

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
Customs Appeal
Original Side

Present:

The Hon'ble Justice Debangsu Basak

CUSTA 26 OF 2018
THE COMMISSIONER OF CUSTOMS (AIRPORT & ADMN.)
VS.
M/S SHIPPING & CLEARING AGENTS PVT. LTD.

For the Appellant : Mr. K. K Maiti, Adv.
Mr. Tapan Bhanja, Adv.

For the Respondent : Mr. Arijit Chakraborty, Adv.
Mr. Suman Banerjee, Adv.

Hearing concluded on : May 02, 2024
Judgment on : June 13, 2024

DEBANGSU BASAK, J. :-

1. This reference is in respect of the judgement and order dated June 8, 2023 that has been passed by the Division Bench in CUSTA 26 of 2018.
2. While dealing with an appeal under Section 130 of the Customs Act, 1962 the Division Bench had differed on the point of upholding the decision of Customs, Excise and Service Tax Appellate Tribunal regarding non-acceptance of the Enquiry Report.
3. Without meaning any disrespect to the Hon'ble Judges of the Division Bench, and for the sake of convenience the Hon'ble Judge delivering the first view in the judgement and

order dated June 8, 2023 is referred to as the Hon'ble First Judge while the Hon'ble Judge delivering the second view is referred to as the Hon'ble Second Judge.

- 4.** The respondent herein as Customs Broker had filed a bill of export on January 2, 2014 for clearance with the customs authorities. The customs authorities had found that the respondent herein, as Customs Broker, to be in connivance with the exporter by aiding and abetting illegal exportation of contraceptives. The bill of export that had been submitted by the respondent as the Customs Broker was in relation to export of specified contraceptives banned by the Government of India for export as such contraceptives were meant for sale within India at a subsidised rate with the subsidy being provided by the Government of India.
- 5.** With regard to such bill of export an offence report in the form of an Order in Original dated May 15, 2015 had been received by the appellant from the Commissioner of Customs (Preventive), Kolkata. By an order dated June 19, 2015 the customs authorities had suspended the operation of the Customs House Agent (CHA) License of the respondent, with immediate effect under Regulation 19 of Customs Brokers Licensing Regulations, 2013. A post

decisional hearing had been granted to the respondent under Regulation 19 (2) of the Regulations of 2013 on June 22, 2015. Suspension of the respondent had been confirmed on June 24, 2015. A Show Cause Notice under Regulation 20 (1) of the Regulations of 2013 had been issued to the respondent on July 31, 2015. The respondent had filed a writ petition being WP No. 1076 of 2015 challenging the Order in Original dated May 15, 2015 as well as the Show Cause Notice dated July 31, 2015.

- 6.** Customs authorities had completed the enquiry under Regulation 20 (5) of the Regulations of 2013 on December 17, 2015 and the enquiry report was supplied to the respondent by a letter dated December 21, 2015.
- 7.** By an order dated January 6, 2016, WP No. 1076 of 2015 had been disposed of by directing the respondent to approach the Tribunal. The respondent had preferred another writ petition being WP No. 364 of 2016 challenging the order of suspension which was disposed of by an order dated April 29, 2016 by granting opportunity to the respondent to file a reply to the Show Cause Notice dated July 31, 2015 within a week and to conclude the revocation proceedings within 3 months of the receipt of the reply to the show cause notice from the respondent.

- 8.** The respondent had filed its reply to the show cause notice on May 10, 2016. Personal hearing for adjudication of the show cause notice had been granted to the respondent on July for 2016 when nobody had appeared on behalf of the respondent. By an order dated August 16, 2016 the Principal Commissioner of Customs had revoked the license and forfeited the security amount furnished by the respondent, under Regulation 20 (7) of the Regulations of 2013.
- 9.** The respondent had challenged the order dated August 16, 2016 of the Principal Commissioner of Customs before the Tribunal when the Tribunal by the order dated November 30, 2017 was pleased to set aside the order of revocation but upheld the order of confiscation of the security amount.
- 10.** Being aggrieved by the order dated November 30, 2017 of the Tribunal, the customs authorities had filed an appeal under Section 130 of the Customs Act, 1962 resulting in the judgement and order dated June 8, 2023.
- 11.** The Division Bench has held that, the requirement to file the enquiry report within 90 days was not mandatory at all. The Division Bench has however differed on the action of the Tribunal in treatment of the enquiry report. While the

