

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 86939 of 2021

(Arising out of Order-in-Original CAO No. 92/CAC/PCC(G)/SJ/CBS/Adj. dated 29.09.2021 passed by the Pr. Commissioner of Customs (General), Mumbai Zone-I)

Vinayak Shipping Services

(earlier known as M/s Varun Forwarders)
15/235, Adarsh Nagar,
Prabhadevi, Worli, Nariman Road,
Mumbai – 400 030

.... Appellant

Versus

**Principal Commissioner of Customs (General).... Respondent
Mumbai**

New Custom House, Ballard Estate,
Mumbai - 400001

Appearance:

Shri N.S. Patel, Advocate for the Appellant

Shri S.K. Hatangadi, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86217/2023

Date of Hearing: 09.05.2023

Date of Decision: 09.05.2023

Per: M.M. Parthiban

This is an appeal filed by M/s Vinayak Shipping Services holding Customs Broker License No. 11/898 (herein referred to as 'appellants' for short) assailing Order-in-Original CAO No. 92/CAC/PCC(G)/SJ/CBS/Adj. dated 29.09.2021 (referred to as 'impugned order').

2. In the impugned order the learned Principal Commissioner of Customs (General), in exercise of powers conferred upon him under Regulation 20(7) Customs Brokers Licensing Regulations, 2013 (CBLR) [now Regulation 17(7) of CBLR, 2018]/ Regulation 22(7) of Customs House Agents Licensing Regulations, 2004/1984 (CHALR)

had revoked the CB license issued to the appellants for acting as a Customs Broker under the above regulations *ibid*, besides imposition of penalty and forfeiture of entire security deposit furnished by the appellants. Being aggrieved against the impugned order, the appellants have filed this appeal before the Tribunal.

3. The brief facts of the case are that on the basis of an Order-in-Original dated 11.01.2018 in which the appellants were co-noticee on whom penalty under Section 114 (iii) of the Customs Act, 1962 was imposed, separate proceedings under CBLR/CHALR was initiated by jurisdictional Commissioner by issue of notice dated 09.05.2018 alleging charges of contravention of Regulations 10, 11(a), 11(d), 11(e), 11(m) and 11(n) of CBLR, 2013. The said original order dated 11.01.2018 was arising from adjudication of a case where in an information was received by Special Investigation and Intelligence Branch (SIIB) of New Custom House, Mumbai on 03.07.1998 that M/s. Sumangal Overseas Limited, Delhi (referred to as SOL for short), an exporter, had tried to export a huge consignment of gaskets made of paper at highly over invoiced price and claimed ineligible drawback at the rate of 15% of FOB value applicable to 'gaskets of rubber and articles thereof' classifiable under chapter heading 40.04. Out of the total 69 shipping bills filed by the exporter, in respect of 41 shipping bills, the export goods were carted to Docks for examination, these export goods were examined by SIIB Customs on 06.07.1998 and the export goods were actually found to be 'gaskets made of paper in assorted sizes and of inferior quality' which are not eligible for drawback under chapter heading 40.04. On investigation, it was found that Shri Gyan B. Sharma, Partner of the appellants Customs Broker (CB) firm had signed all 69 shipping bills without verifying the existence of the party and did not inform the department about the activities of SOL for the purpose of monetary gain, i.e., he charged Rs.50/- per shipping bill for signing it on behalf of appellants and later on they did not handle the processing or examination of the export goods and returned all shipping bills to unauthorized person for completing the customs formalities such as processing of shipping bills and examination of the goods. Thus, the Department had stated that he rented out his CHA license for the purpose of monetary gain in

violation of CHALR. On completion of investigation, show cause proceedings was initiated under the Customs Act, 1962, vide SCN dated 05.12.2005 and an order-in-original dated 27.8.2006 was passed ordering for confiscation of the impugned goods and allowing it on redemption fine of Rs.20 lakhs under Section 125 *ibid*; and imposing penalty of Rs.5 lakhs each on exporter firm and on the Director of exporter firm, besides imposition of penalty of Rs.1 lakh on Shri Gyan B. Sharma, Partner of appellants CB firm under Section 114 (iii) *ibid*. Being aggrieved against the said order dated 27.8.2006, in the appeal proceedings, the CESTAT had vide its order dated 28.12.2016 remanded the case back to the original authority for providing an opportunity of personal hearing to the appellants. In *de novo* proceedings the original authority passed an order dated 11.01.2018, imposing redemption fine of Rs.30 lakhs; penalty of Rs.25 lakhs on exporter, Rs.15 lakhs on the Director of the exporting firm and Rs. 10 lakhs on Shri Gyan B. Sharma, Partner of appellants CB firm under Section 114 (iii) *ibid*. Being aggrieved of the above order dated 11.01.2018, the appellants had filed an appeal before CESTAT and the same is pending in Appeal No. C/90071/2018. On the basis of the Order-in-Original dated 11.01.2018, separate proceedings under CBLR/CHALR was initiated by jurisdictional Commissioner by issue of notice dated 09.05.2018 alleging charges of contravention of Regulations 10, 11(a), 11(d), 11(e), 11(m) and 11(n) of CBLR, 2013. In deciding these allegations the impugned order has been passed by the learned Principal Commissioner of Customs (General).

