IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 22.11.2018

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.Nos.26923 and 26934 of 2018
and
WMP Nos.31287 and 31302 of 2018

M/s.Carewell Shipping Pvt. Ltd.,
Rep. by its Director-cum-Chairman,
Shri G.R.Seethabathy,
Old No.48, Rajajisalai, 3rd Floor,
Chennai 600 001. ..Petitioner in both W.Ps.

Vs.

1.Commissioner of Customs,
Chennai VIII Commissionerate,
Custom House, No.60, RajajiSalai,
Chennai 600 001.

2.Assistant Commissioner of Customs (CBS),
Chennai VIII Commissionerate,
Custom House, No.60, RajajiSalai,
Chennai 600 001.

3.The Inquiry Officer,
Assistant Commissioner of Customs (AM, CH-IV),
Chennai IV Commissionerate,
Custom House, No.60, RajajiSalai,
Chennai 600 001. ..Respondents in both W.Ps.

PRAYER in W.P.No.26923/2018: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of certiorari to call for the records pertaining to the impugned show cause notice dated 13.04.2018 in F.No.R-46/CBS by the first respondent and quash the same.

PRAYER in W.P.No.26934/2018: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of certiorari to call for the records pertaining to the impugned Order in Original No.62706/2018 dated 14.03.2018 passed by the first respondent and quash the same.

For Petitioner in both W.Ps. : Mr.Hari Radhakrishnan

For Respondents : Mr.K.S.Ramasamy
in both W.Ps. CGSC

COMMON ORDER

W.P.No.26923 of 2018 is filed challenging the show cause notice dated 13.04.2018 issued by the first respondent. W.P.No.26934 of 2018 is filed challenging the order dated 14.03.2018 suspending the customs broker license of the petitioner until further orders.

2. The petitioner is one and the same in both the writ petitions. The case of the petitioner is as follows:

The petitioner is a holder of Customs Broker License issued by Chennai Customs Commissionerate. The said license was extended to Mumbai Customs Zone also. A Bill of entry dated 17.02.2017 was filed by the petitioner on behalf of M/s.AVN Enterprises. A show cause notice was issued on 12.10.2017 by the Joint Commissioner of Customs, Nhava Sheva to the importer as well as the petitioner, being his authorised representative. The Principal Commissioner of Customs, Mumbai, passed a prohibition order dated 19.01.2018 prohibiting the petitioner from working in Mumbai Customs Zone. The first respondent passed an order dated 19.02.2018 under Regulation 19(1) of Customs Broker License Rules, 2013, suspending the license of the petitioner. A post decisional hearing was conducted on 28.02.2018. Thereafter, the impugned order dated 14.03.2018, continuing the suspension of the license was passed until further orders. The petitioner was further issued with a show cause notice dated 13.04.2018 proposing to revoke the license, forfeit the security deposit and impose penalty. The said show cause notice was issued under Regulation 20(1) of the said Rules. The third respondent was appointed as the Inquiry Officer. The petitioner submitted their reply dated 25.04.2018 and appeared before the Inquiry Officer on 14.05.2018. The Inquiry Officer made a report on 14.08.2018 and the same was forwarded to the petitioner on 20.09.2018. The third respondent has concluded that the allegation of violation of the Regulation 11(d) and 11(e) of the said Rules is not established and that the violation of Regulation 11(n) is found established. The second respondent informed the petitioner that the Adjudicating Authority disagreed with the conclusion of the inquiry report. Therefore, the present writ petitions are filed challenging the impugned proceedings.

3. A separate counter affidavit is filed by the respondents in both the writ petitions. The case of the respondents is as follows:

The petitioner is a habitual offender. The petitioner failed in discharging their obligations as Customs Broker as required under Regulations 11(d), (e) and (n) of the said Rules. In this case, the offence Report was received on 29.01.2018 and an order of suspension was issued on 19.02.2018, which is well withing the stipulated time under Regulation 19(2) of the said Rules. The time mentioned is a directory and not a mandatory. An offence report bearing dated 20.11.2017 was received by CB Section, Mumbai-I against the petitioner with regard to certain fraudulent export for M/s.Azure Enterprises, M/s.Nobel Enterprises and M/s.Universal Enterprises. Hence, the conclusion of the Inquiry Officer that the allegation made under Regulations 11(d) and 11(e) is not established, is not acceptable. The Adjudicating Authority disagreed with the conclusion of the Inquiry Officer and the disagreement was communicated to the petitioner. Therefore, the petitioner can submit their representation if any and can very well participate in the adjudication process.

