(2014) 05 DEL CK 0288

In the Delhi High Court

Case No : W.P.(C) 2595/2014, C.M. Nos. 5384/2014 & 5385/2014

Millennium Express Cargo Pvt. Ltd. APPELLANT

Vs

The Deputy Commissioner of Customs (Import and General) RESPONDENT

Date of Decision : 12-05-2014

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2014) 143 DRJ 715 : (2014) 307 ELT 455 : (2014) 29 GSTR 279

Hon'ble Judges : Vibhu Bakhru, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Rohit Kapur, Advocate for the Appellant; Sonia Sharma, Sr. Standing Counsel and Mr. Rattan Deep, Advocate for Resp. No. 1, Advocate for the Respondent

Judgement

S. Ravindra Bhat, J.—In these writ proceedings under Article 226 of the Constitution of India, the petitioner, a Customs House Agent ("the petitioner"), challenges the action of the respondent, the inquiry officer under Regulation 22 of the Customs House Agent Licensing Regulations, 2004 ("CHALR") in respect of a show cause notice dated 30-1-2014 issued by the Commissioner of Customs seeking to revoke the petitioner''s Customs House Agent (CHA) license. The petitioners are aggrieved by the respondent''s ex-parte inquiry report dated 4-3-2014, in disregard of its written reply and request to be granted hearing.

2. The facts briefly are that the Petitioner was contacted by M/s. Nikhaar Associates ("the importer") to file bill of entry for clearance of its goods in October 2011. The petitioner collected all the requisite documents, including the authorisation letter (authorizing the concerned representative of the importer, Mr. Subhash to approach the petitioner) to fulfill the ''Know Your Customer'' norms ("KYC norms") under CBEC circular No. 9/2010 dated 8-4-2010 and the CHALR. The petitioner subsequently filed the requisite documents and around 22 bills of entry for four months (29-10-2011 to 6-3-2012), towards clearance of the goods imported i.e. "Stainless Steel Circles and Stainless Steel Scrap". The goods were

cleared by the customs authorities after verification of all the statutory requirements, genuineness of importer-exporter code and payment of appropriate customs duty and there is nothing on record to show mis-declaration or concealment of facts in respect of the identity of goods of the importer. After this, the importer did not approach the petitioner for any clearance work from March to August. In mid-August, the petitioner was approached by the importer once again to file bills of entry for clearance of "Induction Cookers" (Bill of Lading No. OOLU 2525885320 dated 3-8-2012); the petitioner submitted a bill of entry No. 7756887 dated 24-8-2012, as well as all necessary documents including the authorisation letter dated 22-8-2012 (authorising another representative, Mr. Anuj Jain), to the concerned customs officer in fulfillment of the KYC norms. These goods too were cleared by the customs authorities.

3. On 30-8-2012 however, the Directorate of Revenue Intelligence ("DRI") searched the petitioner''s premises and asked its director to submit the authorization letter and other documents related to the consignments cleared by the petitioner for the importer. The director was also interrogated about pending or future consignments from the importer, of which the director stated that he had no knowledge. No documents pertaining to the same were found at the premises of the petitioner either. On the same day, the DRI visited the premises of the importer and discovered a new consignment that was to reach ICD, Tughlakabad on 31-8-2012. The DRI officers subsequently opened a container No. TGHU 9546915 under Bill of Lading No. OOLU 2526182800 dated 18-8-2012 imported in the name of the importer, and found it to contain cigarettes of two brands of Indonesian origin, while the description of the goods was "Induction cookers" under the brand name of Jetking. On this basis, they alleged that the importer imported goods illegally by mis-declaring them in the IGM and Bill of Lading.

4. During the DRI investigation, an offence report dated 10-9-2012 was filed before the Commissioner of Customs with details of the importer. On 28-9-2012, a suspension order was passed under Regulation 20(2) of the CHALR against the petitioner on the ground that it had contravened Regulations 13(e) and 13(o) of the CHALR read with Regulation 11(e) and 11(n) of CBLR, 2013. After receiving the order, the petitioner requested for a hearing. A post decisional hearing was allowed on 17-10-2012. In the written reply filed on the same date, the petitioner submitted all the documents of the importer, to prove its fulfilment of KYC norms. However, in disregard of this, another suspension order dated No. 31/ NLB/POLICY/2012 confirming the earlier one was passed on 6-11-2012. The petitioner appealed and sought a stay before the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") on 17-12-2012. Pending the appeal, the commissioner of Customs issued a show-cause notice dated 30-1-2014, seeking to revoke the CHA license of the petitioner.