4. Learned Advocate appearing for the appellants submitted that this case relates to an incident occurred in 1998, and the SCN was issued after 20 years on 09.05.2018 and the enquiry report submitted after another 3 years on 20.09.2021. Thus there is an unexplained inordinate delay in the enquiry proceedings under CHALR/CBLR, and the learned Advocate pleaded that on this ground itself the impugned order is liable to be set aside. Further, he stated that SCN issued for initiating action on the appellants and the impugned order revoking the CB license and imposition of penalty under CBLR, 2013 is incorrect as for an action taken by CB during 1998, the CHALR, 1984 is the relevant regulations in force and not CBLR, 2013. It is also

pleaded by the Advocate that on the ground of not allowing cross-examination of witnesses on whose statements entire action had been taken by the Department, violates the principles of natural justice. Accordingly the learned Advocate claimed that on merits as well as on time limits, the impugned order does not sustain and pleaded that the same may be set aside. In this regard, he relied upon the following case laws: -

- (a) *Sanghavi Recondition P. Ltd. Vs. Union of India* – 2018 (12) GST290 (Bom.)
- (b) *Reliance Industries Ltd. Vs. Union of India* – 2019 (368) E.L.T. 858 (Bom.)
- (c) *Raymond Ltd. Vs. Union of India* – 2019 (368) E.L.T. 481 (Bom.)
- (d) *Joveens Expotex Vs. Commissioner of Customs, C.EX. & S.T. Coimbatore* – 2018 (363) E.L.T.414 (Tri. Chennai)
- (e) *Sunil Kohli Vs. Union of India* – 2012 (285) E.L.T. 421 (S.C.)

5. Learned AR appearing for the Revenue reiterated the findings recorded in the impugned order. He further submitted that the de novo order dated 11.01.2018 was received on 30.01.2018, and this has been treated as an offence report for initiating proceedings under CBLR against the appellants. Due to COVID 19 pandemic situation during enquiry proceedings and on account of administrative reasons there was delay in adjudicating the impugned case. However the Department had extended all cooperation to the appellant to put forth their submissions and also issued summons for concerned witnesses and to trace out the whereabouts of these persons. However, as these persons were not traceable, no cross-examination opportunity could be offered to the appellants. Hence, the learned AR submitted that the principle of natural justice was observed and there was no inordinate delay in the proceedings leading to the impugned order. He relied upon the judgment of Hon'ble High Court of Mumbai in the case of *Principal Commissioner of Customs (General), Mumbai Vs. Unison Clearing Pvt. Ltd.* – 2012 (361) E.L.T. 321 (Bom.) for the delay caused in adjudication of the case beyond the time limit prescribed under CBLR.

6. We have heard both sides and have gone through the records of the case.

7. From the perusal of the records of the case, it is seen that SIIB Customs had received an information on 03.07.1998 about alleged irregular claim of drawback by SOL in export of 'gaskets made of paper in assorted sizes and of inferior quality' which are not eligible for drawback under chapter heading 40.04 which is applicable for 'gaskets of rubber and articles thereof'. On scrutiny and further examination of export goods on 06.07.1998 in respect of 41 shipping Bills brought for carting to Docks, the SIIB Customs found that the goods were actually gaskets made of paper in assorted sizes and of inferior quality, and in view of the ineligible claim for drawback of Rs.1,35,37,617/-, the goods were found to be liable for confiscation and accordingly the same were seized. However, at the request of SOL vide their letter dated 08.07.1998 for converting the drawback shipping bills into duty free shipping bills and having deposited amount of Rs.25 lakhs towards any liability arising out of investigation/adjudication on 10.07.1998, the export goods in 41 shipping bills were allowed for export provisionally on 16.07.1998 permitting such conversion. During the course of investigation, statements were recorded under Section 108 ibid, from various persons involved in the offence i.e., on 03.07.1998 from S/Shri Sunil Narayan Aher, employee of appellants CB firm; Ridwanulla Abdul Kadar Shaikh, freight forwarding agent and later joined as employee of appellants CB firm; Gyan B Sharma, Partner of CB firm and from Shri Narender Kumar, Director of SOL on 06.07.1998 and on 07.09.1999. As per the aforesaid statements, it appeared that Shri Narender Kumar, Director of exporter-SOL deliberately handed over the shipping bills to Shri Ridwanulla Abdul Kadar Shaikh, who is not holding any valid customs pass for carrying the work of customs export processing formalities and examination of the goods before the customs authorities so that the actual description of the goods not be disclosed to the appellants. Further, he deliberately did not declare the composition of the goods and also declared the drawback heading as 40.04 in order to avail undue duty drawback. It is also noted that one Shri Rezwan, who knew the exporter-SOL was introduced to Shri Mahesh Goyal, partner of appellants-CB firm on whose instructions Shri Gyan B Sharma, the other Partner of CB firm and authorised

