IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2019

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.34027 of 2018
and
W.M.P.No.39521 of 2018

M/s.Thiru Rani Logistic Private Ltd.,
Registered Office : New No.1
Krishnadoss Road,
Chennai – 600 012
Rep. by its Senior General Manager
Mr.P.Manivasagam ...Petitioner

Vs

The Commissioner of Customs (Chennai-VIII)
Customs House,
Rajaji Salai,
Chennai – 600 001. ...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records of the respondent relating to the Order of Suspension Ref.No. F.No.S.Misc.16/2009-Enq.(Pt.File) dated 13.12.2018 issued under Regulation 11(2) of Handling of Cargo in Customs Areas Regulations, 2009 and quash the same and direct the respondent to permit the petitioner to continue to operate a Licensed Container Freight Station under the Handling of Cargo in Customs Areas Regulations, 2009.

For Petitioner : Mr.S.Vasudevan

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

O R D E R

The petitioner is aggrieved against the order of suspension dated 13.12.2018 issued under Regulation 11(2) of Handling of Cargo in Customs Areas Regulations, 2009.

2.The case of the petitioner is as follows:

a) The petitioner is licensed to run its Container Freight Station at No.1, New North 200 Feet Road, Madhavaram, Chennai –

600 110. The license was issued under the Handling of Cargo in Customs Areas Regulations, 2009 (HCCAR). The license is renewed till 31.05.2022. During the normal course of its business, the Container Freight Station received a Container bearing No.HMMU6066767 on 25.10.2018. The Container was nominated to the Container Freight Station for movement and clearance by Freight Link Logistics Private Limited. The Consignee was SLV Trading Company. The Bill of Entry seems to have been filed by the Importer with the Customs describing the goods stuffed in the Container as "Christmas Decoration Lights and Horns". Pursuant to filing such Bill of Entry, the officers of the Dock Intelligence Unit under the respondent came to the Container Freight Station of the petitioner on 26.10.2018 and examined the contents. The Cargo was found to be White Crane Needles, Sewing Machine Needless, Shirt Pins for Garments etc., and also some Christmas Decoration Lights and Horns. This was a clear case of mis-declaration of the Cargo by the Importer, to which, the petitioner has no role to play.

b) The Customs Officer seized the Cargo on 27.10.2018 and kept in storage at the Container Freight Station inside the Container Yard of the petitioner. A Mahazar was issued by the Customs Authorities dated 27.10.2018. On 05.12.2018 at about 22.53 hours, a truck bearing Registration No.TN 04 AQ 3488 arrived at the Container Freight Station. The said truck produced a Gate Pass which later turned out to be a forged Gate Pass and deceived the Security Staff of the Container Freight Station to get ingress into the Container Freight Station. Based on the forged Gate Pass, the truck took delivery of the said Container with the Cargo seized by the Customs and left in the Container Freight Station. At that time, the Preventive Officer of the Container Freight Station was not present. On 06.12.2018 at about 12.30 p.m., the theft/crime was noticed when the Gate Pass was discovered to be a forgery. The CCTV footage was thereafter checked and the details of the truck bearing Registration No.TN 04 AQ 3488 were traced out. Thereafter, enquiries were made and the owner of the truck was traced and it was found that the Cargo was de-stuffed and the empty container stored in M/s.Sri Container Terminal. Thereafter, the petitioner lodged a written complaint with M-1 Madhavaram Police Station and the Officers of the Customs. The Police Authorities did not accept the complaint on the ground that only the Customs Authority shall have right to lodge the complaint. The petitioner immediately informed to the respondent authorized officer present at the Container Freight Station orally on 06.12.2018 at 4.30 p.m. The complaint was also made to the respondent's representatives in Dock Intelligence Unit at 5.45 p.m. in writing. An e-mail dated 06.12.2018 was also sent at 6.20 p.m. to the respondent. The petitioner could not immediately inform the theft of the Container without actually and physically verifying each of the Containers since there are more than 400 containers were stored in the Container Freight Station.

