IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.9395 of 2018
and W.M.P.No.11202 of 2018

Orders reserved on 29.06.2018	Orders pronounced on 09.07.2018

M/s.Sabin Logistics Pvt. Ltd.,
Rep. by its Director, Mr.S.Loganathan,
No.41 A, Vembuli Amman Koil Street,
Palvanthangal, Chennai-600 114. ... Petitioners

-vs-

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

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records pertaining to the impugned Order-in-Original No.62751/2018 dated 06.04.2018 issued by the respondent and quash the same.

For Petitioner : Ms.V.Pramila

For Respondent : Mr.T.Pramodkumar Chopda,
Senior Standing Counsel for CBEC

O R D E R

The petitioner, a Customs Broker, who had been granted a licence under the provisions of the Customs Brokers Licensing Regulations, 2013 (hereinafter referred to as "the CBLR"), has filed this writ petition challenging an order passed by the respondent under Regulation 19(2) of the CBLR continuing the order of suspension passed vide order dated 14.03.2018 until further orders.

2.Ms.V.Pramila, learned counsel appearing for the petitioner contended that the impugned order is liable to be set aside on several grounds and the grounds touching upon the jurisdiction for invoking the power under Regulation 19(1) of the CBLR are the main grounds on which the impugned order has been challenged. It is submitted that Regulation 19(1) of the CBLR confers power on the Commissioner to order suspension of a licence, where immediate action is necessary and where an enquiry against such broker is pending or contemplated. It is submitted that the case on hand would clearly show that the allegation of misdeclaration was noticed by the Department on 01.03.2017 whereas the order of immediate suspension was passed on 14.03.2018, after one year, after the alleged misdeclaration was detected.

3.Further, it is submitted that in terms of Regulation 19(1) of the CBLR, the petitioner is entitled to submit their objections in continuance of the order of suspension, wherein several contentions were raised by the petitioner vide their reply dated 27.03.2018, and reiterated that in the personal hearing, on the very same day, in spite of having placed all materials, the respondent passed the impugned order continuing the suspension, which is a verbatim reproduction of the earlier order dated 14.03.2018. In support of her contention, the learned counsel placed reliance on the decision in the case of East West Freight Carriers (P) Ltd. vs. Collector of Customs, Madras reported in 1995 (77) E.L.T. 79 (Mad.) and the decision of the Division Bench of the High Court of Bombay in Babaji Shivram Clearing & Carriers Pvt. Ltd. vs. Union of India reported in 2011 (269) E.L.T. 222 (Bom.).

4.Mr.T.Pramodkumar Chopda, learned Senior Standing Counsel appearing for the respondent submitted that before the Court examining the factual matters, which have been dealt with in detail in the counter affidavit, the Court may take into consideration the fact that the offence report was received by the respondent from the office of the Air Cargo Intelligence Unit, Chennai VII Commissionerate on 27.02.2018 and the petitioner's licence was suspended with immediate effect by order dated 14.03.2018 and an opportunity of personal hearing was granted on 27.03.2018 and hence, there is no delay in initiating action and the case warrants immediate suspension.

5.Further, by referring to the counter affidavit, it is submitted that the petitioner in the affidavit filed in support of the writ petition, has referred to a Board Circular No.9/2010-Cus., which was issued much prior to coming into force of CBLR and hence, not applicable to the case on hand. The requirement prescribed under the CBLR for suspension of a licence under Regulation 19(1) of the CBLR is that personal hearing has to be offered within 15 days from the date of suspension, which has been complied with in the petitioner's case. Further, it is submitted that orders issued under Regulations 19(1) and 19(2) of the CBLR are temporary measures and final order is to be issued under Regulation 20 of CBLR, after the receipt of the inquiry report from the nominated Inquiry Officer and issue of show cause notice. The learned counsel placed reliance on the decision of this Court in the case of M/s.Blessing Cargo Care Pvt. Ltd., vs. The Commissioner of Customs in W.P.No.27359 of 2017 dated 08.12.2017, which order was confirmed by the Hon'ble Division Bench of this Court in Writ Appeal No.38 of 2018 vide judgment dated 09.01.2018, by directing the appellant to avail the Appellate Authority.

6.Heard the learned counsels for the parties and perused the materials placed on record including the counter affidavit filed by the respondent.

7.The sheet anchor of the challenge to the impugned proceedings is on the ground that the facts of the case do not warrant exercise of power under Regulation 19(1) of the CBLR, which confers power on the Principal Commissioner or Commissioner of Customs in appropriate cases, where immediate action is necessary, suspend the licence of a cusoms broker, where an enquiry against such broker is pending or contemplated. The Regulation 19 of the CBLR reads as follows:

> “Regulation 19. Suspension of licence. - (1) Notwithstanding anything contained in regulation 18, the [Principal Commissioner or Commissioner] of Customs may, in appropriate cases where immediate action is necessary, suspend the licence of a Customs Broker where an enquiry against such [broker] is pending or contemplated.
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> (2) Where a licence is suspended under sub-regulation (1), the [Principal Commissioner or 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 gratned to the Customs Broker:
>
> Provided that in case the [Principal Commissioner of Customs or Commissioner of Customs, as the case may be] passes an order for continuing the suspension, the further procedure thereafter shall be as provided in regulation 20.”

