

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on
13.02.2019

Orders pronounced on
25.02.2019

CORAM

THE HON'BLE Dr. JUSTICE ANITA SUMANTH

W.P.No.24239 of 2018

and W.M.P.No.28243 of 2018

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

--Vs--

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

2. Shri Felix Raj,
Enquiry Officer,
Assistant Commissioner of Customs,
Chennai III Commissionerate,
Customs House,
No.60 Rajaji Salai,
Chennai-600 001

...Respondents

PRAYER: Writ Petitions filed under Article 226 of the Constitution of India praying for a writ of Certiorari calling for the records of the respondent in F.No.549/CB5 dated 13.08.2018 and quash the same.

For Petitioner: Mr.V.Pramila

For Respondent: Mr.G.M.Syed Nurallah Sheriff,
Standing Counsel

O R D E R

The writ petitioner seeks the issuance of a writ of certiorari calling for the records of the respondents in Notice bearing No. F.No.54/CB5 dated 13.08.2018 and a quash of the same.

2. Heard Ms.Pramila, learned counsel for the petitioner and Mr.G.M.Syed Nurullah Sheriff, learned Senior Standing Counsel for the respondent.

3. The submissions of Ms.Pramila are as follows:

The petitioner is a licenced Customs Broker. Shipping Bill No.4319410 dated 23.02.2017 was filed on behalf of one, Fortune Leather Exports, destination Italy, for export of Goat Upper Finished Leather. The authorities noticed that the shipping bill had been registered on 25.02.2018 but the Let Export Order (LEO) had not been issued by the Proper Officer. Moreover, there was an allegation by the Officers that as against fourteen packages declared in the shipping bill, there were forty seven packages listed in the Airway Bill and Bond Closure documents and the consignment was thus recalled by the Authorities and arrived back in India at 06.03.2017. Upon examination of the consignment they were found to contain forty seven packages in number as against the disclosure by the petitioners' of fourteen.

4. Further examination was initiated by the 1st respondent who also drew samples from the packages. The examination also confirmed, vide report dated 10.03.2017, that the contents of the goods did not confirm to the norms and did not constitute 'finished leather' as claimed by the petitioner. The petitioners' office premises was subjected to a search on 04.03.2017 and various documents had been seized. Pursuant thereto, allegations were made to the effect that there had been earlier instances as well where there had been no proper declaration on behalf of other exporters.

5. Based on the above sequence of events, an order dated 14.03.2018 was issued under Regulation 19(1) of the Customs Broker License Regulations (CBLR), 2013 ordering suspension of the license of the petitioner with immediate effect and pending further enquiry.

6. The provisions of Regulation 19(2) of CBLR, 2013 provide for the Commissioner to issue notice to the customs broker and afford opportunity to it to make its submissions in regard to the order of suspension. The notice, in the present case, was issued on 14.03.2018. The assessee filed an objection on 27.03.2018 and appeared before the respondent on 27.03.2018. After hearing the petitioner, an order-in-original dated 06.04.2018 was passed ordering the continuation of suspension ordered on 14.03.2018.

7. As against the same, a Writ Petition in W.P.No.9395 of 2018 was filed by the petitioner. An order of stay of the order of suspension was granted by this Court on 24.04.2018. A petition to vacate stay was filed along with a counter affidavit by the 1st respondent, the Commissioner of Customs, on 13.06.2018. On 09.07.2018, the writ petition was disposed of by this Court directing the petitioner to file an appeal before the Customs, Excise and Sales Tax Appellate Tribunal (CESTAT) in so far as the order of suspension dated 06.04.2018 was statutorily appealable. The contents of the aforesaid order, insofar as it is relevant to the issue that arises in this case is as follows:

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.

8. The petitioner thereafter filed an appeal challenging the order of the learned Single Judge, dated 09.07.2018 in Writ Appeal No.1879 of 2018. Along with the same, CMP No.15125 of 2018 was filed seeking a stay that was granted on 31.08.2018. The said Appeal is stated to be pending before the Division Bench.

9. Regulation 20 requires the issuance of a notice by the Customs Authority within ninety days from the date of receipt of the offence report setting out the grounds on which the authorities propose to revoke the license or impose penalty upon the broker. The notice should call upon the broker to submit, within thirty days, a written statement of defence and also to

stipulate whether the broker requires a personal hearing in the matter. The specific case made out by the writ petitioner is that the notice issued in the present case dated 13.08.2018 under Regulation 20 is beyond the period of ninety days as stipulated statutorily and is liable to be quashed.