4. Mr.Hari Radhakrishnan, learned counsel appearing for the petitioner submitted as follows:

i) The proceedings initiated against the petitioner to revoke the license cannot be allowed to proceed further as the mandatory requirement of preparing and filing report of the inquiry within the period specified under Regulation 20(5) has been violated. In this case, the show cause notice was issued on 13.04.2018 and the petitioner has filed their reply and also participated in the inquiry conducted on 25.04.2018. However, the third respondent/Inquiry Officer made the report ready only on 14.08.2018, which is beyond the period of 90 days, as contemplated under Regulation 20(5) of the said Regulations. Therefore, based on such invalid report, no further proceedings can go on. The time stipulated under Regulation 20(5) is mandatory and not directory. In support of this contention, the Division Bench decision of the Delhi High Court reported in 2016 (338) ELT 347 (Del), Impexnet Logistic vs Commissioner of Customs (General) and the Division Bench decision of this Court made in CMA No.738 of 2016 dated 13.10.2017 are relied on.

ii) In so far as the challenge against the impugned suspension order is concerned, the same was passed without disclosing and giving a finding as to what is the necessity for taking immediate action to suspend the license as required under Section 19(1). If the impugned order does not disclose any reason for issuing the suspension as an immediate action, the same cannot be sustained. In support of this contention, 1995 (77) ELT 79 (Mad), East West Feight Carriers (P) Ltd. vs Collr. of Customs, Madras, is relied on. Even otherwise, since the show cause notice itself is challenged on the ground that further proceedings is barred by limitation in view of belated filing of report, the suspension order issued contemplating inquiry against the petitioner cannot be sustained.

5. Per contra, the learned counsel appearing for the respondents submitted as follows:

The offence report was issued on 13.04.2018 and the show cause notice was issued well within 90 days as required under Regulation 20(1). Therefore, there is no delay in issuing the show cause notice. Once the show cause notice was issued in time, filing of the report beyond the period prescribed time under the Regulation 20(5) cannot stand in the way of the Adjudicating Authority to proceed with the matter. In any event, the time prescribed for filing such report can only be directory and not mandatory. The petitioner is an habitual offender and therefore, he cannot escape from the clutches of the proceedings on the ground that the report was filed belatedly. In support of his contention, the learned counsel relied on the decision of the learned Single Judge of this Court made in W.P.Nos.19312 and 19313 of 2016 dated 13.07.2016.

6. Heard both sides.

7. The challenge made in these two writ petitions is against the show cause notice and the order of suspension of the petitioner's customs broker license. The prime contention of the petitioner against the show cause notice is that the third respondent/Inquiry Officer has failed to file the report within 90 days from the date of issuance of the show cause notice and therefore, the entire proceedings are vitiated. There is no dispute to the fact that the show cause notice was issued on 13.04.2018. It is also not in dispute that the petitioner filed their reply and participated in the inquiry on 25.04.2018. However, the third respondent prepared the report only on 14.08.2018, which is evident from the perusal of the said report itself, made available in the typed set of papers. Therefore, it is clear that the third respondent has prepared the said report on 14.08.2018, which is undoubtedly beyond the period of 90 days from the date of issuance of the show cause notice. At this juncture, it is relevant to quote Regulation 20(5) of the said Regulations, which reads as follows:

> "20.Procedure for revoking licence or imposing penalty.
>
> ...(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)."`

8. Perusal of the above Regulation clearly indicates that such report on conclusion of the inquiry shall be prepared and submitted within a period of 90 days from the date of issue of notice under Sub Regulation (1). It is contended by the respondents that the time stipulated under Regulation 20(5) for filing such report is only directory and not mandatory. The

very same issue was considered by the Division Bench of the Delhi High Court in a case reported in 2016 (338) ELT 347 (Del), Impexnet Logistic vs Commissioner of Customs (General). The Delhi High Court at paragraph Nos. 6 to 10 has observed as follows:

> "6. From the list of dates submitted by the Respondent, it appears that an enquiry report dated 4th March, 2015 was forwarded by the Inquiry Officer only on 10th March 2015 which was 13 months after the suspension of the licence. It is thereafter that the impugned order dated 1st June, 2015 was passed after affording the petitioner an opportunity of being heard.
>
> 7. It is plain that in the case there has been a violation of the time-limits set out in Regulation 20 of the CBLR (corresponding to Regulation 22 of the CHALR) in the decision dated 12th May, 2016 in Cus. AA 25/2015 (Indair Carrier Pvt. Ltd. v. Commissioner of Customs (General) [2016 (337) E.L.T. 41(Del)] this Court held:
>
> "6. The time limits in the CHALR 2004 for issuance of the SCN to the CHA licence holder and completion of the inquiry within 90 days of issuance of such SCN are sacrosanct. The aforesaid time limits were engrafted into Regulation 22 of the CHALR, 2004 by a Notification No. 30/2010-Cus.(N.T.) dated 8th April, 2010. Simultaneously, the CBEC issued Circular No. 9/2010 dated 8th April 2010 clarifying the procedures governing the suspension and revocation of CHA licence. In para 7.1 of the said Circular, it was noted as under:
>
>> "7.1 The present procedure prescribed for completion of regular suspension proceedings takes a long time since it involves inquiry proceedings, and there is no time limit prescribed for completion of such proceedings. Hence, it has been decided by the Board to prescribe an overall time limit of nine months from the date of receipt of offence report, by prescribing time limits at various stages of Issue of Show Cause Notice, submission of inquiry report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs recording his findings on the issue of suspension of CHA license, and for passing of an order by the Commissioner of Customs. Suitable changes have been made in the present time limit of forty five days for reply by CHA to the notice of suspension, sixty days time for representation against the report of AC/DC

on the grounds not accepted by CHA, by reducing the time to thirty days in both the cases under the Regulations."

7. This Court has consistently emphasised the mandatory nature of the aforementioned time limits in several of its decisions. These include the decision in Schankar Clearing & Forwarding v. C.C. (Import & General) 2012 (283) E.L.T. 349 (Del.), the order dated 25th April, 2016 passed by this Court in Customs Appeal No. 14/2016 (Commissioner of Customs (General) v. S.K. Logistics) and the order dated 29th April, 2016 in W.P. (C) No. 3071/2015 (Sunil Dutt v. Commissioner of Customs (General) New Customs House). The same position has been reiterated by the Madras High Court in Sanco Trans Ltd. v. Commissioner of Customs, Sea Port/Imports, Chennai (2015) 322 E.L.T. 170 (Mad.) and Commissioner v. Eltece Associates 2016 (334) E.L.T. A50 (Mad.)."

8. Recently by an order dated 24th April 2016 in W.P. (C) No.1734/2016 [HLPL Global Logistics Pvt. Ltd. v. The Commissioner of Customs (General) [2016 (338) E.L.T. 365 (Del)] this Court reiterated that the time-limits in Regulation 20 of the CBLR/Regulation 22 of the CHALR are sacrosanct.

9. Admittedly, the SCN under the CHALR/CBLR in the present case was issued only on 9th December, 2013, i.e. beyond the mandatory period of 90 days from the date of receipt of the offence report by the Respondent, i.e. 31st January 2013. Consequently, all proceedings pursuant thereto are held to be invalid. Further, even the enquiry report was not submitted within a period of 90 days of the issuance of the SCN.

10. Consequently, the Court set asides the impugned order dated 1st June, 2015 passed by the Respondent revoking the licence of the petitioner."

9. The other decision relied on by the petitioner is the decision made in CMA No.732 of 2016 dated 13.10.2017 by the Division Bench of this Court. In the said decision, the Division Bench, after following the Delhi High Court decision reported in 2016 (337) ELT 41 (Del), Indair Carrier Pvt. Ltd vs Commissioner of Customs (General), has observed at paragraph No.42 as follows:

"42. Once the limitation prescribed is mandatory, as has been declared by the courts of law, it cannot be stated that, because of the other issues, that is the merit of the case, this mandatory requirement of the limitation can be ignored."