signatory, had signed the shipping bills/documents of the exporter-SOL. The said Shri Rezwan handled all the work such as passing of documents, carting of the goods in the docks and examination of the goods etc. As Shri Gyan B Sharma, did not do anything as a prudent CHA, other than simply signing the documents, the Department related these action as renting out of their CHA/CB license for the purpose of monetary gain in violation of CHALR/CBLR and in particular Regulations 10, 11(a), 11(d), 11(e), 11(m) and 11(n) of CBLR, 2013 on the basis of enquiry report.

8. The foremost objection raised by the learned advocate for appellants is that though the exports have taken place in 1998, the impugned order to revoke the license has been issued on 29.09.2021 under Regulation 20(7) of CBLR, 2013 (now Regulation 17(7) of CBLR, 2018) inasmuch as such regulations do not have retrospective application for taking action against the appellants for the events taken place in 1998. On perusal of the SCN dated 05.12.2005 and the impugned order dated 29.09.2021, it is seen that all the 41 shipping bills relevant to this case are of 1998.

9. Customs House Agents Licensing Regulations, 1984 (CHALR, 1984) was issued by Notification No. 85-Cus., dated 19-3-1984 which was later amended from time to time. The extract of relevant provisions of CHALR, 1984 are as follows:

"In exercise of the powers conferred by sub-section (2) of section 146 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise & Customs hereby makes the following regulations, namely :-

1. Short title and commencement.-

(1) These regulations may be called the Customs House Agents Licensing Regulations, 1984.

(2) They shall come into force on the date of their publication in the Official Gazette.

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26. Repeal.-

(1) The Custom House Agents" Licensing Regulations, 1965, are hereby repealed.

(2) Notwithstanding such repeal anything done or any action taken under the Custom House Agents (Licensing) Regulations, 1965, shall be deemed to have been done or taken under the corresponding provisions of these Regulations."

Subsequently, Customs House Agents Licensing Regulations, 2004 (CHALR, 2004) was issued in supersession of CHALR, 1984 vide Notification No.21/2004- Customs (N.T.), dated 23/02/2004. Relevant portion of the CHALR, 2004 is exacted below:

"In exercise of the powers conferred by sub-section (2) of section 146 of the Customs Act, 1962 (52 of 1962), and in supersession of the Customs House Agents Licensing Regulations, 1984, except as respect things done or omitted to be done before such supersession, the Central Board of Excise and Customs hereby makes the following regulations, namely :-

1. Short title and commencement.-

(1) These regulations may be called the Customs House Agents Licensing Regulations, 2004.

(2) They shall come into force on the date of their publication in the Official Gazette."

Later, Customs Brokers Licensing Regulations, 2013 and presently 2018 have been issued in supersession of earlier CHALR/CBLR vide Notification No.41/2018-Customs (N.T.), dated 14.05.2018. Relevant portion of the CBLR, 2018 is exacted below:

"In exercise of the powers conferred by sub-section (2) of section 146 of the Customs Act, 1962 (52 of 1962), and in supersession of the Customs Brokers Licensing Regulations, 2013, published vide number G.S.R. 395(E), dated the 21st June, 2013, except as respect things done or omitted to be done before such supersession, the Central Board of Indirect Taxes and Customs hereby makes the following regulations, namely: -

Regulation 1. Short title, commencement and application: -

(1) These regulations may be called the Customs Brokers Licensing Regulations, 2018.

(2) They shall come into force on the date of publication in the Official Gazette.