c) The Officer of Customs arrived at 7.30 p.m. on 06.12.2018 at the spot and conducted investigation. The petitioner fully cooperated with the investigation. The petitioner had also immediately taken action to recover the container through its sources. The Customs conducted a proper investigation and traced out both the containers as well as the stolen goods/Cargo which was imported through the Container. Some of the perpetrators have been detained by the Customs. The Officers of the respondent, therefore, recovered the entire Cargo which was stolen with the forged Gate Pass. However, the Officers of the respondent had stopped processing documents for the Containers which had arrived at the Port for delivery at the Container Freight Station of the petitioner. A total of 88 Containers had arrived at Chennai Port for which Public Note Receipt already allowed by the respondent's representative in Container Manifest Facilitation Centre and were due for loading into lorries for delivery at the Container Freight Station. The petitioner submitted a written representation dated 09.12.2018 to the Customs Officer. Thereafter, on 11.12.2018, the respondent released all the existing containers for delivery to the respective consignees through the Container Freight Station of the petitioner.

d) The petitioner is a recognized licensed Container Freight Station receiving many containers from various vessels on day today basis for storing the same in Container Freight Station. From 07.12.2018, no Imported Containers were permitted to be processed for movement to the Container Freight station of the petitioner. A letter dated 12.12.2018 was sent to the respondent to give them an opportunity to be heard to explain the details of the case before taking any action. However, on 13.12.20178, the respondent issued the impugned order of suspension. The impugned order was issued without notice to the petitioner and without hearing them. Therefore, it violates the principles of natural justice. There is no immediate urgency necessitating applicability of Rule 11(2) of the 2009 Rules. The fact that the Customs have permitted release of all the 88 containers which were lying at the Port after the said incident, is a clear indication that there is no urgency involved to suspend nor any intentional violation of the Rules by the petitioner.

3. A counter affidavit is filed by the respondent wherein it is stated as follows:

a) The petitioner is declared as Customs Area for Handling both import and export goods and was also appointed as the Custodian of Import/Export goods. The license was renewed for a period upto 31.05.2022. As a Customs Cargo Service Provider, the Customs Freight Station is bound to discharge duties and abide by the Regulations. The Cargo would be delivered only on issuance of the delivery orders by the steamer agents subsequent to the payment of customs duty. The petitioner received a container bearing No.HMMU6066767 on 25.10.2018. On 26.10.2018, the Container was detained by the Docks Intelligence Unit and detention order letter had been given to the CFS officials. After examination of the said Container, it was found that the Container contained crane needles, sewing machine needles, shirt pins for garments etc. A mahazar was drawn and the said container was handed over to the CFS officials for their safe custody.

b) On 06.12.2018, the Docks Intelligence Unit was informed about the theft of the Container by the Manager of the petitioner. The said information was made only after 19 hours of the occurrence. The Customs Department has done the investigation and was able to trace out the cargo and the empty container on 07.12.2018. The time gap of 19 hours has helped the perpetrators of crime to destuff the cargo from container in one private warehouse and remove the empty container from there. By not making the theft complaint immediately to the Customs Authority, the petitioner might have intentionally waited till the cargo from the container was completely de-stuffed and transported to some unknown safe place. Consequently, on 13.12.2018, an order of suspension was issued to the petitioner as per the provisions of Regulation 11(2) of the Handling of cargo in Customs Areas Regulation, 2009. No orders were issued by the respondent for stoppage of container movement prior to the issuance of the order for suspension. An opportunity was given to the petitioner to be heard before the Commissioner of Customs Chennai VIII on 28.12.2018 which was intimated vide letter dated 20.12.2018. The order for suspension was issued for non-compliance of the Rules and Regulations of Handling of Cargo in Customs Areas Regulations, 2009 in view of the available facts and statements. The petitioner had intentionally failed in discharging their duties as Customs Cargo Service Provider required under section 45(2)(b) of the Customs Act, 1962 and Regulations 5(n),6(1)(a),6(1)(b),6(1)(f) and 6(1)(i) of Handling of Cargo in Customs Areas Regulations, 2009. As per the Customs Act, 1962 Custodian is solely responsible for the safety of the cargo. The petitioner has miserably failed to perform their duties and responsibilities as the custodian of seized goods.