Hon'ble First Judge has opined that, the Tribunal correctly exercised discretion in deciding not to attach any weight to the enquiry report and reject it, the Hon'ble Second Judge has opined that the enquiry report should not be discarded on the ground that the enquiry was not completed within the period prescribed under the Regulations when such period was directory. The Hon'ble Second Judge has opined that it was reasonable for the Tribunal to accept and consider the enquiry report and decide the matter on merits. The Hon'ble Second Judge has thereafter proceeded to re-appreciate the facts and arrive at the same conclusion as that of the Hon'ble First Judge in upholding the impugned order under appeal.

- 12.** Learned advocate appearing for the appellant has referred to a list of dates of the events happening in the matter leading up to the impugned order of the learned Tribunal. He has contended that, the Division Bench was unanimous with regard to the provisions of the Regulations of 2013 being directory in nature. He has contended that, the reference should be disposed of by holding that the time period specified in completing the enquiry and submitting the enquiry report are directory in nature.

- 13.** Learned advocate appearing for the respondent has submitted that, there is a difference of opinion amongst the High Courts with regard to the issue as to whether, the time period for completing the enquiry and submitting the enquiry report was mandatory or directory. He has drawn the attention of the Court to **2017 SEC online Mad 7084 (Santon Shipping Services vs. Commissioner of Customs), 2018 (360) ELT 879 (Del) (Necko Freight Forwarders Ltd. vs. Commissioner of Cus. (General)), 2018 (361) ELT 731 (Del) (Harjeet Singh Johar vs. Commissioner of Customs (General)), 2019 (367) ELT 200 (Mad) (Sabin Logistics Pvt. Ltd. vs. Commissioner of Customs, Chennai-VIII), 2019 (368) ELT 319 (Mad) (Kalki Shipping Associates vs. Commissioner of Customs, Chennai-VIII), 2019 (368) ELT 1059 (Mad) (Carewell Shipping Pvt Ltd. vs. Commissioner of Customs, Chennai), 2020 (371) ELT (Mad.) (KTR Logistics Solutions Pvt. Ltd. vs. Commissioner of Customs, Chennai), 2021 (378) ELT 144 (Mad) (PL Shipping and Logistics Ltd. vs. Commissioner of Customs, Chennai-VII), 2021 (377) ELT 562 (Mad) (Aristo Shipping Services vs. Principal Commissioner of Customs, Chennai-VIII), 2022 (382)ELT 30 (Del) (Leo Cargo Services vs.**

Commissioner of Customs, Airport and General, New Delhi) and **2023 (384) ELT 558 (Del.) Him Logistics Private Limited versus Commissioner of Customs, (Airport and General))** and submitted that, the Madras and Delhi High Courts have held that, the timelines provided in the Regulations of 2013 are mandatory. He has also drawn the attention of the Court to **2018 (362) ELT 947 (Cal) (Ota Falloons Forwarders Private Limited vs. Union of India), 2020 (373) ELT 323 (Cal) (Asian Freight vs. Principal Commissioner of Customs (Airport and Administration)), 2018 (361) ELT 321 (Bom) (Principal Commissioner of Customs (General), Mumbai vs. Unison Clearing Private Limited), 2019 (368) ELT 41 (Telengana) (Shasta Freight Services Private Limited vs. Principal Commissioner of Customs, Hyderabad), and 2022 (380) ELT 60 (Bom) (Commissioner of Customs (Gen), Mumbai vs. Srinivas Clearing and Shipping (I) Private Limited)** and contended that, Bombay, Telangana and our High Court have held that, the timeline for completion of proceedings under the Regulations of 2013 were directory in nature.