10. The petitioner relies on a series of decisions of this Court and the Delhi High Court that settle the issue that the timelines set out in Regulations 19 and 20 are mandatory and would have to be complied with strictly. The cases are as follows:

(i) Masterstroke Freight Forwarders Pvt. Ltd. Vs. Commissioner [Reported in (2016) 332 ELT 300 (Mad)];

(ii) Commissioner of Customs (Exports) Chennai, Vs. Ganesh Shipping Agency [Reported in 2009 (245) ELT 120 (Mad)];

(iii) Sowparnika Shipping Services Vs. Commissioner of Customs, Chennai-VIII [Reported in 2017 (352) ELT 286 (Mad)];

(iv) Saro International Freight Systems Vs. Commissioner of Customs Chennai-VIII [Reported in 2016 (334) ELT 289 (Mad)];

(v) A.M.Ahamed & Co.Vs. Commissioner of Customs (Imports) Chennai, [Reported in 2014 (309) ELT 433 (Mad)];

(vi) Commissioner of Customs, Tuticorin Vs. MKS Shipping Agencies Pvt. Ltd. [Reported in 2017 (348) ELT 640 (Mad)];

(vii) Sanco Trans Ltd Vs. Commercial of Customs Sea Port/Imports Chennai, [Reported in 2015 (322) ELT 170 (Mad)];

(viii) A.P.Enterprises, Vs. Commissioner of Customs (General) [Reported in 2017 (352) ELT 290 (Del)];

(ix) Commissioner of Customs (General) Vs. Atharva Global Logistics [reported in 2016 (338) ELT 682 (Del)];

(x) Impexnet Logistic Vs. Commissioner
[Reported in 2016 (338) ELT 347 (Del)];

(xi) Overseas Air Cargo Services Vs.
Commissioner [reported in 2016 (340) ELT 119
(Del)];

(xii) Santon Shipping Services Vs.
Commissioner of Customs, Tutocorin [In CMA No.
730/2016 and CMP No.5921/2016 dated
13.10.2017].

11. Per contra, Mr.G.M.Syed Nurullah Sheriff, learned senior standing counsel for the respondents defends the impugned notice of suspension by way of detailed counter as well as oral submissions.

12. He outlines the activities of the petitioner in detail, highlighting the fact that the imports were contrary to law and in violation of several of the provisions of the Act and Rules seeing as these acts of the petitioner, according to him, shall directly impact the lis to decide upon the veracity of the order of suspension itself.

13. As far as the main argument of the petitioner is concerned, which is that the notice under Regulation 20 is beyond limitation, Mr.Noorullah, submits that initial order of suspension dated 14.03.2018 as well as continuation of suspension order dated 06.04.2018 had been challenged by the petitioner in W.P.No.9395 of 2018 wherein, the learned Single Judge had granted a stay of operation of the impugned order on 24.04.2018. The stay was in force till the date of receipt of the final order. In deciding the Writ Petition finally, the learned Single Judge had directed the petitioner to file an appeal before the Customs Excise and Service Tax Appellate Tribunal(CESTAT) challenging the impugned order, specifically directing that the limitation for filing of appeal be computed by excluding the period when the order of suspension had been stayed by the order of the Court. Mr.Noorullah, thus argues that the period when the stay was in operation be excluded even in computing the period of 90 days for issuance of the notice in terms of Regulation 20(1). This, in effect, is the issue to be decided.

14. Heard both learned counsel and perused the papers and case-law cited, carefully.

15. The provisions of Regulations 19 and 20 of the CBLR are relevant for the purpose of this writ petition and are extracted herein:

19. Suspension of licence. - (1) Notwithstanding anything contained in regulation 18, the Commissioner of Customs may, in appropriate cases where immediate action is necessary, suspend the licence of a Customs Broker where an enquiry against such agent is pending or contemplated.

(2) Where a licence is suspended under sub-regulation (1), the 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 granted to the Customs Broker:

Provided that in case the Commissioner of Customs passes an order for continuing the suspension, the further procedure thereafter shall be as provided in regulation 20.

20 Procedure for revoking licence or imposing penalty -(1) The Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the licence or impose penalty requiring the said Customs Broker to submit within thirty days to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defense and also to specify in the said statement whether the Customs Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs....

16. The issue as to whether the 90 day time limit for issuance of notice for revocation of licence under Regulation 20 (1) is mandatory or directory is no longer res integra. There are a series of decisions of the courts that have decided the

same holding it to be mandatory. The revenue does not dispute this position either. However, learned counsel urges that in the facts of this case, the period be computed excluding the period when the order of suspension passed under Regulation 19 was stayed by this court.