c) The suspension order has been passed on 13.12.2018 after recording voluntary statements from the CFS Senior General Manager, Operations General Manager, Imports manager, FCL operations executive, Reach Stacker Operator and Helper to Reach Stacker Operator. After hearing to all the voluntary statements, it was clearly understood that M/s.Thirurani Logistics Pvt Ltd CFS has miserably failed to perform their duties and responsibilities as custodian as per the Customs Act, 1962. Even the CFS Senior General Manager has accepted their mistake for not following the standard procedures. However, a post decisional hearing was granted on 28.12.2018 to the petitioner by the Commissioner of Customs Chennai VIII. The petitioner has not been charged with for violation of Section 45 (3) of the Customs Act, 1962. To allow the petitioner to continue for work as Customs Cargo Service Provider with such a method of working will seriously jeopardize the Customs duties and security of cargo. An inquiry is going on and the matter will be adjudicated on merits after completion of the investigation. Hence, the writ petition may be dismissed.

4. The learned counsel for the petitioner submitted as follows:

The respondent has invoked Regulation 11(2) to suspend the license without indicating anywhere in the impugned order as to whether an immediate action is necessary to suspend the license, pending enquiry. Such finding is very much essential and necessary for invoking Regulation 11(2), since the same is empowering the respondent to suspend the license without notice. The petitioner themselves have complained before the respondent about the theft of the container immediately on the next day, apart from approaching the police as well by reporting the theft. Therefore, the bonofide of the petitioner cannot be doubted. The petitioner would cooperate with the enquiry and however, in the meantime, the license cannot be suspended which affects the business of the petitioner drastically. In support of his contention, the learned counsel relied on the the decision of this Court reported in 1995(77) ELT 79 (Madras) (East west Freight Carriers (P) Ltd. vs. Collector of Customs, Madras) and 1998(104) ELT 11 (Cal.) (N.C.Singha & Sons v. Union of India).

5. On the other hand, the learned counsel appearing for the respondent submitted that there is a serious lapse on the part of the petitioner in allowing the Container to move from the possession of the Freight Station without verifying the genuineness/credentials of the person who produced the Gate Pass. The facts and circumstances of the present case would indicate that there is a necessity for issuing the impugned order immediately and therefore, the immediate action as contemplated under Regulation 11(2) can be culled out from the facts and circumstances of the present case. If the suspension order is stayed or quashed, it would prejudice the interest of the Revenue, since the enquiry is going on. Learned counsel for

the respondent also relied on the Standing Order No.48/2017 dated 28.01.2017 in support of his submission.

6. Heard both sides.

7. The petitioner is aggrieved against the order of suspension issued under Regulation 11(2) of HCCAR, 2009. Since I have narrated the respective pleadings of the parties and the facts and circumstances supra, which warranted the filing of the present writ petition, I am not reiterating the same once again hereunder.

8. Admittedly, the impugned order of suspension was issued under Regulation 11(2) of HCCAR, 2009, which reads as follows:

> "11. Suspension or revocation of approval for appointment of a Customs Cargo Service Provider:
> (1) .....
> (2) Notwithstanding anything contained in sub-regulation (1), the Commissioner of Customs 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."