5. The petitioner alleges that the inquiry officer appointed by the authorities, declined to furnish the documents relied upon for the issue of show-cause notice,

despite requests from the petitioner in letters dated 10-2-2014, 11-2-2014 and 26-3-2014. In spite of this, the petitioner filed written "interim replies" on 27-2-2014 before the respondent, requesting hearing. However, on 22-3-2014, the petitioner received a letter dated 14-3-2014 from the office of the Assistant Commissioner of Customs with a copy of the inquiry report dated 4-3-2014 submitted by the respondent in respect of the show-cause notice dated 30-1-2014. The inquiry report, in relevant part, reads:

1.4 Enquiries made with the owner of the CHA firm and ''G'' Card holder viz. Tej Pal Singh indicated that entire clearance work for M/s. Nikhaar Associates was being handled by Sh. Tej Pal Singh who met the Proprietor of this Company for the first time, long back (7--8 months) ago and obtained IEC Code, PAN Card, Authority Letter etc. On the basis of which he started handling the work of the company and after that he had never met him. All the documents for clearance were received by him through some other person who had introduced the Importer to the CHA. No KYC details were filed in the prescribed Performa. Sh. Tej Pal Singh was asked to produce their customer (Importer) for joining investigation by DRL But he reported that the person was not living at the given address and his present where about were not known to him. Further, On 30.8.2012 the DRI team searched the declared premises of M/s. Nikhaar Associates and the Proprietor Mrs. Subhash at 1484, Sec--16, Faridabad, Haryana, The address was found to be a residential premises but the person was not found to be residing there. The inquiries caused from other residents in the building revealed that no such has been residing therefor the last one year and no company in the name of M/s. Nikhaar Associates even existed there.

xxx xxx

4.2....The facts further revealed that when Sh. Tej Pal Singh was asked to produce their customer (Importer) for joining investigation by DRI, he reported that the person was not living at the given address and his present whereabouts were not known to him. Further, on 30.8.2012 the DRI team searched the declared premises of M/s. Nikhaar Associates and the Proprietor Mrs. Subhash at 1484, Sec--16, Faridabad, Haryana. The address was found to be a residential premises but the person was not found residing there. The inquiries caused from other residents in the building revealed that no such person has been residing therefor the last one year and no company in the name of M/s. Nikhaar Associates even existed there. Thus, the matter is crystal clear and just to say that all the documents for clearance were received by Sh. Tej Pal Singh through some other person and without verifying the facts/details of ''know your customer'' or not looking after the work at this ICD, doesn''t serve the purpose towards CHA''s responsibilities & justification of his legal obligations. Here, the authorized person of CHA received all the documents for clearance through some other person and when the CHA was asked to produce their Customer i.e. Importer for joining Investigation, he failed. As much as no such the concerned person was even living at the given address and also his present whereabouts were not known to him. Obviously, the CHA has not exercised the due diligence for accepting the said information and informing the Importer accordingly, Not only this, the CHA has also failed to verify antecedents of his client, identity of his client and functioning of his client at the declared address by using reliable, independent authentic documents, data or information. He failed to take care, caution and circumspection for which it appeared a case more as facilitator the Importer to evade the payment of appropriate Customs Duty by mis--declaring the goods, its Quantity and value, by filing documents and without verifying documents and with out verifying the facts/details of ''Know Your Customer'' (KYC). As much as the CHA did not come forward to avail an opportunity of his defense and no written statement in the support were submitted to me till date. Thus, in view of all above, it is clear case to be held responsibility in contravention of the provisions of Regulations 13(e) and 13(o) of CHALR, 2004, read with Regulation 11(e) and 11(n) of CBLR, 2013.

6. The petitioner, having been denied the right to be heard, has approached this Court seeking that the impugned inquiry report be quashed for being in violation of the principles of natural justice. The petitioner also submits first, that no bill of entry has been filed by the importer through any CHA for the container No. TGHU 9546915, second, the offence report was filed based on initial investigation of DRI and submitted much before the completion of the investigation and issue of show cause notice by DRI, and third, that the suspension order was passed after the expiry of the statutorily allowed period of 15 days from the date of receipt of the offence report, where the only permissible course of action for the authorities was to issue a show cause notice for the suspension of the CHA license. The respondent argues that the claim to a right of hearing is premature at the stage of the Inquiry Officer and that no principle of natural justice has been breached. It was further submitted that only the subsequent order of the Commissioner can possibly be challenged for violation of natural justice. After notice was issued, the relevant records were called for.

