(2014) 06 MAD CK 0026

In the Madras High Court

Case No : Writ Petition No. 6748 of 2014 and M.P. No. 1 of 2014

International Exim Agency APPELLANT

Vs

Commr. of Cus. (Imports), Chennai RESPONDENT

Date of Decision : 11-06-2014

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2015) 316 ELT 35 : (2016) 36 GSTR 411

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Advocate : S. Murugappan, Advocates for the Appellant; Ramakrishna Reddy, Advocates for the Respondent

Judgement

B. Rajendran, J.—The petitioner has filed this writ petition challenging the order dated 19-2-2014 of the respondent by which the respondent ordered for continuation of suspension of the licence of the petitioner as custom broker and directed the petitioner to surrender the original licence book and all customs ID cards issued to them to Custom Broker''s Section forthwith. According to the petitioner, the petitioner firm has been issued the customs broker licence by the respondent and based on such licence, the petitioner firm is authorised to function as a customs broker for handling and processing import and export documents filed by various importers. While so, during the course of such business activity, on behalf of the petitioner firm, certain bills were filed in the name of M/s. Surana Corporation Limited, as importers of clearance of imported jewellery from Thailand. Such clearance were investigated by the Directorate of Revenue Intelligence and it was alleged that there were duty evasion. In this context, the statement of the importers as well as the petitioner firm were recorded. It was alleged by the Directorate of Revenue Intelligence that M/s. BSM Freight Forwarders handled those documents, which was not in accordance with the provisions of Customs House Agents Licensing Regulations, 2004. It was further alleged that the petitioner firm has aided/abetted the importers in evasion of duty and therefore, the petitioner is liable for penalty in terms of the provisions of the Customs Act. Therefore, after conclusion of the investigation, a show cause notice dated 25-10-2013 was issued to the importers as well as the petitioner firm in terms of Customs Act. As far as the petitioner is concerned, it was proposed to impose penalty. On receipt of the notice, the petitioner has submitted a detailed reply on 18-11-2013 and requested to afford an opportunity of hearing. While the petitioner was anticipating for a personal hearing, the respondent passed an order dated 6-1-2014, suspending the licence issued to the petitioner by referring to the above events. After suspending the licence, an opportunity of hearing was given to the petitioner on 15-1-2014 in which the petitioner firm also participated and reiterated that they have nothing to do with the transaction relating to alleged duty evasion. Thereafter, the impugned order dated 19-2-2014 was passed by the respondent ordering to continue the suspension of licence. Aggrieved by the same, the present writ petition has been filed by the petitioner.

2. The learned counsel appearing for the petitioner would contend that for invoking Regulation 19 of the Customs Act, the respondent ought to have satisfied three important ingredients i.e., (i) this is an appropriate case for invoking the Regulation (ii) that immediate action is required and any action taken belatedly after occurrence of the event/transaction is not covered and (iii) there should be an inquiry pending against the customs agent or is contemplated. In the absence of the above said three essential ingredients, the respondent is not justified in invoking Regulation 19 of the Customs Act. It is further contended that there is no indication in the impugned order as to how this is an appropriate case for overlooking the normal process stipulated under Regulation 20 and why action is being taken under [Regulation 19]. The alleged incident took place during the year 2011 and resorting to suspend the licence of the petitioner after two years is unwarranted. In this context, the learned counsel for the petitioner relied on the decision of the Division Bench of the Delhi High Court in the case of Falcon Air Cargo and Travels (P) Ltd. Vs. Union of India, wherein the Division Bench of the Delhi High Court held that while considering the claim of the importer for revocation of suspension of licence, the authorities have to keep in mind the consequences of such action and the proportionality of the punishment with reference to the alleged omission. Relying on this decision, it is submitted by the learned counsel for the petitioner that in this case, in the show cause notice, the respondent only proposed to impose penalty on the petitioner, however, choose to suspend the licence of the petitioner which is un warranted. It is also contended that as per Regulation 19, an order for revoking the suspension or continuing the suspension of licence, ought to have been issued within 15 days, but in the present case, such order has been issued beyond the period stipulated in the regulation. The learned counsel for the petitioner also brought to the notice of this Court that as against the impugned order, the petitioner has filed an appeal before the Customs, Central Excise and Service Tax Appellate Tribunal. As there is no regular sitting of the Tribunal inasmuch as the Judicial Member of the Tribunal retired from service, the

petitioner has filed the present writ petition.

3. On the contrary, the learned standing counsel for the respondent argued that when the petitioner has indulged in helping the importers to evade customs duty, then the respondent is well within his power to suspend the licence issued to the petitioner. In fact, the petitioner was given ample opportunity before suspending the licence issued to them and therefore it cannot be said that the impugned order is in violation of the principles of natural justice. It is further contended that when the petitioner has chosen to file an appeal and it is pending before the appellate authority, invoking the jurisdiction of this Court under Article 226 of the Constitution of India and filing the present writ petition is not maintainable and on that ground, he prayed for dismissal of the writ petition.

4. I heard the learned counsel for the petitioner as well as the learned standing counsel for the respondent and perused the materials placed on record. Admittedly, as against the impugned order passed by the respondent ordering to continue the order of suspension, the petitioner has filed a statutory appeal. However, it is stated that for want of Judicial Member, the Appellate Tribunal is not functioning and therefore, having regard to the urgency involved in this case, the petitioner has filed this writ petition. This is evident that the statutory appeal filed by the petitioner is pending before the Appellate Tribunal.