8.When a licence is suspended under Regulation 19(1) of the CBLR, the Principal Commissioner or Commissioner of Customs shall within fifteen days from the date of suspension, give an opportunity of hearing to the Customs Broker, whose licence is suspended and may pass an order either revoking the order of suspension or continuing it, as the case may be.

9.The proviso states that in case the Principal Commissioner or Commissioner continues the suspension, the further procedure thereafter shall be as provided under Regulation 20 of the CBLR.

10.Regulation 20 of the CBLR deals with procedure for revoking licence or imposing penalty. In the instant case, the petitioner's customs broker licence was suspended by order dated 14.03.2018 under Regulation 19(1) of the CBLR, an opportunity of personal hearing was granted to the petitioner within fifteen days therefrom, i.e., 27.03.2018 and an order dated 06.04.2018 has been passed under Regulation 19(2) of the CBLR continuing the order of suspension. This order is impugned in this writ petition.

11.The circumstance under which the Principal Commissioner or Commissioner of Customs can invoke the power under Regulation 19 (1) of the CBLR is circumscribed in the said provision. The provision states that in appropriate cases, where immediate action is necessary, the Commissioner may suspend the licence of the Customs Broker, where an enquiry about such broker is pending or contemplated. Thus, the power under Regulation 19(1) of the CBLR is exercisable in appropriate cases and the Commissioner should form an opinion that immediate action is necessary and an enquiry against the broker should be pending or contemplated.

12.The petitioner's contention is that based on intelligence, the alleged misdeclaration was detected on 01.03.2017. However, the order of immediate suspension was passed on 14.03.2018, one year after the alleged misdeclaration was detected. Therefore, it is submitted that it is not a case where immediate suspension is warranted and the petitioner's case is not an appropriate case where such power could have been exercised. The respondent seeks to sustain the order by contending that the offence report was received from the office of the Air Cargo Intelligence Unit, Chennai VII Commissionerate on 27.02.2018 and immediately, thereafter, by order dated 14.03.2018, the licence was suspended and an opportunity of personal hearing was granted on 27.03.2018 and the order has been validly passed. The petitioner, during the course of personal hearing, had submitted a written statement dated 27.03.2018, wherein, they questioned the justification for immediate suspension by referring to the following dates and events.

Date	Description of Event
25.02.2017	SB 4319410 Regd with description Goat Upper Finished leather;
25.02.2017	3 more SBs found regd with ICES for lesser no. of packages – found in export shed during interception of Fortune consignment - sent for test - negative report - order passed imposing fine and penalty
01.03.2017	Specific Intelligence received by dept reg alleged misdeclaration of export goods by Fortune Leathers
01.03.2017	Shipment allegedly uplifted with LEO after Bond closing on 28.02.2017
03.03.2017	ACIU request to Oman Airways to call back cargo from Muscat (in transit) - final destination Italy
04.03.2017	Customs Officers searched sabin off premises - records for Jan 2016 till 04.03.2017 seized
06.03.2017	Intimation from airlines reg return arrival of the cargo; ACIU officers opened and 100% examination in supdt/cha presence; sample drawn for test and consignment seized under Mahazar; AA1 requested to detain the cargo
08.03.2017 / 10.03.2017	CLRI report for Fortune leather consignment – does not satisfy norms in PN 21/2009
08.03.2017 to 11.04.2017	Statements of persons recorded;
18.03.2017, 23.03.2017, 30.03.2017, 13.04.2017, 19.04.2017 & 09.05.2017	Letters sent by ACIU to DGM (Export Cargo) & GM (Cargo) calling for records of Export cargo by sabin
14.03.2018	Suspension Order under Regu. 19(1) passed with Immediate effect suspending licence except for all the documents filed prior to the present order.
27.03.2018	PH under Regu 19(2) granted.

13.From the above dates and events, it is seen that Specific Intelligence was received by the Department alleging misdeclaration on 01.03.2017. The cargo, which was shifted through Oman Airways, recalled from Muscat before reaching its final destination at Italy. Thereafter, summons have been issued and the business premises of the exporter as well as the petitioner were searched, records were recovered and statements were recorded. The cargo arrived at 06.03.2017, which was opened for 100% examination and samples were drawn and the consignments were seized on 06.03.2017. The CLRI submitted a report on 08.03.2017 / 10.03.2017 stating that the consignment does not satisfy norms in PN 21/2009. The statements of persons including the Customs Broker were recorded between 08.03.2017 to 11.04.2017. Several correspondence were sent between March 2017 to May 2017 calling for records of the export cargo handled by the petitioner. The Licensing Authority is the Customs Department and the intelligence and inquiry conducted was by the Air Intelligence and the Air Customs. The offence report was received by the respondent on 27.02.2018.