(3) These regulations shall apply to, a Customs Broker who has been licensed and such other persons who have been employed or engaged by a licensed Customs Broker under these regulations or the Customs House Agents Licensing Regulations, 1984 or the Customs House Agents Licensing Regulations, 2004 or the Customs Brokers Licensing Regulations, 2013.

(4) Every license granted or renewed under these regulations shall be deemed to have been granted or renewed in favour of the licensee, and no license shall be sold or otherwise transferred."

CHALR, 1984 was in force during the relevant point of time when the export of goods were found to have violated the provisions of Customs Act, 1962 and consequently action of the appellants are questionable under the then existing CHA Regulations i.e., CHALR, 1984. Subsequently, CHALR, 2004 came into force only on 23.4.2004. On plain reading of the Preamble of the said CHALR, 2004 and subsequently amended Regulations, it is clear that for the acts or omissions which are done before the CHALR, 2004/CBLR, 2013/CBLR, 2018 came into force, the erstwhile Regulations i.e., in this case CHALR, 1984, would apply. However, the subsequent Regulations would save such action taken or omitted to have been taken, inasmuch as they do not supersede such action under the erstwhile Regulations. The shipping bills in these export transactions are of the year 1998. When the transactions in dispute are of the year 1998, the provisions in CBLR, 2013/2018 cannot bind the appellant. Thus we are of the considered opinion that the impugned order revoking the license of appellants, imposition of penalty and forfeiture of the security deposit under the CBLR, 2013/2018, which came into force prospectively on 21.6.2013 and 14.05.2018, without invoking the relevant provisions of CHALR, 1984 under the saving clause of the preamble, is therefore cannot be sustained in law.

10. We also find that similar issue has already been decided by the Co-ordinate Bench of the Tribunal in the case of M/s. Sri Shipping Services Vs. Commissioner of Customs, Coimbatore in Final Order No. 42308 of 2021. The relevant paragraphs of the said order is extracted below:

"18. It is clear that for the acts or omissions which are done before the CHALR, 2004 came into force [vide Notification No. 21/2004-Cus. (NT) dated 23.2.2004], the erstwhile CHALR, 1984 would apply. The shipping bills in these transactions are of the year 2003. So also in the Show Cause Notice, the department has mentioned the number of two shipping bills for which there was no IE Code mentioned in the shipping bills in respect of M/s. Gomathy Garments and M/s. Akshaya Impex. Both these shipping bills are also dated 11.3.2003. When the transactions are of the year 2003, the provisions in Regulation 2004 cannot bind the appellant. In the Show Cause Notice, though in para 4, there is a mention that it is to be read with relevant provisions of the erstwhile Regulation 1984, interestingly all the provisions invoked are that of 2004 Regulations. The allegations raised in para 5 of the Show Cause Notice is that the appellant has violated provisions of Regulation

13(a), (d) and (e) as well as Regulation 19(8) of the CHALR, 2004. The said para reads as under:-

"From the foregoing, it appears that M/s. Sri Shipping have failed to comply with the provisions of

(i) Regulation 13(a) of CHALR, 2004 inasmuch as they have failed to advise their clients to comply with the provisions of the Act and on non-compliance failed to bring the matter to the notice of the Deputy / Assistant Commissioner of customs.

(ii) Regulation 13(e) of CHALR, 2004 inasmuch as they have failed to exercise due diligence to ascertain the correctness of any information which they impart to a client with reference to any work related to clearance of cargo.

(iii) Regulation 19(8) of CHALR, 2004 inasmuch as the CHA has failed to exercise such supervision as may be necessary to ensure the proper conduct of persons who transacted business."

19. This plea was raised by the appellant before the adjudicating authority also. But the same has not been considered. We have no hesitation to hold that the charges levelled against the appellant under CHALR, 2004 cannot sustain when the acts / omissions / cause of action has happened prior to the introduction of the Regulations. The Show Cause Notice itself is not sustainable in law and the entire proceedings are vitiated. The impugned order revoking the license or directing to forfeit the security cannot sustain in law."