5. In this case, the licence issued to the petitioner was cancelled by the respondent on 6-1-2014 in connection with an alleged incident that took place during the year 2011. The respondent has suspended the licence by invoking Regulation 19(2) of the Customs Broker Licensing Regulations, 2013. According to the petitioner, as per Regulation 19, the respondent has to satisfy as to the fulfillment of three ingredients namely (a) whether it is an appropriate case for invoking the provisions of Regulation 19(b) whether immediate action is necessary to suspend the licence of a customs broker when an enquiry against such agent is pending or contemplated and (c) where a licence is suspended, the respondent shall, within 15 days of such suspension, ought to have given an opportunity of hearing to the customs broker and may thereafter pass such order for revoking the licence or continuing the suspension but it was not followed in this case. According to the counsel for petitioner, the impugned order ordering to continue the suspension has been passed without affording an opportunity of hearing. It is also stated that there is no loss caused to the department on account of the alleged act of the petitioner, while so, the impugned order is unnecessary.

6. It is seen from the records that for the show cause notice dated 23-10-2013, a reply dated 18-11-2013 was given by the petitioner and sought for personal hearing. In the reply, it was specifically pleaded that the order of suspension be revoked inasmuch as it affects his fundamental right to carry on business.

7. The learned counsel for the petitioner relied on the decision in the case of Babaji Shivram Clearing and Carriers Pvt. Ltd. Vs. Union of India, wherein it was

held that when the order of suspension is belated, it is not sustainable in law as suspension should be ordered where immediate action was necessary.

8. The learned counsel for the petitioner also relied on the decision in the case of Rajinder Kumar Goyal Vs. Collector of Customs, wherein it was held that there is no necessity to take immediate action to suspend the licence in the facts and circumstance of that case. In this case, the alleged incident took place during the year 2011 and the licence issued to the petitioner was suspended on 6-1-2014. In those circumstances, it is the duty of the respondent to spell out in clear terms as to whether it is an appropriate case where immediate action is warranted pending enquiry. In this case, the impugned order has been passed without properly explaining as to the immediate necessity to suspend or continue to suspend the licence issued to the petitioner.

9. In identical circumstances, the Division Bench of the Delhi High Court had an occasion to go into the question of delay in passing the order of suspension contrary to what is stipulated in the statute. In Para Nos. 5 and 6 of the decision rendered in the case of Schankar Clearing and Forwarding Vs. Commissioner of Customs (Import and General), it was held as under:-

"Regulation 20 empowers the Commissioner of Customs to revoke or suspend the licence of CHA, in certain eventualities including in the case of misconduct. Regulation 20(2) is an overriding provision conferring emergency powers upon the Commissioner to - without any previous show cause notice or any previous hearing - wherever immediate action is warranted, direct suspension of licence pending an inquiry. Regulation 22 spells out the procedure for suspension or regulation of licence. It is in effect the procedure to be adopted for the purpose of holding an inquiry. However, proviso to Regulation 22(1) reserves the right of the Commissioner of Customs to order immediate suspension of the CHA licence. A close reading of these provisions would disclose that the power to direct immediate action is confined to taking it within 15 days from the date of receipt of a report from the investigating authority. In this case the report of the investigating agency was received on 9-3-2011, a fact which is borne out in the order of the Tribunal and contentions of the parties before us. Concededly the Commissioner did not seek recourse to the power under Regulation 20(2). The immediacy or urgency of the situation was allowed to lapse and eventually the Commissioner issued the suspension order on 10-10-2011, even then, the power invoked was Regulation 20(1). This was later modified through a corrigendum. However, the fact remains that this power could not have been taken recourse to after the lapse of 15 days which is underlined by a ''non-obstante'' clause in Regulation 20(2) and further underlined by the proviso to Regulation 22(1). The net result is that where immediate suspension is called for, the Commissioner has to take swift action and cannot wait, if he does so suspension can be made only after the full inquiry is held as provided by Regulation 22. In this case, the final report of the inquiry was made on 7-5-2012, the appellate was issued with a show cause notice on 5-6-2012.

6. Having regard to the above discussion, this Court is of the opinion that the suspension order impugned in this case dated 12-10-2011 as confirmed on 24-1-2012 cannot be sustained; it is clearly contrary to CHALR 2004. It is therefore, set aside. The authorities are however, at liberty to proceed with the inquiry and pass any order in accordance with law after granting opportunity of the appellant and following the procedure prescribed in the rules. All contentions are left open. The appeal is allowed in the above terms."

10. A cumulative reading of the aforesaid decisions with the facts of this case would indicate that the alleged incident took place during the year 2011 for which action has been proposed during 2013. The respondent has issued a show cause notice on 23-10-2013 in which it was proposed to impose penalty. The petitioner submitted his explanation on 18-11-2013 and thereafter, the licence of the petitioner was suspended on 6-1-2014. Thereafter, by the impugned order dated 19-2-2014, the suspension was ordered to continue. With the above facts, at this stage, this Court cannot go into the question as to whether the impugned order has been validly passed or not especially when the petitioner has filed an appeal before the appellate authority, which alone is competent to go into the question as to the validity of the order dated 19-2-2014. Therefore, without going into the validity of the impugned order dated 19-2-2014, especially when the statutory appeal filed by the petitioner is pending before the Appellate Tribunal, this Court is of the view that the impugned order dated 19-2-2014 shall be stayed till such time the Appellate Tribunal take up the appeal and decide the appeal on its own merits. Accordingly, the writ petition is disposed of with the observation that the impugned order dated 19-2-2014 of the respondent shall remain stayed till the disposal of the statutory appeal preferred by the petitioner by the Appellate Tribunal. It is made clear that any observations made in this writ petition need not be taken into consideration by the Appellate Tribunal at the time of disposal of the appeal and that the appeal shall be disposed of on its own merits and in accordance with law as expeditiously as possible. No costs. Consequently, connected miscellaneous petition is closed.