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

% **Judgment reserved on: 01 December 2023**
Judgment pronounced on: 30 January 2024

\+ W.P. (C) 15808/2022

NAMAN GUPTA ..... Petitioner
Through: Mr. Prabhat Kumar, Mr. Karan Dang and Ms. Swadha Gupta, Advocates.

versus

COMMISSIONER OF CUSTOMS AIRPORT AND GENERAL ..... Respondent
Through: Mr. Ajit Kumar Kalia, Sr. Standing Counsel along with Mr. Abhinav Kalia, Advocate.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

1. This Writ Petition has been preferred by Custom House Agent (CHA) against the Order-in-Original dated 29.06.2022 passed by respondent, revoking the Custom Broker License of the petitioner, forfeiting the entire security deposit and imposing penalty of Rs. 50,000/-.

2. **BRIEF FACTS**

Briefly stated, petitioner was granted license to operate as a Custom Broker (CB), which was valid upto 19.12.2025. The instant matter pertains to the previous exports of ball-bearings, investigation of which, was initiated by SIB, ACC, Kolkata on the basis of four live

export consignments of unbranded ball-bearings on 24.09.2020 filed by M/s Gupta Vyapar (IEC CTGPG 6543A). These four consignments were highly over-valued for export to defraud to the exchequer by way of getting very high Input Tax Credit (ITC) Refund and other export related incentives. Thereafter, data pertaining to export of ball-bearings was analyzed for the period 01.01.2020 to 12.09.2020, wherein, it was found that a total of 35 consignments of similar/identical description had been exported, out of which, 23 consignments had been cleared by M/s Naman Gupta & Associates (hereinafter referred to as Custom Broker). The total ITC claimed by such exporters was Rs. 3.3 crores approximately, while total drawback claimed was to the tune of Rs. 36.62 lakhs. It was seen that petitioner was involved in the clearance of 23 shipping bills of ball-bearings filed by nine different exporters. Out of nine exporters, five were found to be non-existent. Two exporters i.e. M/s National Auto Parts and M/s Beam International were admitted to have been involved in the export unintentionally. Two other exporters M/s Theism Tradecom Private Limited and M/s Nitya Enterprises did not appear to record their statements. Statements of Md. Ishtiyaque Ahmad, Proprietor of M/s Beam International and Sh. Sanjit Ghosh, Proprietor of M/s National Auto Parts were recorded under Section 108 of the Customs Act, 1962. Statement of Authorized Representative of the petitioner was also recorded under Section 108 of the Customs Act, 1962. A purported offence report dated 11.08.2021 was forwarded by the Deputy Commissioner of Customs, Air Cargo Complex, NSCBI Airport, Kolkata, who initiated action against the petitioner for the violation of Regulation 10(d), 10 (m), 10 (n) & 10 (q) of the Customs

Broker Licensing Regulation, 2018 (CBLR, 2018). On the basis of such offence report and the relied upon documents forwarded by the Customs Authorities including the statements recorded under Section 108 of the Customs Act, 1962 by the prohibition order dated 13.10.2021, the Principal Commissioner of Customs, (Airport & ACC), Kolkata prohibited the petitioner from carrying out his duties as a Custom Broker within the West Bengal Commissionerate. The prohibition order was valid for a period of 30 days from the issuance thereof and lost its force by efflux of time. On 01.12.2021, respondent passed a purported order under Regulation 16 (1) of the regulations suspending the C.B. License of the petitioner with immediate effect and directed the petitioner to appear post-decisional hearing on 13.12.2021. After considering the oral and written statements made on behalf of the petitioner, by order dated 24.12.2021, respondent passed suspension order under Regulation 16 (2) of the said regulations. Respondent issued a Show Cause Notice dated 05.01.2022 under Regulation 17 (1) of the regulations, requiring the petitioner to show cause within 30 days from the date of the notice as to why he should not be held responsible for the alleged contravention of provisions of Regulation 10 (d), 10 (m), 10 (n) & 10 (q) and why his Custom Broker License should not be revoked and penalty be not imposed under Regulation 17 & 18 thereof. Petitioner submitted reply to the Show Cause Notice dated 05.01.2022. Petitioner through its Authorized Representative appeared before the Inquiry Officer, appointed by the respondent in the said Show Cause Notice. The Inquiry Officer submitted its report dated 04.04.2022, *inter alia*, holding the petitioner guilty of violating the provisions of