11. We further find that in respect of delay in suspension proceedings of customs broker license, the Hon'ble High Court of Bombay in the case of *Principal Commissioner of Customs (General), Mumbai Vs. Unison Clearing P. Ltd.*, reported in 2012 (361) E.L.T. 321 (BOM – HC) have elaborately discussed the issue and came to a conclusion that the only way to effectively implement the provisions in the interest of both the parties is that the reasons for delay can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable" or 'not'. The relevant paragraph of the judgement is extracted below:

"15. In view of the aforesaid discussion, the time-limit contained in Regulation 20 cannot be construed to be mandatory and is held to be directory. As it is already observed above that though the time line framed in the Regulation need to be rigidly applied, fairness would demand that when such time limit is crossed, the period subsequently consumed for completing the inquiry should be justified by giving reasons and the causes on account of which the time-limit was not adhered to. This would ensure that the inquiry proceedings which are initiated are completed expeditiously, are not prolonged and some checks and balances must be ensured. One

step by which the unnecessary delays can be curbed is recording of reasons for the delay or non-adherence to this time-limit by the Officer conducting the inquiry and making him accountable for not adhering to the time schedule. These reasons can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable". This is the only way by which the provisions contained in Regulation 20 can be effectively implemented in the interest of both parties, namely, the Revenue and the Customs House Agent."

12. From the records of the case, we find that there is definitely delay in adjudication and that for the export transactions occurred in 1998, the order of revocation of appellant's customs broker license has been passed on 29.09.2021. Revenue is unable to explain why there was such a long delay of 21 years in taking action against appellants, when the information about ineligible claim for drawback was received on 03.07.1998 by SIIB Customs and the export goods were seized on 06.07.1998. Though the first order-in-original in respect of such violations under Customs Act, was passed on 27.08.2006, the subsequent de novo order dated 11.01.2018 has been taken as the basis for initiating action against the appellants under CHALR/CBLR for issue of Show Cause Notice on 09.05.2018. The impugned order has been passed after conducting an enquiry with a delay of more than three years and four months from the date of issue of SCN. There are no reasons recorded in detail justifying the delay in passing the impugned order by the learned Principal Commissioner. The explanation offered by the department that the delay in show cause proceedings and passing the impugned order is due to COVID and unspecified administrative reasons, cannot be accepted as reasonable grounds in terms of the test laid down by the Hon'ble High Court of Bombay.

13. We further find from the perusal of records, that the 41 shipping bills in which the goods were attempted for export by claiming ineligible drawback seized on 06.07.2018, at the request of exporter-SOL were immediately allowed to be converted from drawback shipping bills into duty free shipping bills on 10.07.1998, and even the export goods in 41 shipping bills were allowed for export

provisionally on 16.07.1998 by the department. Thus, in effect no drawback was sanctioned by the department to the exporter on account of such wrong claim of the export goods. It also appears that the learned Principal Commissioner/Commissioner of Customs (General) as licensing authority for Customs broker under CHALR/CBLR never took any action in the past 21 years while periodically renewing the Customs Broker License of the appellants after every 5/10 years in terms of Regulation 12 of CHALR, 1984/Regulation 11 of CHALR, 2004/ Regulation 9 of CBLR, 2013/2018. It is also on record that the entire show cause proceedings vide SCN dated 09.05.2018 is based on the Order-in-Original dated 11.01.2018, as the same has been shown as relied upon document at para 15 of the said SCN. However, the appellants have claimed that in order to defend itself when they had tried to obtain copy of various statements recorded by SIIB Customs investigation under RTI application, the RTI Cell of the Customs General Commissionerate of Mumbai Customs Zone-I had replied as follows:

"With regard to the information sought by the above referred RTI, reply has been received from (Customs Brokers Section) CBS Section, Mumbai Customs Zone-I, NCH vide letter F. No. S/06-19/2021-22 CBS and is as under:

As per O-in-O No.CAO No.30/2017-18/CAC/CC(E)PS/ADJ dated 11.01.2018, case was made by SIIB and statements were recorded during the investigation. Action against the CB was initiated on receipt of above O-in-O (Offence report). No SCN or RUDs were forwarded. Therefore, CB Section does not have copies of any statement."

We are unable appreciate how the enquiry proceedings under CBLR/CHALR could have been conducted and the impugned order would have been passed by the learned Principal Commissioner by following the principles of natural justice, when the statements of persons involved in the case which were relied upon for proving the charges framed against the appellants were not even available in the Customs Broker section dealing with the case, albeit the requirement of providing a copy of the same to the appellants and giving an opportunity to them for defending themselves. Thus, we are of the considered opinion that the Principles of Natural Justice has not been followed in passing the impugned order and thus it cannot be sustained in law. In view of the above, we do not consider it necessary to go into the details of each of regulations alleged to have

been violated by the appellants, for our consideration and examination.

14. In view of the foregoing discussions, we do not find any merits in the impugned order dated 29.09.2021 passed by the learned Principal Commissioner of Customs (General), Mumbai in revoking the license of the appellants, as well as in imposition of penalty against them and for forfeiture of security deposit. Therefore, by setting aside the impugned order, we allow the appeal in favour of the appellants.

(Operative portion of the order pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha