IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.02.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

W.P.Nos.44344 and 44345 of 2016
And
W.M.P.Nos.38213 and 38215 of 2016

M/s.Patriot Freight Logistics System
Rep. by its Proprietor Mr.Sahaya Edin Prabu
... Petitioner in both the W.Ps.

Vs.

1 The Commissioner of Customs
Commissionerate - VIII,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. ... Respondent in W.P.44344/2016

1 The Commissioner of Customs (Imports),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. ... Respondent in W.P.44345/2016

2 The Inquiry Officer
The Deputy commissioner of Customs (Bonds),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. ... Respondent in both W.Ps.

Prayer in W.P.44344 of 2016:

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the entire records of the 1st respondent herein leading to the issuance of the impugned order dated 09.02.2015 in F.No.R-542/CHA and Order-in-Original No.34970/2015, by the 1st respondent and quash the same.

Prayer in W.P.44345 of 2016:

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the entire records of the 1st respondent herein leading to the issuance of the impugned Notice/ Proceedings under Regulation 22 of CHALR 2004, dated 15.12.2011 issued in F.No.R-542/CHA Vol.II, by the 1st respondent and quash the same.

For Petitioner : Mr.A.K.Jayaraj

For Respondents : Ms.Hema Muralikrishnan

C O M M O N   O R D E R

1.These are two writ petitions filed under Article 226 of the Constitution of India.

1.1.By virtue of W.P.44345 of 2016, challenge is laid to the show cause notice dated 15.12.2011 issued to the petitioner under Regulation 22 of Customs House Agents Licence Regulations, 2004 (in short, 2004 Regulations).

1.2.Via, W.P.44344 of 2016, challenge is laid to the order dated 09.02.2015, whereby, the petitioner's licence has been revoked and the entire security deposit has been ordered to be forfeited.

2.Notice in these petitions was issued on 02.01.2017. Since then, counter affidavits have been filed on behalf of the respondents. The petitioner filed an additional affidavit, wherein, an attempt has been made to explain, inter alia the delay in moving the Court by way of the instant writ petitions.

3.Briefly, the facts which obtain in the present writ petitions and are required to be noticed are as follows:

The petitioner was granted a Customs House Agents (CHA) Licence by the Commissioner of Customs. It appears in December 2013, two importers namely, M/s.Brightway Network Imports and exports, Vadapalani, Chennai and M/s.Bobby Enterprises, Ghaziabad, had used the services of the petitioner for importing certain goods. However, the declaration made in the Bills of Entries was found to be incorrect. The declaration made therein was that the goods in issue were flower pot stands, whereas, they were infact, electronic items. Consequently, based on Intelligence, the consignments were intercepted.

3.1.Consequently, an investigation was triggered in the matter. Upon conclusion of investigation, a show cause notice under Section 124 of the Customs Act, 1962 (in short, the Customs Act) was issued for imposition of penalty, both on the importers, as well as the petitioner herein. The said show cause notice was dated 23.06.2011.

3.2.As a result of the aforesaid, on 15.12.2011, the Commissioner of Customs (Imports) issued a show cause notice to the petitioner under Regulation 22 of the 2004 Regulations. Concededly, no reply was filed to the show cause notice dated 15.12.2011. By virtue of this notice, the petitioner was called upon to show cause as to why his CHA Licence ought not to be revoked and the security deposit made over by him be not forfeited for failure to comply with Regulation 13(a), 13 (d), 13(o) of the 2004 Regulations.

3.3.In pursuance of the show cause notice dated 15.12.2011, an Enquiry Officer was appointed who submitted his report on 25.02.2013. It is infact the stand of the respondents before me that a copy of the Enquiry Report was forwarded to the petitioner on 28.02.2013 with a request to make a representation, if any, qua the findings written by the Enquiry Officer.

3.4.Concededly, no reply was filed by the petitioner to the findings contained in the Enquiry Report. Furthermore, it appears that despite several opportunities being given, the petitioner did not appear for a personal hearing except on 07.11.2014. The hearings fixed on 25.07.2014, 12.08.2014 and 27.08.2014 were not attended to by the petitioner. As per the stand of the respondents, on 07.11.2014, the petitioner i.e., Mr.Sahaya Edin Prabhu, Proprietor, along with his Manager, Mr.G.Achuthan, appeared before the Commissioner of Customs (Imports). At the said hearing, the petitioner submitted a letter dated 04.06.2011.