17. The sequence of dates events in this matter are as follows:

27.02.2018 - Date of Offence Report.
14.03.2018 - Order of Suspension under Regulation 19(1) suspending licence with immediate effect.
27.03.2018 - Personal Hearing in terms of Regulation 19(2).
06.04.2018 - Order of continuation of suspension of License issued by the respondent.
16.04.2018 - WP No.9395 of 2018 listed for Admission before learned Single Judge.
24.04.2018 - Interim stay granted.
13.06.2018 - Counter filed by respondent.
29.06.2018 - WP argued and Orders Reserved.
09.07.2018 - Orders Pronounced dismissing the WP.
21.08.2018 - WA No.1879/2018 filed challenging order in WP
13.08.2018 - Impugned show cause notice issued by 1st respondent.

Thus, the period when the interim order was in force, 24.08.2017 to 27.07.2018, to be excluded from the period of 90 days from date of receipt of offence report for issuance of notice under Regulation 20(1). The impugned notice has been issued on 13.08.2018.

18. In Masterstroke Freight (supra), this court, after an exhaustive summary of the relevant case law on this point, concludes at para 48 & 49 as follows:

48. Upon perusal of the above regulation, it can be seen that an independent right is issued to the Commissioner to initiate action de hors the enquiry under other Regulations and the Customs Act. The regulations do not only contemplate action against the erring Brokers but also contemplates timely action; No doubt that action is to be initiated against the erring brokers as laid down by this Court in the case of Kamatchi Agencies cited supra, but the same has to

be in strict compliance with provisions. The law of limitation is common to both the parties. The provision not only enables the respondent to levy penalty, but also empowers the respondent to revoke the license, which is an extreme step, curtailing the right to carry on any trade or profession as guaranteed by the Constitution of India. The object behind such a provision can only imply the following; (1) the truth must be culled out at the earliest point in the interest of not only the Customs Broker or for that matter of the department also, (b) that such unlawful activities must be curbed at the earliest point by revoking the licence, (c) unless a time limit is prescribed, action would not be initiated.

(49) The purpose for which such time limit has been prescribed is to curb the smuggling of goods and in the result to cancel the licences of the brokers if they are involved and to impose penalty. The interpretation of a statute must always be to give a logical meaning to the object of the legislation and the aim must be to implement the provisions rather than to defeat it. As laid down by the Apex Court in the judgments relied upon by the learned counsel for the petitioners, when a statute prescribes a thin of the language "shall" in the regulation cannot be termed as "directory" as one of the consequence of the action is the revocation of the licence and it would also pave way for inaction by the officials breeding corruption.

19. In the case of MKS Shipping Agencies (supra), a Division Bench of this Court hearing a writ appeal filed by the Commissioner of Customs Duty, Tuticorin challenging an order of the learned Single Judge concluding that the time lines set out in Regulations 19 and 20 were mandatory and sacrosanct, dismissed the appeal holding that there was no irregularity in the conclusion of learned Single Judge. At paragraph no.9 the Division Bench states thus:

'9. Insofar as the submission of the learned Counsel for the appellant that since the impugned notice is a show cause notice, it cannot be challenged by filing a Writ Petition and remedy open to the respondent/ Writ Petitioner is to submit his response and in the event of any adverse order, he can file an appeal before CESTAT Act, the said submission lacks merits and substance for the reason that admittedly, the impugned show cause notice has been issued beyond the period of ninety days from the receipt of offence report and

since the relevant statutory regulation as well as Circular issued by them had been violated with impunity, the respondent / Writ Petitioner need not be driven to avail the alternative remedy. In this context, it is useful to refer to the decision of the judgment reported in (2004) 7 SCC 166, S.J.S. Busniess Enterprises (P) Ltd Vs. State of Bihar and Others, wherein, it has been held as follows:-

"Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable, the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not. The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a Court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If however a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226 it would not be appropriate for the Court to entertain the writ petition. The Rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another Court. But this Court has also held in Chandra Bhan Gosain Bhan V. State of Orissa that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application under Article 32. But where in the parallel jurisdiction, the order is not a speaking one or the

matter has been disposed of on some other ground, this Court has, in a suitable case, entertained the application under Article 32. Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of, the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226. Therefore the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.

9. The learned Judge, on facts of the case has categorically found that despite an offence report dated 29.08.2012, the appellant fails to issue the notice within the time prescribed under the Customs House Agents Licensing Regulations 2004. It is also pertinent to point out at this juncture that the interim order of suspension passed against the respondent / Writ Petitioner by invoking Regulation 20 (2) of the Customs House Agents Licensing Regulations 2004 has nothing to do with the Regulation 22(1) of the Customs House Agents Licensing Regulations 2004 as both are independent to each other and therefore, the pendency of the legal proceedings pertain to the interim suspension cannot operate as any impediment for the appellant to issue the notice within the time prescribed under the Customs House Agents Licensing Regulations 2004 and as such, the belated issuance of the show cause notice, after the receipt of the offence report dated 29.08.2012, on the face of, is unsustainable. The learned Judge has rightly taken note of the said aspect and reached the conclusion to allow the Writ Petition. 'सत्यमेव जयते'

20. Santon Shipping Services Vs. Commissioner of Customs, Tuticorin in CMA No.730/2016 and CMP. No.5921/2016 dated 13.10.2017, a Division Bench of this High Court held thus:..