- 14.** The issue that has fallen for consideration in this reference is whether, the Tribunal could have discarded the enquiry report in its entirety as being submitted in breach of

the timeline prescribed in Regulation 20 (5) of the Regulations of 2013 or should have considered the same on merits and on such consideration have the discretion to attach such weightage to it as deemed appropriate.

15. Both the Hon'ble Judges of the Division Bench have held that, timeline under Regulation 20 (5) of the Customs Broker Licensing Regulations, 2013 were directory. In arriving at such a decision, the Division Bench has noted ***Asian Freight (supra)***.

16. So far as this High Court is concerned, in view of the Division Bench having unanimously held that, the timeline under Regulation 20 (5) of the Regulations of 2013 was directory in nature, the same is binding not only on this Court but also on all Tribunals and authorities functioning under this High Court. In the event it is contended that, by the impugned order in the appeal Tribunal has discarded the enquiry report in view of the breach of the timeline prescribed under Regulation 20 (5), then the impugned order of the Tribunal cannot be sustained in such context. However, in the facts and circumstances of the present case, the Tribunal has accepted a portion of the impugned order so far as forfeiture of the security deposit of the respondent is concerned. Therefore, in the facts and

circumstances of the present case, it cannot be said that, the Tribunal has rejected the enquiry report or the order impugned before it in its entirety purely on the ground of the timeline prescribed under Regulation 20 (5) of the Regulations of 2013 being breached.

17. No doubt, the Adjudicating Authority, which would obviously include the Tribunal has the discretion to attach such weightage as is permissible in law to the enquiry report, albeit submitted in breach of the timeline prescribed under Regulation 20 (5) of the Regulations of 2013, in deciding on the quantum of punishment or the relief, to be imposed or granted, as the case may be. In the facts of the present case, the Hon'ble First Judge has held that, the Tribunal was correct in attaching such weightage to the enquiry report as deemed appropriate. The Hon'ble First Judge has noted that, a portion of the order impugned before the Tribunal was accepted by the Tribunal.

18. The order impugned before the Tribunal has been premised upon the enquiry report. The order impugned before the Tribunal has prescribed both cancellation of the license as well as forfeiture of the security deposit of the broker. The Tribunal has accepted a portion of the order impugned before it, that is to say that, it has upheld the

forfeiture of the security deposit of the broker while setting aside the order of cancellation of the license. In doing so, it has to be held that, the Tribunal accepted the enquiry report partially in imposing such a penalty on the respondent. If the Tribunal had discarded, the enquiry report in its entirety, which it could not have done, in view of the pronouncement of this Court in ***Asian Freight (supra)*** and ***Ota Falloons Forwarders Private Limited (supra)*** which were binding upon it, at that material point of time, then, the order under appeal before the Division Bench could not have been sustained. Again, the Division Bench has noted that, the Tribunal has accepted a portion of the enquiry report and therefore, the Division Bench has proceeded to uphold the order of the Tribunal impugned before it.

19. The Adjudicating Authority while dealing with the proceeding under Regulation 20 of the Regulations of 2013, is called upon to take into consideration the materials proved before it. Absence of the broker before it or refusal of the broker to participate in the adjudication proceedings does not vest the broker with any additional benefits of a requirement on the Adjudicating Authority to apprise the reply of the broker in the manner suggested by the Hon'ble

Second Judge. All that the Adjudicating Authority is required to do is to evaluate all evidence placed before it to arrive at its findings. In the facts and circumstances of the present case, neither the enquiry report nor the order of adjudication impugned before the Tribunal can be faulted for not having taken into consideration relevant materials.

20. In such circumstances, the present reference is answered by holding that, the timeline prescribed under Regulation 20 (5) of the Regulations of 2013 are directory. The Tribunal is vested with the discretion to attach such weightage to the enquiry report as deemed appropriate, after consideration of the same on merits.

21. Department will treat CUSTA 26 of 2018 as disposed of.

[DEBANGSU BASAK, J.]