7. The relevant provisions applicable here are:

20. Suspension or revocation of licence.--

(1) The Commissioner of Customs may, subject to the provisions of regulation 22, revoke the licence of a Customs House Agent and order for forfeiture of part or whole of security, or only order forfeiture of part or whole of security, on any of the following grounds, namely:-

(a) xxx

(b) failure of the Customs House Agent to comply with any of the provisions of these regulations, within the jurisdiction of the said Commissioner of Customs or anywhere else;

(c) xxx

(2) Notwithstanding anything contained in sub-regulation (1), the Commissioner

of Customs may, in appropriate cases where immediate action is necessary, within fifteen days from the date of receipt of a report from investigating authority, suspend the licence of a Customs House Agent where an enquiry against such agent is pending or contemplated.

(3) Where a licence is suspended under sub-regulation (2), notwithstanding the procedure specified under regulation 22, the Commissioner of Customs may, within fifteen days from the date of such suspension, give an opportunity of hearing to the Customs House Agent 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 House Agent.

22. Procedure for suspending or revoking licence under Regulation 20.--

(1) The Commissioner of Customs shall issue a notice in writing to the Customs House Agent within ninety days from the date of receipt of offence report, stating the grounds on which it is proposed to suspend or revoke the licence and requiring the said Customs House Agent 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 House Agent desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs.

Prided that the procedure prescribed in regulation 22 shall not apply in respect of the provisions contained in sub-regulation (2) to regulation 20.

(2) The Commissioner of Customs may, on receipt of the written statement from the Customs House Agent, or where no such statement has been received within the time-limit specified in the notice referred to in sub-regulation (1), direct the Deputy Commissioner of Customs or Assistant Commissioner of Customs to inquire into the grounds which are not admitted by the Customs House Agent.

(3) xxx

(4) xxx

(5) At the conclusion of the inquiry, the Deputy Commissioner of Customs or Assistant Commissioner of Customs shall prepare a report of the inquiry recording his findings and submit his report within ninety days from the date of issue of a notice under sub-regulation (1).

(6) The Commissioner of Customs shall furnish to the Customs House Agent a copy of the report of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, and shall require the Customs House Agent to submit, within the specified period not being less than thirty days, any representation that he may wish to make against the findings of the Deputy Commissioner of Customs or Assistant Commissioner of Customs.

(7) The Commissioner of Customs shall, after considering the report of the

inquiry and the representation thereon, if any, made by the Customs House Agent, pass such orders as he deems fit within ninety days from the date of submission of the report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, under sub-regulation (5).

(8) Any Customs House Agent aggrieved by any decision or order passed under regulation 20 or sub-regulation (7) of regulation 22, may prefer an appeal u/s 129A of the Act to the Customs, Central Excise and Service Tax Appellate Tribunal established under sub-section (1) of section 129 of the Act.

[emphasis supplied]

8. In the present case, the petitioner''s complaint is that despite responding to the showcase notice on 27-02-2014, within the 30 day period permitted, the respondents proceeded to hold an ex-parte enquiry and finalize the report of 04-03-2014.

9. This Court has considered the submissions and the records. The reply-though termed interim-was given within the period prescribed. The noting sheet records an entry acknowledging that the reply was received by customs authorities; the noting was made on 03-03-2014. The next day, i.e. 04-03-2014, a decision to forward the reply to the Inquiry Officer was taken. Unfortunately for the petitioner, that office prepared the report on 04.03.2014, after assuming that the petitioner had nothing to say.

10. Regulation 22 mandates that the CHA should be given hearing before action is taken. In this case, the show cause notice was issued on 30-01-2014; 30 days'' time was given to the CHA to respond to the allegations. A reply was furnished. The respondent''s argument that the reply had to be given directly to the Inquiry Officer is without merit, because it is upon receipts of reply by the Commissioner i.e. the notice issuing official-and a further order by him, that the Inquiry Officer assumes power-under Regulation 22(2) to proceed further. In this case, no such order was made; the Inquiry Officer''s report is premised almost entirely on the investigation report and its allegations.

11. It is axiomatic that when the statute requires observance of a step-in this case an opportunity of hearing-as a prelude to exercise of power, the executive agency has to comply with the terms of the provision. The insistence upon giving an opportunity of hearing to a CHA whose license is suspended, is not an idle formality which sadly the impugned order assumes it to be. The impugned inquiry report, therefore, cannot be sustained; it is accordingly quashed.

12. The respondents are hereby directed to give a hearing within three weeks in terms of Regulation 20(3) to the petitioner (since post decisional hearing was held in 2012) and within two weeks thereafter, pass an order either confirming or revoking the suspension order. Likewise, an order under Regulation 22(2) shall be passed before holding an inquiry.

13. All rights and contentions of both parties are reserved and kept open. For the

above reasons, the writ petition is allowed and the accompanying applications are disposed of.

