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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 07.02.2023*

+ **W.P.(C) 17189/2022**

M/S SUN AVIATION PVT. LTD. Petitioner

Through: Dr. G. K. Sarkar, Ms. Malabika
Sarkar and Mr. Prashant
Srivastava, Advs.

versus

COMMISSIONER OF CUSTOMS
(EXPORT)

..... Respondent

Through: Mr. Rajesh Gogna, CGSC with
Ms. Priya Singh and Mr. Rahul,
Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition impugning an order dated 31.08.2022 (Order-in-Original No.22/JA/JC/ACE/2022 – hereafter ‘**the impugned order**’) passed by the Joint Commissioner of Customs imposing a penalty of ₹2,70,00,000/- (Rupees two crore seventy lacs) on the petitioner under Section 114AA of the Customs Act, 1962 (hereafter ‘**the Customs Act**’).

2. The petitioner is an International Air Transport Association (IATA) Agent and is engaged in booking air freight for exporters and

sub-agents through various airlines. The petitioner claims that in the normal course of its business, it receives bookings for air freight from clearing agents (CHAs), sub-agents, importers/exporters and brokers.

3. The petitioner has been penalized in respect of consignments exported by M/s Manisha Enterprises (proprietorship concern of Smt. Manish Garg) under five shipping bills (Shipping Bill Nos. 1128723, 1128800, 1128824, 1128828 and 1128884, all dated 15.04.2021). It is alleged that on an examination, it was found that the exporter was non-existent and the exports under the said Shipping Bills, were to fraudulently avail export benefits.

4. The petitioner claims that it had not received any Show Cause Notice and, therefore, was not afforded sufficient opportunity to contest the allegations against it. It claims that it was not involved in the exports; it had merely booked air freight and therefore, cannot be held responsible for the exports in question.

5. The principal question that falls for consideration of this Court, is whether the principles of natural justice have been violated, and whether the impugned order had been passed without serving a Show Cause Notice, without affording the petitioner sufficient opportunity to respond to the same.

6. The petitioner claims that it had received a notice dated 29.07.2022 fixing a personal hearing on 16.08.2022. The said notice referred to a Show Cause Notice dated 10.05.2022. However, the said notice was not served on the petitioner. Accordingly, the petitioner sent

a letter dated 08.08.2022 requesting for a copy of the Show Cause Notice, but received no response to its request. It is stated that the personal hearing before the concerned authority was again fixed on 23.08.2022. However, the petitioner did not receive a copy of the Show Cause Notice. Once again, on 23.08.2022, the petitioner sent a letter requesting the respondent to provide a copy of the Show Cause Notice. However, the same pattern followed; the respondent deferred the personal hearing and fixed the same on 26.08.2022, but did not provide a copy of the Show Cause Notice as requested by the petitioner.

7. The petitioner reiterated its request for a Show Cause Notice again, by its letter dated 26.08.2022 but a copy of the Show Cause Notice was not provided.

8. The respondent has filed the counter affidavit claiming that the Show Cause Notice was served in the petitioner. It claims that the Show Cause notice was issued in the normal course and was served by the modes as stipulated. It is contended that the Show Cause Notice was dispatched by speed post and the tracking website (www.indiapost.gov.in) indicates that the Show Cause Notice was delivered on 17.05.2022. The notice for personal hearing was also dispatched by speed post and the tracking website of Speed Post reflects that the same was delivered on 26.08.2022.

9. Mr. Gogna, learned counsel appearing for the respondent, also relied on the decision of the Supreme Court in *N. Parameswaran Unni v. G. Kannan and Anr.:* (2017) 5 SCC 737 and contended that once a

notice is sent by registered post at the correct address, the same deemed to have been served in terms of Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1872. He submitted that in terms of Section 153(3) of the Customs Act, a notice sent by registered post or speed post is deemed to be received by the addressee at the expiry of the period normally taken by such post in transit, unless the contrary is proved. He submitted that the petitioner has not discharged the onus to prove that the Show Cause Notice was not served.