Regulation 10 (d), 10 (m), 10 (n) & 10 (q). Petitioner then submitted a detailed representation dated 09.04.2022 to the respondent controverting each and every finding made by the Inquiry Officer in its report dated 04.04.2022. He was granted personal hearing by the respondent. Respondent agreed with the findings of the Inquiry Officer that CB has failed to comply with the provisions of Regulation 10 (d), 10 (m), 10 (n) & 10 (q) of the CBLR, 2018 and accordingly passed the following order dated 29.06.2022:-

(i) I hereby revoke the CB License No. R-36/DEL/CUS/2016 (PAN:AURPG7276R) valid upto 19.12.2025 of M/s Naman Gupta & Associates;

(ii) I direct the CB to immediately surrender the Original CB License No. R-36/DEL/CUS/2016 (PAN: AURPG7276R) valid upto 19.12.2025 along with all 'F/G/H' Cards issued there under;

(iii) I order for forfeiture of the whole amount of security deposit furnished by them;

(iv) I impose a penalty of Rs. 50,000/- on M/s Naman Gupta & Associates.

3. **GROUNDS OF CHALLENGE**

The impugned order dated 29.06.2022 passed by the Commissioner of Customs has been assailed, inter alia, on the ground that the same is patently illegal and ex-facie violative of fundamental principles of natural justice, inasmuch as, it ignored the fact that petitioner was not granted the right to cross-examination of the witnesses whose statements were relied upon by the Inquiry Officer in coming to the finding of guilt of the petitioner. No reason has been given to justify the denial of right of cross examination to the petitioner as envisaged under Regulation 17 (4). The action of the Inquiry Officer denying the right of the petitioner to cross examine the said witnesses, has prevented the petitioner to raise credible defence against the

purported allegations made in the Show Cause Notice, thereby causing prejudice to the petitioner, and as such, order dated 29.06.2022, justifying such denial of the right of cross-examination, is illegal, mala fide and violative of the fundamental principles of natural justice offending Article 14 of the Constitution. The impugned order has also been challenged on the ground that the same was passed beyond the period of nine months as stipulated in Circular No. 9/2010 Customs dated April 8, 2010 for completion of revocation proceedings under the regulations. Show Cause Notice was also issued beyond the period of 90 days from the date of receipt of the offence report and therefore the entire revocation proceedings initiated under Regulation 17 stood vitiated and on that score, the impugned order is liable to be set aside/quashed. Even though the respondent relied upon the statements made by the exporters, it did not consider the letters of authorization and payments made by them through banking mode of transfer. The respondent completely disregarded the letters and emails written by the petitioner to the exporters requiring them to comply with the provisions of the Customs Act. Respondent also did not take into consideration that the purported Inquiry made by the jurisdictional officials of the GST department were carried out after six months from the date of the report and there is no finding that the exporters were not in existence on the dates of export. It is submitted that the genuineness of the Importer-Exporter Code Number, GSTIN, Permanent Account Number and Authorized Dealer Code were self-verified by the Indian Customs EDI System at the time of uploading of shipping bills in the system and if any anomaly is found in the details of such particulars of the exporter,

the shipping bill cannot be successfully uploaded in the system. The successful uploading of the shipping bills of the exporters are the conclusive proof of the facts that the Importer-Exporter Code Number, GSTIN, Permanent Account Number and Authorized Dealer Code of the exporters were genuine and they were very much in existence on the date of the export. It has also been submitted that the KYC documents submitted by the exporters are public documents issued by the statutory authorities functioning under the Government of India. Such documents were verified from the portal of the authorities and petitioner had no reasons to disbelieve such documents as there is a statutory presumption of its genuineness under Section 79 of the Indian Evidence Act, 1872. It is submitted that the impugned order is an outcome of the purported exercise to save the proper officer of customs, inasmuch as, the proper officer of customs assessed the shipping bills and issued **"Let Export Orders"** without raising any objection against the value of the exported goods in any manner whatsoever and the customs authorities are hell-bent to penalize the petitioner for the fault of the proper officer of customs, despite the fact that as a Custom Broker, petitioner has no role to assess the value of the goods in any manner whatsoever. It is thus argued that the impugned order is an unreasonable restriction on the constitutional right of the petitioner granted under Article 19 (1) (g) of the Constitution.