9. Perusal of the above said provision would show that the Commissioner of Customs is empowered to suspend the approval granted to Customs Cargo Services Provider in appropriate cases where immediate action is necessary, pending enquiry or where the enquiry is contemplated. Therefore, it is evident that action under Regulation 11(2) can be taken only when the Commissioner of Customs is of the view that immediate action is necessary for suspending the license. Needless to say that such consideration must explicitly available in the order of suspension. Certainly, the order of suspension made by exercising the power under Regulation 11(2), an exparte action, is not a punishment by itself, but a preventive action before passing a final order either imposing a punishment or otherwise. At this juncture, it is relevant to note that Regulation 11(1) empowers the very same Commissioner to suspend or revoke the license and the procedure to be followed for suspension or revocation of the license is contemplated under Regulation 12. Perusal of the Regulation 12 would show that before doing so, the licensee should be put on notice and he must be heard. However, Regulation 11(2) can be invoked for suspending the license only when the Commissioner of Customs feels and comes to a conclusion that immediate action is necessary to suspend the license. Thus, the materials to be relied on for initiating and taking action under Regulation 11(1) cannot be the sole basis for taking action under Regulation 11(2). On the other hand, when an action under Regulation 11(2) is contemplated, there

must be other reasons available before the Authority for his consideration to the effect that unless such immediate suspension is ordered, the damage already caused would either continue or likely to continue. In other words, the suspension to be made by invoking Regulation 11(2) must be on the known principle that "prevention is better than cure". Therefore, it is not only necessary to state the intention of the authority to prevent the illegality from its continuance, and also there exist the circumstances of continuance of illegality. Such continuance of illegality cannot be presumed as a matter of course in every case. On the other hand, it has to be stated in clear and categorical terms in each and every case, where action under Regulation 11(2) is invoked, that immediate action is required based on the reasons supporting such apprehension of the Authority of continuance of illegality. Hence, there is a clear distinction between the nature of action taken under Regulation 11(1) & 11(2), while the former is a punitive, the later is a preventive. Perusal of the impugned order in this writ petition would show that no such consideration was made by the Commissioner of Customs except extracting Regulation 11(2) and stating that an enquiry is contemplated in this case and that allowing the petitioner to continue for work will seriously jeopardize the Customs duties and security of Cargo. The respondent has not stated any other reason anywhere as to why an immediate action is required in this case.

10. This Court has considered the similar provision made under Regulation 21(2) of the Customs House Agent License Regulation, 1984 in W.P.No.17363/1994 dated 28.11.1994 reported in 1995(77) ELT 79 (Madras) (East west Freight Carriers (P) Ltd. vs. Collector of Customs, Madras). At paragraph No.7 to 9 of the said decision, it has been observed as follows:

> 7. I have considered the submissions made by the learned counsel for the parties. The power of the Collector to take action under Regulation 21(1) is not questioned in the writ petition. It cannot also be disputed that under Regulation 21(2) the Collector has the power to suspend licence of a Customs House Agent when enquiry against such agent is pending or contemplated where immediate action is necessary.
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> 8. In my opinion the power to suspend the licence is to be exercised where immediate action is necessary. A plain reading of the impugned order does not show that the Collector applied his mind to consider whether immediate action was necessary in the case. The order also does not state that the licence was suspended before immediate action was

necessary. I do not express here one way or the other as to whether on the facts of the case immediate action was necessary or was not necessary because it is for the Collector to take decision in that regard.

9. In the absence of any indication that there was application of mind by the Collector on the aspect as to whether immediate action was necessary, in my opinion, the impugned order cannot be sustained. The Collector gets jurisdiction to suspend the licence in cases where immediate action is necessary. In this view I consider it just and appropriate to pass the following order:-

The writ petitions allowed and the impugned order dated 26-9-1994 issued by the respondent is quashed. It is open to the respondent if so desired to exercise the power under Section 21(2) and pass appropriate orders.