Reasons and Conclusion

10. At the outset, it is necessary to refer to the provisions of Section 153 of the Customs Act, which prescribes the modes for service of notices, summons, orders and other communications. The said Section is set out below:

“153. Modes for service of notice order, etc.—(1) An order, decision, summons, notice or any other communication under this Act or the rules made thereunder may be served in any of the following modes, namely:—

(a) by giving or tendering it directly to the addressee or importer or exporter or his customs broker or his authorised representative including employee, advocate or any other person or to any adult member of his family residing with him;

(b) by a registered post or speed post or courier with acknowledgement due, delivered to the person for whom it is issued or to his authorised representative, if any, at his last known place of business or residence;

(c) by sending it to the e-mail address as provided by the person to whom it is issued, or to the e-mail address available in any official correspondence of such person;

(d) by publishing it in a newspaper widely circulated in the locality in which the person to whom it is issued is last known to have resided or carried on business; or

(e) by affixing it in some conspicuous place at the last known place of business or residence of the person to whom it is issued and if such mode is not practicable for any reason, then, by affixing a copy thereof on the notice board of the office or uploading on the official website, if any.

(2) Every order, decision, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed or uploaded in the manner provided in sub-section (1).

(3) When such order, decision, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved.”

11. In the present case, there is no material to indicate that the Show Cause Notice was served in any of the modes as stipulated under Section 153 of the Customs Act.

12. According to the respondent, the Show Cause Notice had been sent by the speed post. However, it is conceded that there is no material to indicate that it was ‘with acknowledge due’. In terms of clause (b) to sub-section (1) of Section 153 of the Customs Act, a notice may be served by speed post, however, ‘with acknowledgement due’.

13. Mr. Gogna, submitted that in terms of sub-section (3) of Section 153 of the Customs Act, a notice or any communication sent by speed post is deemed to have been received at the expiry of the period normally taken by such post. He also contended that Section 153(3)

does not mention that the speed post or registered post is required to be 'with acknowledgement due'. Therefore, communications sent by speed post without acknowledgement due, would also fall within the deeming provision of Section 153(3) of the Customs Act.

14. The aforesaid contention is unmerited. This Court is unable to accept that the mode of service through registered post or speed post as contemplated under sub-section (3) of Section 153 of the Customs Act is any different from the mode of service by registered post or speed post as contemplated under Section 153(1)(b) of the Customs Act. The modes of service are specified under sub-section (1) of Section 153 of the Customs Act. Sub-section (2) and sub-section (3) of Section 153 of the Customs Act contains deeming provisions stipulating the time of service of orders, decisions, summons, notices or communications would be deemed to have been served. Section 153(2) of the Customs Act provides that order, decision, summon, notice or any communication is deemed to have been served on the date on which it is tendered, published or a copy thereof is fixed or uploaded, if the manner is provided under Section 153(1) of the Customs Act. This is applicable where notices are served in the modes as prescribed under clauses (a), (d) and (e) of Section 153(1) of the Customs Act. Insofar as notices served in the mode as prescribed under Clause (b) of Section 153(1) of the Customs Act is concerned, sub-section (3) is applicable for determining the date on which such service is deemed to have been effected. It is presumed that the notice is served on expiry of the period, which is normally taken by such post in transit. However, this

presumption is rebuttable; it is open for the parties to prove to the contrary.

15. It is important to note that Section 153(3) of the Customs Act does not provide for any mode of service; it merely stipulates the date on which an order, decision, summon, notice or any communication is deemed to have been served when it is dispatch through registered post or speed post. Thus, it is erroneous to contend that Section 153(3) of the Customs Act, provides for a mode of service other than as stipulated under 153(1)(b) of the Customs Act.

16. As is apparent from the plain language of Section 153(3) of the Customs Act, it is open for any party to establish that the notices were not received on expiry of the normal time taken in transit for any article sent through speed post or registered post, as the case may be. In the present case, the petitioner has affirmed on affidavit that it did not receive the Show Cause Notice. The petitioner had informed the respondent prior to the date of personal hearing regarding non-receipt of the Show Cause Notice and had repeatedly requested for a copy of the same. No response was given by the Respondent to the said notices/request. In the given facts, it is difficult to accept that the petitioner has not discharged its burden to establish that it had not received the Show Cause Notice.

17. Since there is no material to indicate that the Show Cause Notice was sent by speed post with acknowledgement due or had been served by any of the modes as specified under Section 153(1) of the Customs

Act, we have no hesitation in accepting the petitioner's contention that it was not served with the Show Cause Notice in question.

18. In view of the above, we find merit in the contention that the impugned order has been passed in violation of principles of natural justice and the petitioner was not afforded full opportunity to contest the allegations against it. Consequently, the impugned order, to the limited extent that it imposes penalty on the petitioner, is set aside.

19. It is clarified that the respondent is not precluded from issuing a Show Cause Notice afresh and passing an appropriate order after affording the petitioner sufficient opportunity to be heard.

20. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

FEBRUARY 07, 2023
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