4. The submission of the learned counsel for the respondent is that the Writ Petition is not maintainable as petitioner has not exhausted the remedy of appeal before learned CESTAT available under Regulation 19 of the CBLR 2018, and therefore, the petition is liable to be

dismissed on this ground alone. It is further submitted that Custom Broker is a link between the revenue authorities and the exporters/importers with an object of facilitating clearances and therefore he is expected to safeguard the interest of both the exporters/importers and the revenue authorities. It is argued that the Custom Broker has been involved in violation of Regulation 10 (d), 10 (m), 10 (n) & 10 (q) laid down in CBLR, 2018. He failed to verify the genuineness of Importer/Exporter Code Number, GSTIN, identity and functioning of each of the exporters who are found to be non-existent or not related to export/import business. The shipping bills were filed without verifying the identity of the exporters or ascertaining the veracity of the declarations made in the shipping bills. This was a necessary precaution that the Custom Broker ought to have taken before the documents were filed. This default shows the lack of due diligence and serious misconduct on the part of Custom Broker. Had the CB conducted proper verification as prescribed in the regulation, it could have come to know before hand that "Exporters were not Genuine". It is submitted that merely collecting the KYC documents cannot be treated as fulfillment of the obligations mandated under CBLR, 2018 as few exporters were found to be non-existent during investigation. Reliance has been placed on the statements of two exporters recorded under Section 108 of the Customs Act in as much as one of the exporters out of the two who appeared during the investigation, clearly stated that the export was done without his knowledge, while the other admitted that he was lured into the fraudulent export in lieu of monetary benefits.

5. With regard to the limitation, it is submitted that the documents required for initiating action against the petitioner were received by respondent on 18.11.2021, while the impugned order was passed on 29.06.2022 and thus the final order was passed within the stipulated time-line of nine months. It is thus submitted that the impugned Order-in-Original is in accordance with the regulations laid down under CBLR, 2018 and is within the ambit of reasonable restrictions and not violative of Article 14 of the Constitution.

ANALYSIS & DECISION

6. Commissioner of Customs vide order dated 29.06.2022, revoked the CB License of M/s Naman Gupta & Associates. Regulation 19 of CBLR, 2018 provides that the Custom Broker, aggrieved by any such order passed by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, under Regulation 16 or 17 may prefer an appeal under Section 129A of the Customs Act,1962 to the Customs Central Excise & Service Tax Appellate Tribunal. Admittedly, in this case, instead of filing an appeal, petitioner has preferred to file writ petition before this court. Thus, the foremost question for consideration is whether the writ petition is maintainable, as an alternative remedy of appeal was available to the petitioner under Section 129 A of the Customs Act, 1962 before CESTAT.

7. In the case of **Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer-cum-Assessing Authority and Others 2023 SCC OnLine SC 95**, the question for determination before the Apex Court was whether the High Court was justified in declining interference on the ground of availability of an alternative remedy of appeal to the appellant under

Section 33 of the VAT Act, which it had not pursued. While extracting the scope of writ powers under Article 226 of the Constitution, maintainability and entertainability of the writ petition, Court observed as under:-

> *"4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of.*

The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh v. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India v. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."

8. As may be seen in the present case, the controversy is purely legal, not involving the disputed question of facts. The petition can be decided only on the question of law and therefore despite an alternative statutory remedy being available, the present writ petition is maintainable.

9. Regulation 17 of CBLR, 2018 prescribes the procedure for revoking the license or imposing penalty. The time limit (s) prescribed

under the CBLR, 2018 is mandatory and not directory and this Court in a plethora of judgment has also repeatedly held so.

10. It is necessary to set forth the relevant regulations applicable to the present case. Customs Broker Licensing Regulation, 2018 was notified on 14.05.2018. The relevant extracts of regulations 17 (1), 17 (5) & 17 (7) are set forth below:-

17. Procedure for revoking license or imposing penalty:-

"(1) The Principal Commissioner or Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the license or impose penalty requiring the said Customs Broker 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 Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs.

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

(7) The Principal Commissioner or Commissioner of Customs shall, after considering the report of the inquiry and the representation thereon, if any, made by the Customs Broker, pass such orders as he deems fit either revoking the suspension of the license or revoking the license of the Customs Broker 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) : Provided that no order for revoking the license shall be passed unless an opportunity is given to the Customs Broker to be heard in person by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be."