14.On a cursory perusal of the impugned order, it is seen that the investigation, which was being done, did not relate to one single consignment, viz., that of M/s.Fortune Leather Exports, but it is seen that nearly 79 export consignments handled by the petitioner, all of which pertain to leather products, are subject matter of scrutiny. The respondent would state in the impugned order that several consignments were cleared by describing the goods as "Finished Leathers" and there is misdeclaration by the exporter / petitioner and apart from misdeclaration, as regards the number of packages. After the personal hearing, the impugned order has been passed on 06.04.2018. In the given facts and circumstances, it has to be seen as to whether the respondent was justified in invoking the power under Regulation 19(1) of the CBLR and whether there is an inordinate delay between the date on which the Air Customs received Specific Intelligence and the date on which the Commissioner of Customs / Licensing Authority suspended the petitioner's licence. In my view, there can be no straight-jacket formula for computing the time period to assess as to whether a case is one which calls for immediate suspension or not.

15.Learned counsel for the petitioner referred to the circular issued by the Board in Circular No.9/2010 and submitted that the time lines fixed therein have been violated. Circulars issued by the Board are internal aids for the Department to regulate their business. A circular cannot override a statutory regulation. The reason for issuing such circulars is on account of certain difficulties faced by certain field formulators and the Board issued guidelines to streamline the process.

16.The Court while exercising the power of judicial review, will examine as to whether there has been any error in the decision making process, as there was any arbitrary exercise of power, whether the party affected had reasonable opportunity to present their case, whether the authority, who exercised the power, had jurisdiction to do so, whether the order suffers from any perversity or palpable illegality and no reasonable person would approve of the decision taken. Thus, while exercising the power of judicial review, the Court will not examine the order passed by the Authority as if exercising appellate powers.

17.On facts, I am convinced that the investigation, which has proceeded since March 2017, appears to have opened a "can of worms". The consignment, which was in transit, handled by the petitioner, was brought back. On examining of the cargo, CLRI certified that it does not confirm to the prescribed standard. On further investigation, it appears that several such similar consignments handled by the petitioner have come under scrutiny. The Department conducted search operations in the premises of the petitioner, after obtaining warrant, documents have been recovered, statements have been recorded from several persons including the officers of the petitioner and the writ petitioner themselves would admit that for several months, statements have been recorded from various persons. Thereafter, for a period of almost four months, several correspondence have taken place and investigation was going on. Thus, in the facts and circumstances of the case and complexity of the matter, it cannot be stated that there was inordinate delay in intimating the Licensing Authority about the offence, which was detected. Thus, in the facts and circumstances of the case, I am of the clear view that the auction initiated by the respondent in invoking such Regulation 19(1) of the CBLR by passing an order on 14.03.2018 on receipt of the offence report on 27.02.2018 cannot be stated to be barred by limitation or an exercise, which is uncalled for. Thus, the petitioner has to necessarily fail on this issue.

18.The learned counsel for the petitioner strenuously contended that despite the petitioner making detailed submissions during the course of personal hearing and having given written submissions on the date of personal hearing, i.e., 27.03.2018, the impugned order passed under Regulation 19(2) of the CBLR is a verbatim reproduction of the order passed under Regulation 19(1) of the CBLR. However, this aspect cannot be gone into in a writ petition, as it requires examination into the facts and this can be done by the Tribunal, as held by the Hon'ble Division Bench in the case of Blessings Cargo Care Pvt. Ltd. (supra).

19.Thus, for the above reasons, this writ petition is dismissed holding that the impugned order of suspension passed under Regulation 19(2) of the Regulations cannot be held to be invalid merely because the power was exercised only after the receipt of the offence report dated 27.02.2018 and the Court is convinced that the exercise of power cannot be faulted as not being the one where immediate exercise was done. In other words, in the facts and circumstances, the invocation of power under Regulation 19(1) of the CBLR cannot be held to be inappropriate. Therefore, the contention, raised by the petitioner, in this regard, is rejected. With regard to all other factual issues, the petitioner is granted liberty to file an appeal before the CESTAT and if such appeal is filed, the CESTAT while computing limitation, shall exclude the period from 13.04.2018 till the receipt of the certified copy of this order. No costs. Consequently, the connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

abr

To

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

+1 CC to Mr.T. Pramodkumar, Advocate sr 44304.
+1 CC to Ms.V. Pramila, Advocate sr 44321.

W.P.No.9395 of 2018

GSP(18/07/2018)