10. Perusal of the above said decisions of this Court and the Delhi High Court would show that the time stipulated under the Regulations for issuing the show cause notice as well as the filing report is not directory and on the other hand, it is mandatory. No other contra decisions are placed before this Court by the learned counsel for the respondents. Even the decision, which he sought to rely made in W.P.Nos.19312 and 19313 of 2016 dated 13.07.2016, is not relevant to the present facts and circumstances, since in that case this Court has considered the question as to whether the respondent therein had sufficient power to sustain the license invoking Regulation 19 (1) of the Regulations. In this case, the petitioner has raised the issue on the time limit fixed under Regulation 20(5) and not 19(1). When the facts placed before this Court are very clear that the report itself was prepared and filed beyond 90 days as statutorily required and when the decision of this Court and the Delhi High Court clearly indicate that such time limit fixed is mandatory, this Court is of the view that the report so filed beyond the period of 90 days cannot be considered as a valid report and consequently further proceedings cannot be allowed to go as a follow up action.

11. Regulation 20(5) contemplates that the Commissioner shall furnish the copy of the report to the customs broker and shall require the customs broker to submit their reply within 30 days against the said report. Regulation 20(7) contemplates that the Commissioner shall after considering the report of the inquiry officer and the representation of the broker, pass such orders, as he deems it fit either revoking the suspension order or imposing penalty within 90 days from the date of submission of the report. As this Court has already found that the very filing of the report was beyond the period of 90 days as required under Regulation 20(5) and thus taken the view that the Commissioner of Customs is not entitled to proceed further under Regulations 20(6) and 20(7) as stated supra, the impugned show cause notice cannot have legs to stand any more, as naturally it has to fall on its own, in view of the lapse committed by the Officers as stated supra, as the inquiry report, pursuant to the issuance of the show cause notice, was admittedly filed beyond the prescribed period of limitation.

12. It is claimed by the Revenue that the petitioner is an habitual offender and therefore, the proceedings are rightly initiated against them. This Court is not inclined to go into such allegation against the petitioner, as this Court is inclined to interfere with the impugned proceedings only on the ground of limitation, as discussed supra. If the petitioner is an habitual offender, as alleged by the Revenue, it is not known as to what prevented the concerned authorities in proceeding against the petitioner by following the mandatory requirements

contemplated under law. When there is a lapse on the part of the concerned authority in not making the report within the time stipulated which prevents further proceedings, the Revenue has to blame itself for such lapse, especially when the Courts have held that the period of limitation prescribed under the Regulation, as discussed supra, is mandatory.

Therefore, it is for the authorities to be more vigilant in complying with the mandatory requirements under law, while proceeding against an offender without giving room for any lapse even on technicalities.

13. Considering all the above facts and circumstances, this Court is inclined to set aside the impugned show cause notice dated 13.04.2018. Accordingly, W.P.No.26923 of 2018 is allowed and the impugned show cause dated 13.04.2018 is set aside.

14. While coming to the other writ petition in W.P.No.26934 of 2018 filed against the order of suspension dated 14.03.2018, as this Court has already found that the very inquiry report filed by the Inquiry Officer itself was not valid in the eye of law and consequently, the SCN cannot be sustained, the order of suspension shall also automatically cease to operate any more. Accordingly, W.P.No.26934 of 2018 is allowed and the impugned order of suspension dated 14.03.2018 is also set aside. However, this Court makes it very clear that setting aside the impugned show cause notice and the impugned suspension order does not preclude the Revenue from initiating any other action against the petitioner in a manner known to law, as this Court has chosen to set aside both the impugned orders only on the ground of limitation as discussed supra. It is further made clear that this Court is not expressing any view on the merits of the contention raised by both parties in respect of the alleged violation. No costs. The connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To
1.Commissioner of Customs,
Chennai VIII Commissionerate,
Custom House, No.60, RajajiSalai,
Chennai 600 001.

2.Assistant Commissioner of Customs (CBS),
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3.The Inquiry Officer,
Assistant Commissioner of Customs (AM, CH-IV),
Chennai IV Commissionerate,
Custom House, No.60, RajajiSalai,
Chennai 600 001.

+2 Ccs to Mr.K.S.Ramasamy, CGSC, sr 79981, 79982.
+1 CC to Mr.Hari Radhakrishnan, advocate sr 79881.

W.P.Nos.26923 and 26934 of 2018

SJ(CO)
SP(17/12/2018)