11. In terms of regulations 17 (1), a show cause notice is to be issued within 90 days from the date of **receipt** of the Offence report, while regulation 17 (5) prescribes a time period of 90 days from the date of issue of Show Cause Notice for submission of an Inquiry Report. Regulation 17 (7) prescribes that within 90 days from the date of the submission of the Inquiry Report and after consideration thereof, the Principal Commissioner/Commissioner shall pass orders either revoking the suspension of license or revocation of license of the Customs Broker. Although, the said regulation does not prescribe an overall time limit for completing the inquiry, Circular No. 09/2010/Customs dated 08.04.2010 issued by the Central Board of Excise and Customs, Department of the Revenue, Ministry of Finance, Govt. of India, *inter alia* prescribed time limits for procedures governing the suspension/revocation of CB licenses. Para 7.1 of the said circular, *inter alia* states that there shall be an overall time limit of nine months from the date of receipt of the offence report for the passing of a final order as follows:

> *"7.1. The present procedure prescribed for completion of regular suspension proceedings takes a long time since it involves inquiry proceedings, and there is no time limit prescribed for completion of such proceedings. Hence, it has been decided by the Board to prescribe an overall time limit of nine months from the date of receipt of offence report, by prescribing time limits at various stages of issue of Show Cause Notice, submission of inquiry report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs recording his findings on the issue of suspension of CHA license, and for passing of an order by the Commissioner of Customs. Suitable changes have been made in the present time limit of forty five days for reply by CHA to the notice of suspension, sixty days time for representation against the report of AC/DC on the grounds not accepted by CHA, by reducing the time to thirty days in both the cases under the Regulations."*

12. On a perusal of the record, it is evident that the offence report against the Customs Broker M/s Naman Gupta & Associates was issued on 11.08.2021 (Annexure P-5). Once an offence be put is received, the time period as provided in the CBLR commences. The Order-in-Original dated 29.06.2022 takes note that copy of the offence report dated 11.08.2021 against the subject CB was received from the Special Investigation Branch on 18.11.2021 and Show Cause Notice was issued on 05.01.2022. Inquiry was completed on 01.04.2022 and was forwarded to the Commissioner of Customs vide letter dated 04.04.2022 (Annexure P-11).

FINDINGS OF COMMISSIONER (AIRPORT & GENERAL) WITH REGARD TO REGULATION 10 (d), 10 (m), 10 (n) & 10 (q)

13. The Commissioner of Customs in his order dated 29.06.2022, returned the following finding:-

> *"26. Now I proceed to discuss the violations of CBLR, 2018 by the Customs Broker firm:*
> ***Regulation 10(d)*** *-advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner ,of Customs, as the case may be;*
> *In this regard, I find that during investigation conducted in the matter, six out of nine exporters were found to be non-existent. The two exporters who appeared during investigation clearly stated that they had never met the CHA. Further, the exporters also denied having made any payment to the Customs Broker though the CB has stated that they have received payment from the exporters. In his statement dated 04.03.2021, Shri Ravi Ranjan Prasad, Power of Attorney holder of the CB stated that the exporters had contacted him through their forwarders and middleman. Hence the contention of the CB that they had*

advised the exporters to comply with the provisions of Customs Act, 1962 through letters and e-mails does not appear credible. Further, no such letter has been produced before this office by the CB. Therefore, I hold that the CB has failed to comply with the provisions of Regulation 10(d) of CBLR, 2018.

***Regulation 10 (m)** – discharge his duties as a Customs Broker with utmost speed and efficiency and without any delay;*

The CB had taken up the responsibility of clearance of goods pertaining to exporters who were found to be non-existent or those who were in no way involved in the export/import business. Further, as admitted by the exporters who appeared during investigation, the CB had never met their clients/exporters. These facts are sufficient to prove that the CB had not performed his duties efficiently and thereby, violated provisions of Regulation 10(m) of CBLR, 2018.

