BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 02.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P(MD)No.5052 of 2018
and
W.M.P(MD)Nos.5019, 6612 and 7017 of 2018

M/s.Hari & Co.,
Container Freight Station,
No.4/29E, Madurai Bye-pass Road,
Tuticorin - 628 008.
by its
Executive Director and Authorized Signatory,
R.Arul Murugan ... Petitioner

Vs.

The Commissioner of Customs,
Customs House,
New Harbour Estate,
Tuticorin - 628 006. ... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of Certiorarified Mandamus to call for the records connected with the passing of order of immediate suspension of operation of the custodianship of the CFS held by the petitioner firm in terms of the provisions contained in Regulation 11(2) of the Handling of Cargo in Custom Area Regulations, 2009 in file C.No.VIII/48/4/2002-Cus-Pol dated 05.03.2018, (vide public notice No.26/2004, dated 13.05.2004), by the respondent herein and quash the same as having passed without jurisdiction and contrary to law and consequently, permit the petitioner firm to operate as custodianship/container freight station under the Handling of Cargo in Customs Area Regulations, 2009.

For Petitioner : Mr.N.Prasad
For Respondent : Mr.B.Vijayakarthikeyan

O R D E R

Pursuant to the directions of the Hon'ble Division Bench of this Court in W.A.(MD) No.673 of 2018, dated 28.04.2018, the vacate stay petition is taken up for hearing.

2. The petitioner is a Container Freight Station. Pursuant to a seizure of goods along with the cover cargo stuffed in container bearing No.CLHU284936 by the Department of Revenue Intelligence on 16.11.2013, from one M/s.Omkar International, Bangalore, the container was deposited with the petitioner for safe custody. Thereafter, a show cause notice was issued to the said M/s.Omkar International, Bangalore and an Order in Original No.328/2015, dated 31.03.2015, was passed confiscating the seized red sanders. Pre-trial proceedings under Section 110(1-B) of the Customs Act, 1962, were conducted on 22.05.2014 and the samples were drawn and photographs were taken and thereafter, the container was sealed with One Time Seal No.12-759287 in the presence of the learned Additional Chief Judicial Magistrate, Madurai and kept under the care and custody of the petitioner, Container Freight Station.

3. On 28.09.2017, the Directorate of Revenue Intelligence identified the red sanders ripen for disposal and allotted the same for disposal through M/s.MMTC, Chennai. At the time of checking the red sanders on 27.02.2018 by the Customs Officers from Disposal Section, Custom House, Tuticorin, along with the officials of M/s.MMTC Ltd., and M/s.Green Solutions, Tuticorin, who was entrusted with the grading of red sanders, it was found that the One Time Seal was tampered and in that place, another One Time Seal No.12-326812 was pasted. On opening the container, the confiscated red sanders were found missing.

4. The petitioner, who is the Container Freight Station, is a custodian of goods entrusted to him and are fully responsible for the safe custody of the seized cargo entrusted. Since it was missing, the respondent found that *prima facie*, it is a case of illegal removal of seized/confiscated goods and because of the failure on the part of the custodian in ensuring safety and security of the goods, which were under his custody, suspended the custodianship vested with the petitioner, vide public notice No.26/2004, dated 13.05.2004, until further orders and further observed that for the sake of avoiding inconvenience caused to the importers/exporters, the goods available as on the date of issue of the order, shall be allowed to be cleared for import or export, as the case may be, during office hours only.

5. This Court while admitting the writ petition granted interim stay of the order. Since no reasons were assigned, the respondents filed a writ appeal and it was remitted to this Court for disposal of vacate stay petition as mentioned in the opening paragraph.

6. The learned Counsel for the petitioner would submit that as per Regulation 11(2) of the Handling of Cargo in Customs

Area Regulations, 2009, the Principal Commissioner of Customs/Commissioner of Customs, as the case may be, may in appropriate cases, where immediate action is necessary, suspend the approval granted to the Customs Cargo Service Provider.

7. According to him, this is not an appropriate case for imposing immediate suspension. The Container Freight Station is certified as a best station for the past two consecutive years. More than 500 employees are employed. Insofar as the illegal removal of red sanders is concerned, he has nothing to do with it. It cannot be ascertained as to who has committed this illegal act. As long as there is no *prima facie* material to involve the petitioner, such stringent action shall not be taken and suspension will amount to imposing of a punishment without enquiry. It will affect the livelihood of the petitioner and employees working under him.

8. The petitioner would rely upon the judgment in ***Chandra CFS & Terminal Operators P. Ltd., v. C.C., Chennai-VIII*** reported in ***2015 (326) E.L.T. 122 (Mad.)***, wherein suspension was invoked when a *prima facie* case appeared that there was an active role on the part of custodian in that case and therefore, necessary orders were solicited.

9. Unless the active involvement or antecedent or any material to indicate that the Custom Freight Station is involved in the criminal offence, it should be construed only as a case of recklessness or negligence or dereliction in discharging the duties. As long as there is no *prima facie* material to show that the criminal offence is committed by the petitioner, it is not an appropriate case for invoking the suspension.

10. Per contra, the learned Counsel for the respondent would vehemently contend that the custodian, namely, the Container Freight Station shall ensure the safety and security of the materials seized irrespective of its value. In the present case, the value of the red sanders seized by the Directorate of Revenue Intelligence, Tuticorin, is Rs.6.79 Crores. The loss cannot be compensated, because it affects the economy of the country and if any lenient view is taken on this issue, it will set a bad precedent and therefore, the stay granted in respect of the suspension order shall be vacated.

11. He also relied upon the very same judgment in ***Chandra CFS & Terminal Operators P. Ltd., v. C.C., Chennai-VIII*** reported in ***2015 (326) E.L.T. 122 (Mad.)*** and submitted that there are certain duties and responsibilities for the custodian of the goods. When there is a violation of those duties and responsibilities, and *prima facie*, if it makes out a case for suspension, the penal action will be taken later. The continuous

operation of the Container Freight Station will prejudice the public interest.

12. I have considered the rival submissions.

13. On the face of it, the impugned order of suspension specified that the custodian has failed to ensure the safety and security of the goods which were entrusted to his custody. Other than this, no other serious allegation is made against him. Admittedly, the very same petitioner was certified to be the best Container Freight Station for the past two consecutive years. There are no materials to point out that he is involved, much less, actively involved in the removal of the confiscated goods.

14. The contention of the learned Counsel for the respondent that a security agency has been employed by the petitioner 24X7 and the CCTV cameras are also installed, shows that the Container Freight Station has been diligent in carrying out their business. Moreover, in all Container Freight Stations, there are two Customs officials also available in order to monitor the transactions and in-flow and out-flow of materials as it shall be under surveillance of Customs Department.

15. It is pertinent to note that the pre-trial proceedings under Section 110(1-B) of the Customs Act, 1962, was concluded as early as on 22.05.2014. The pre-trial proceedings were conducted for the purpose of disposal of the seized and confiscated goods. Even though the pre-trial proceedings were concluded on 22.05.2014 and One Time Seal was affixed, it was checked up only when the inspection was conducted on 27.02.2018 for the disposal of the red sanders and in between (22.05.2014 and 27.02.2018), almost four years had elapsed.

16. It is not clear as to when the goods confiscated were removed illegally within these four years. Unless and until the real culprit is caught, it will not come to light as to who are all involved in this criminal offence and as to whether the petitioner has any role in such illegality. There can be a suspicion, till such time, against the Container Freight Station also.

17. In the absence of *prima facie* materials to indicate that the petitioner is actively involved in the illegal removal of the seized goods in connivance with the staff or others, or hoodwinking the Customs officials, they shall be construed to be innocent. The impugned order does not disclose as to how the continuance of petitioner will prejudice the proceedings initiated and lacks further details as to the entrustment other seized goods with the petitioner hampering the public interest. The order is in the nature of fixing the petitioner for the lapse with a view to save the skin of the officials of the respondent. There are about

600 workmen employed in the petitioner establishment. The respondent himself permitted the petitioner for clearing the existing goods stacked in the Container Freight Station, as it will cause hardship to the importers and exporters. When the petitioner is permitted with restricted operations, it raises a query as to why they should not be permitted to operate till the disposal of the proceedings initiated against them. In the absence of any serious allegation or *prima facie* materials, that, as stated supra, the petitioner has a role or actively involved in the offence, it cannot be considered as an appropriate case warranting suspension.