11. Likewise, the Division Bench of Calcutta High Court in its decision reported 1998(104) ELT 11 (Cal.) (N.C.Singha & Sons v. Union of India) has considered the very same Regulation 21(2) of the Customs House Agent Licence Regulation, 1984, and found at paragraph Nos.4 and 5 as follows:

"4. We have heard the learned Advocates for the parties and considered the rival contentions. Regulation 21(2) of 1984 Regulations read thus:

"21(2). Notwithstanding anything contained in sub-regulation (1), the Commissioner may in appropriate cases, where immediate action is necessary, suspend the licence of a Custom House Agent where an enquiry against such agent is pending or contemplated."

5. A Perusal of the order dated 9th June, 1998 passed by the respondent No.2 clearly suggests that the power under Regulation 21(2) was resorted to apparently without spelling out in the impugned order as to whether any immediate action was necessary so as to suspend the licence of the appellants with immediate effect. Undoubtedly a plain reading of the Regulation 21(2) clearly stipulates that the requirement to take immediate action is a sini qua non to the suspension of a licence under Regulation 21(2) because such suspension is not by way of any punishment, as is contemplated by Regulation 21(2), but is required to cater to a

situation warranting immediate action. The purpose of resorting to immediate suspension of a licence because of some immediate action is to immediately stop the activities of the clearing agent so as to disable him from taking any further action in the matter since, under a particular situation and under some given set of circumstances, the requirement of immediate action may demand that the clearing agent may be immediately required to be prevented from working any further. The minimum that is required by the Commissioner to enable him to exercise such power is the spelling out of the circumstances in the order warranting the need to take such immediate action and to actually say that immediate action is indeed required in the matter. What we see from the impugned order dated 9th June, 1998, is that the expression "immediate action" itself is missing. That apart, what we find from the preamble, recitals and facts stated in the order is that the circumstances did not warrant the taking of immediate action in terms of Regulation 21(2) of the 1984 Regulation.

12. Going by the above decision of this Court as well as the Division Bench of Calcutta High Court, it is evident that the present impugned order passed under Regulation 11(2) without there being any finding as to why immediate action is necessary to suspend the license, cannot be sustained even though the respondent is entitled to proceed against the petitioner under 11(1) after issuing notice to them.

13. No doubt, the learned counsel for the respondent contended that the impugned order had referred to all the violations of the Standing orders and therefore, the impugned suspension order has to be construed as the one passed with immediate action. I have already stated that the suspension under Regulation 11(2) is not a punishment. Hence, the alleged violation cannot be relied on as the sole basis for taking action under Regulation 11(2). At this juncture, it is to be noted that after the alleged theft of the Container and the complaint made by the petitioner on the very next day before the Customs Authorities, the respondent permitted the petitioner to clear 88 Containers. This fact will go to show that inspite of the allegation made in the impugned order, the petitioner was permitted to clear 88 Containers arrived at the Chennai Port on 11.12.2018.

14. Learned counsel for the respondent though vehemently contended that the petitioner has violated various procedures contemplated under the Regulations and that of the Standing Order No.48/2017 dated 28.11.2017, this Court is not expressing any view on the above contentions, when admittedly, an enquiry is pending against the petitioner. Even otherwise, as I already pointed out the respondent is not prevented from suspending or revoking the license by invoking Regulation 11(1) after issuing notice to the petitioner. As this Court is convinced to interfere with the impugned order only on the reason that the same is not satisfying the requirement under 11(2) of the above said Regulation, the other contentions raised by the learned counsel for the respondent on merits of the allegation made against the petitioner, need not be looked into, at this stage.

15. Accordingly, the Writ Petition is allowed and the impugned order is set aside. However, it is open to the respondent to proceed against the petitioner under Regulation 11 (1), if the respondent is contemplating to suspend or revoke the license of the petitioner, after conducting enquiry. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsi

To

The Commissioner of Customs (Chennai-VIII)
Customs House,Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.S.Vasudevan, Advocate Sr.1871
+1cc to Mr.G.M.Syed Nurullah Sheriff, Advocate Sr.2107

W.P.No.34027 of 2018

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