4.The petitioner's stand, apparently, advanced before the Commissioner of Customs (Imports) was that a decision be taken after taking into account the submissions made in the letter dated 04.06.2011. The first respondent/ the Commissioner of Customs proceeded to pass an order thereafter, i.e., order dated 09.02.2015, by which, not only the petitioner's licence was revoked, but also, the security deposit made over by him was forfeited. Aggrieved by the aforementioned show cause notice and the order of revocation, the petitioner, as indicated above, has moved this Court.

5.The sole ground, on which, the petitioner has assailed the orders referred to above, namely, the show cause notice and the revocation order referred to above, is that, on the date when the show cause notice was issued, the same could not have been issued as the time frame provided in Regulation 22 had already expired. In other words, the stand of the petitioner before me is that the Commissioner of Customs (Imports)/ first respondent had no jurisdiction to issue the show cause notice.

6.For this purpose, learned counsel for the petitioner relied upon the following judgments:

(i)2016 (338) E.L.T.347 (Del.) titled: Impexnet Logistic Vs. Commissioner of Customs (General).

(ii)2016 (340) E.L.T.119 (Del) titled: Overseas Air Cargo Services Vs. Commissioner Of Customs (General), New Delhi.

7.On the other hand, Ms.Hema Muralikrishnan, learned counsel for the respondents submitted that the writ petitions should be dismissed on the ground of delay and latches. It is the learned counsel's contention that the show cause notice was issued as far back as on 15.12.2011 and that the petitioner has approached this Court after a period of nearly six years.

8.Ms.Hema Muralikrishnan has further submitted that even the revocation order was issued as far back as on 09.02.2015 and the petitions have been filed only in 2016. On being queried, Ms.Hema Muralikrishnan has fairly submitted that the view taken by this Court with regard to limitation is squarely against the respondents.

9.I have heard the learned counsels appearing for the parties and perused the record.

10.No doubt, the petitioner has approached this Court, apparently, at his own leisure, the aspect which stares the respondent in the face is that after the expiry of the period of ninety days from the date of the offence Report, as stipulated in Regulation 22 of the 2004 Regulation, the first respondent/ the Commissioner of Customs (Imports) had no jurisdiction to issue a show cause notice.

11.This aspect of the matter has been dealt with by this Court in several judgments including the order dated 15.12.2016 passed in W.P.No.37796 of 2016, titled: M/s.Sowparnika Shipping Services Vs. The Commissioner of Customs, Chennai and another. Relevant observations are extracted herein hereafter for the sake of convenience.

> "14. I have heard the learned counsel for the parties and perused the records. According to me, the judgments cited before me by the learned counsel for the petitioner cover the issue raised in the present Writ Petition.
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> 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.
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> 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.
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>> "....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. A perusal of the observations made by 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."

(emphasis is mine)

12.If the state of the law is as indicated above, the mere fact that the petitioner approached this Court not too early in the point of time would not disentitle him from claiming reliefs sought in the instant writ petitions. More so, as the petitioner, in my view, was at liberty to challenge either the issuance of show cause notice or, wait till the time a final order was passed. The final order of revocation was passed on 09.02.2015. Insofar as the delay between the date when the revocation order was passed and the writ petitions were presented, the delay has been sought to be explained by the petitioner by taking the stand that the matter was being handled by his Manager who had left his services and therefore, the petitioner was unable to approach the Court with due expedition. This stand is supported by an affidavit which has not been rebutted by the respondent. Therefore, the stand of the petitioner will have to be accepted, qua, the delay.

13.Thus, having regard to the state of law, the writ petitions have to be allowed. Consequently, the show cause notice dated 15.12.2011 and the order dated 09.02.2015 are quashed. Resultantly, the connected pending applications are also closed. However, there shall be no order as to costs.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

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To

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

2 The Commissioner of Customs (Imports),
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3 The Inquiry Officer
The Deputy commissioner of Customs (Bonds),
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

+2ccs to Mr.A.K.Jayaraj, Advocate sr.7084,7085

+1cc to Mrs.Hema Muralikrishnan, Advocate sr.7377

W.P.Nos.44344 and 44345 of 2016
And
W.M.P.Nos.38213 and 38215 of 2016

gm1(co)
ss(15/02/2017)