18. Now that, it is brought to the knowledge of this Court that a show cause notice in SCN.No.01/2018, dated 24.07.2018 had been issued by the respondent, calling for objections from the petitioner. In view of the show cause notice dated 24.07.2018, the respondent can take action and impose punishment, if the petitioner is found guilty. Regulation 11 of Handling of Cargo in Customs Areas Regulations, 2009 reads as under:

> "**REGULATION 11. Suspension or revocation of approval for appointment of a Customs Cargo Service provider.-** (1) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be may, subject to the provisions of these regulations, suspend or revoke the approval granted to the Customs Cargo Service provider subject to the observance of procedure prescribed under regulation 12 and also order for forfeiture of security, if any, for failure to comply with any of the provisions of the Act and the rules, regulations, notifications and orders made thereunder;
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> (2) Notwithstanding anything contained in sub-regulation (1), the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may in appropriate cases where immediate action is necessary, suspend the approval granted to a Customs Cargo Service provider where an enquiry against such Customs Cargo service provider is pending or contemplated."

19. In view of Regulation 11(1) of the Regulations extracted above, a show cause notice dated 24.07.2018 has already been issued. Once the penal proceedings are initiated and it culminated in a show cause notice, the interim suspension may no longer be required. On completion of the above said proceedings, the petitioner, if aggrieved, has a remedy of appeal.

20. The learned counsel for the respondent would raise another ground that the writ is not maintainable without exhausting the alternative remedy. In fact, against the suspension issued under Regulation 11(2) of the Regulations, the petitioner can only seek review by the competent authority. Even assuming that an appeal remedy is available, as held by the Hon'ble Supreme Court in ***HARBANSLAL SAHNIA AND ANOTHER VS. INDIAN OIL CORPORATION LTD. AND OTHERS [2003 (2) SCC 107]*** where the petitioner's dealership, which was there bread and butter, came to be terminated for an irrelevant and non-existent cause, held the petitioners should have been allowed relief by the High Court itself, instead driving them to exhaust alternative remedy, this Court also inclined to consider the case of the petitioner in the same lines.

21. Eventhough, *prima facie* materials are not available warranting suspension of the petitioner, the seriousness of the occurrence and the offence committed shall not be lost sight of. The value of the red sanders illegally removed is worth about Rs.6.79 Crores and that it is the property of our Nation. Hence, the matter cannot be treated very lightly and suitable protective and preventive measures shall be taken. The petitioner had failed to ensure safety and security and was negligent on his part. In such circumstances, the interest of justice will be served and balance of convenience is achieved by imposing stringent conditions, which may, if the petitioner is indicted in future, compensate the fiscal loss caused to the Government, independent of the punishment to be imposed on the culprits for the crime.

22. Even though the learned Counsel for the petitioner would submit that the market value of the red sanders as on today, would be around Rs.1.7 Crores as it was done in similar case, this Court is not inclined to accept the same, but go by the value assessed by the Directorate of Revenue Intelligence to the tune of Rs.6.79 Crores.

23. Therefore, considering the subsequent developments, this Court is inclined to pass the following orders:

> **(i)** The order of interim stay granted by this Court, vide order dated 09.03.2018, is made absolute till the disposal of the proceedings initiated by the respondents in SCN No.01/2018 dated 24.07.2018, on conditions that,
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> > *(a)* the petitioner shall execute a bank guarantee to the tune of Rs.6.79 Crores in favour of the respondent within a period of three weeks from the date of receipt of a copy of this order;

(b) The petitioner shall submit his objections to the show cause notice dated 24.07.2018 within 30 days as indicated by the respondent;

(c) The petitioner shall co-operate with the enquiry proceedings without adopting dilatory tactics.

(ii) On compliance of all the aforesaid conditions by the petitioner, the Enquiry Officer appointed by the respondent shall complete the proceedings within a period of four months thereafter.

24. The learned counsel for both sides would request that the writ petition itself be treated as disposed of, even though the Division Bench of this Court in W.A.(MD) No.673 of 2018 directed this Court by an order dated 24.04.2018 to dispose of the vacate stay petition. Accordingly, this writ petition itself stands disposed of, without rendering any findings on the merits on other legal issues raised. No costs. Consequently, connected writ miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar (CS-II)

To

The Commissioner of Customs,
Customs House,
New Harbour Estate,
Tuticorin - 628 006.

+ 1 CC TO Mr.B.VIJAY KARTHIKEYAN, ADVOCATE IN SR No. 76746
+ 1 CC TO Mr.N.PRASAD, ADVOCATE IN SR No. 76778

RSB/TK
TE/JM/SV/SAR-2 : 14/09/2018 : 7P/4C