out a prima facie case, the respondents ought to have, without any shadow of doubt, treated the word shall in Regulation 11 as mandatory and not directory. Therefore, when a time limit is prescribed in Regulations, which empowers action in Regulation 18 and procedure in Regulation 20 (1), the use of the term shall cannot be termed as directory. It is pertinent to mention here that the CBLR, 2013 have replaced the CHA Regulations. The CHA regulations did not have any time limit to complete the proceedings. Therefore, by a Circular 09/2010 dated 08.04.2010, the necessity to include a time limit for initiating action was addressed by the Board after field inspection and by a notification dated 08.04.2010, amendments prescribing time period for initiating action and completing proceedings was made. The same was given effect by notification dated 20.01.2014. Whereas, under the CBLR, 2013 having found the necessity to prescribe a period, the Central Board, the statutory authority had included the same in the Regulations itself, when they were brought into force. Therefore, when a time limit is prescribed in Regulations, which empowers action under Regulation 18 by following the procedure in Regulation 20 (1), the use of the term shall cannot be termed as directory. Under such circumstances, the rule can only be termed as Mandatory."

17. In so far as, when, the prescribed period should start ticking, another learned single Judge of this Court, in A.M.Ahamed & Co., has made the following observations:

".....17. Unfortunately, the Regulations do not define what an offence report is and the Regulations do not even state as to how an offence report is to be sent. The Regulations do not even use the expression "offence report" anywhere else other than Regulation 22(1). Even the grounds on which a licence can be revoked or suspended, mentioned in Regulation 20(1), do not include the definition of the expression offence or offence report. There are only three grounds on which a licence can be suspended or revoked under sub-regulation (1) of Regulation 20. Regulation 20(1) reads as follows:-

"20.Suspension or revocation of licence.

(1) The Commissioner of Customs may, subject to the provisions of regulation 22, revoke the licence of a Customs House Agent and order for forfeiture of part or whole of security, or only order forfeiture of part or whole of security, on any of the following grounds, namely :

(a) failure of the Customs House Agent to comply with any of the conditions of the bond executed by him under regulation 10;

(b) failure of the Customs House Agent to comply with any of the provisions of these regulations, within the jurisdiction of the said Commissioner of Customs or anywhere else;

(c) any misconduct on his part, whether within the jurisdiction of the said Commissioner of Customs or any where else which in the opinion of the Commissioner renders him unfit to transact any business in the Customs Station.

18. The above regulation has only 3 ingredients namely (i) failure to comply with the bond conditions, (ii) failure to comply with the regulations and (iii) a misconduct, for any of which, the licence can be revoked. Since the above regulation does not use the expression "offence report", we have to presume that a report indicating the availability of any one of the above 3 ingredients should be construed as an offence report. Consequently, the date of knowledge gained by the Commissioner, by means of any communication, be it show cause notice or order-in-original, has to be construed as the date of receipt of the offence report. Otherwise, a report about anyone of the above 3 ingredients can be sent at any time, even after five years or ten years...."

(emphasis is mine)

18. A perusal of the observations made in A.M.Ahamed & Co. case, is indicative of the fact, that the learned single Judge

was of the view that, since, there is no definition of offence report in the Regulations, the period would commence from the date of knowledge gained by the Commissionerate.

19. The Division Bench of the Delhi High Court, both in Impexnet Logistics and Overseas Air Cargo Services, have held that the period of 90 days, provided for issuance of SCN for revocation of Customs Brokers Licence, is sacrosanct.

20. Having regard to the consistent view of Courts across the Board, I am not inclined to take a contrary view.

21. In this case, the facts adumbrated hereinabove would reveal that SCN, with regard to the offence allegedly committed by the petitioner and his principal, was issued on 22.09.2014. The said SCN was adjudicated upon on 29.05.2015. Therefore, even if, I were to take into account the latter date, which is the date when the order-in-original was passed, the impugned SCN issued to the petitioner for revocation of his licence would be way out of time. Therefore, taking into account the position of law and the facts obtaining in this case, I am inclined to allow the Writ Petition. It is ordered accordingly. The impugned SCN dated 18.10.2016, is, consequently, quashed.

22. There shall, however, be no order as to costs. Resultantly, the connected Miscellaneous Petition stands closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

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To

1. The Commissioner of Customs, Chennai
VIII Commissionerate, Custom House,
No.60, Rajaji Salai, Chennai - 600 001.

2. The Deputy Commissioner of Customs
(Inquiry Officer), Room No.G-117,
1st Floor, Custom House,
No.60, Rajaji Salai, Chennai - 600 001.

2 cc to Mr.B. Satishsundar, Advocate, Sr. 73768, 73263
1 cc to Mr.A.P. srinivas, Advocate, Sr. 73756

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GJ (CO)
kk 19/1