'41. In view of the aforesaid judgments, in our opinion, the issue as to whether the limitation prescribed i.e. 90 days period under Regulation 22 (1) of CHALR 2004, is mandatory or not, is no more res integra.

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.

43. It is not the case of the 1st respondent that the 90 days limitation contemplated under Regulation 22 (1), is directory. It is also not the case of the 1st respondent that the show cause notice was issued within the limitation period of 90 days from the date of offence report.

44. Since the offence report was dated 22.09.2010 and the show cause notice, admittedly, was issued only on 18.11.2011, there can be no doubt that the said show cause notice was issued well beyond the period of limitation of 90 days.

45. Whatever be the claim and counter claim on the merits, in this appeal can, in our view, they get shadowed by the failure on the part of the revenue in not acting in time, by issuing the show cause notice, within the period as contemplated under Regulation 22 (1) of CHALR, 2004.

46. Therefore, we are of the considered view, and in fact have no hesitation to hold so that, the Revenue has not issued and the show cause notice dated 18.11.2011 within the period of limitation prescribed under Regulation 22 (1) CHALR, 2004 and thus, the consequent proceedings involving revocation of the appellant's CHALR licence and forfeiture of its security deposit, is unlawful.'

21. In the present case, though there was an order of stay passed on 24.04.2018 by this court, there was nothing that prevented the respondent from issuing the show cause notice under Regulation 20 (i) of the CBLR, 2013, within the period of 90 days since the aforementioned period commences from the date of offence report, which, in this case, is 27.02.2018. The Regulation stipulates a seamless procedure commencing from the date of offence report and there is nothing in the regulation that indicates distortion of this time frame by intervening events.

22. The Delhi High in the case of Commissioner of Customs (General) vs. Atharva Global Logistics [2018 (338) E.L.T. 682] considered a similar plea by the Customs department as advanced in the present case. The plea was for exclusion of the period when the suspension of the license was rejected. The court negatived the same holding that there was no provision for such exclusion under Regulation 20. The relevant paragraph is as follows:

'6.The Court is unable to agree with the above submission. As already held by this Court in several orders including the recent order dated 24th May, 2016 in WP. (C) No.1734 of 2016 [HLPL Global Logistics Pvt. Ltd. V. The Commissioner of Customs (General)] [2016 93380 E.L.T. 365 (Del.)] the time limit specified in Regulation 20(1) of the CBLR, 13 is sacrosanct i.e, the SCN had to be issued to the petitioner within ninety days from the date of the receipt of the offence report. It is plain that the SCN dated 17th June, 2014 was issued for the purpose of revocation of the CB license of the respondent and was not issued within 90 days of the date of receipt of the offence report which admitted in this case is 7th October, 2013. The question of exclusion of the period during which the suspension of the license continued is not contemplated in Regulation 20(1) of the CBLR, 2013. If there are no grounds for revocation of license then obviously the suspension cannot be maintained. Consequently, there is no legal infirmity in the impugned order of the CESTATE which calls for interference.

23. I am of the view that where a provision/regulation spells out a specific period of limitation, such period is mandatory and any exclusion there from should also be provided for specifically. For instance, the Explanation to Section 153 of the Income Tax Act, 1961 provides for the exclusion of various periods in computing statutory periods of limitation. One such exclusion is the period when a stay of proceedings was in operation. The relevant portion of the provision is extracted below:

'153.-Time limit for completion of assessment, reassessment and computation '

....

Explanation I

For the purposes of this section, in computing the period of limitation"

ii) the period during which the assessment proceedings is stayed by the order of injunction of any court; or

.....

shall be excluded'

24. In the light of the discussion as above, the writ petition is allowed and the impugned order is set aside. Connected miscellaneous petition is closed. There shall be no order as to costs.

s/d-

Assistant Registrar (CS-I)

True Copy

Sub-Assistant Registrar

ska/rkp

To

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

2. Enquiry Officer,
Assistant Commissioner of Customs,
Chennai III Commissionerate,
Customs House,
No.60 Rajaji Salai,
Chennai-600 001

+1 CC to M/s.V.Pramila, Advocate sr 17756.

+1 CC to Mr.G.M.Syed Nurallah Sheriff, Advocate sr 18062.

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and W.M.P.No.28243 of 2018

SP(05/04/2019)