***Regulation 10 (n)** verify correctness of Importer Exporter Code (IEC) number. Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information.*

*The CB in his written submission as well as during the course of Personal Hearing have stated that they had verified the genuineness and correctness of IEC and GSTIN of the exporters and verified their existence at the declared places of business, firstly, by visiting the web portals of the DGFT and GST respectively and secondly, by personally visiting the declared place of business of each of the exporters thereby discharging their obligations under Regulation 10 (n) of the said Regulations, 2018. However, ongoing through the case records, I find that many of the exporters were found to be non -existent during investigation and few of them were nowhere related to export business. If an exporter procures IEC, GSTIN, PAN , Authorised Dealer Code fraudulently, then Shipping Bills can be filed even if the exporter is non - existent. I find that the two exporters who appeared for tendering statement under Section 108 of the Customs Act, 1962 stated that they were not involved in the export of the subject goods. Shri Sanjit Ghosh, so called proprietor of M/s National Auto Parts Ltd. clearly mentioned in his statement that **"He does not operate the firm. However, the address given was his home address and no such***

firm was existing at that address". *The CB in his defence in an attempt to dis-credit the statement of Shri Sanjit Ghosh, has sought refuge in various technicalities like as to why did not Shri Ghosh get his IEC registered if he had no role in issuance of IEC. Similarly, if Sanjit Ghosh was threatened, then why did he not file complaint. These arguments may be valid but are not the subject matter of these proceedings. CB cannot expect an exoneration of failure to carry out proper identity check of the exporter by resorting to fault finding in the conduct of the exporter. Hence it emerges that the verification as mandated under regulation 10(n) of the CBLR, 2018 was not done properly. Had the CB conducted proper verification as prescribed in the Regulation, they would have come to know beforehand that the exporters were not genuine. Thus, I find that the CB has failed to fulfill his obligations under Regulation 10(n) of the CBLR , 2018.*

Regulation 10(q) *- co-operate with the Customs authorities and shall join investigations promptly in the event of an inquiry against them or their employees.*

In his statement dated 04.03.2021, Shri Ravi Ranjan Prasad , Power of Attorney holder of the CB stated that he and his employees had visited declared place of business of exporters and found them existent. However, most of the exporters have been found to be non-existent and the two exporters who appeared during investigation denied having met the CB. Hence, it is apparent that the CB tendered false statement u/s 108 of Customs Act, 1962 and did not cooperate in the investigation . Therefore, I find that the CB has violated the provisions of Regulation IO(q) of CBLR, 2018."

14. Findings are drawn mainly relying on the statements of two exporters and reports of jurisdictional GST authorities that rest of the exporters were non-existent. In his statement recorded under Section 108 of the Customs Act, 1962 Md. Ishtiyaque Ahmad, Proprietor of M/s Beam International, *inter alia*, stated:-

i) The export made vide Shipping Bill No. 4042026 dated 24.07.2020 was his first and last export;

ii) One person of name Shri Santosh came to him with the proposal to export goods such as ball bearings and leather goods by

using his IEC, GSTIN, Current Account and other necessary documents;
iii) He invested around Rs. 25 lakhs for this purpose and was told by Shri Santosh that he would manage all the export related process and he would only have to sign some export related documents:
iv) He was promised that the money that would be received in his current account, in the form of duty drawback and Input Tax Credit (ITC), would be divided between them on equal basis;
v) He neither purchased nor saw the concerned export goods under Shipping Bill No. 4042026 dated 24.07.2020;
vi) He never met any of the representatives of the concerned CHA;
vii) He had not made any payments to the CHA or the Freight Forwarder;
viii) He admitted his mistake and stated that he was willing to return the drawback and IGST refund that he received in his account.

15. Similarly, Sanjit Ghosh, Proprietor of M/s National Auto Parts in his statement recorded under Section 108 of the Customs Act, 1962, stated as under:-

i) He did not have any idea about the issuance of his IEC;
ii) He works as an employee in a sweet shop;
iii) One person named as LakhanMondal whom he met in a birthday party of his friend took all his KYC details such as Aadhar card, PAN card, Voter card in the guise of making arrangements for him to go abroad for work;
iv) He does not operate the firm M/s National Auto Parts Ltd. However, the address given was his home address and no such firm was existing at that address;
v) He does not know any Customs Broker;
vi) He did not meet any representative of Customs Broker M/s Naman Gupta & Associates in order to export consignment of ball bearing covered under Shipping Bill No. 3781573 dated 13.07.2020;
vii) He did not file any shipping bill.
viii) In October 2020, initially an amount of Rs. 1,18,000 and next day an amount of Rs. 13,30,000 was deposited in his account (these amounts were credited as Drawback and IGST refund respectively);

ix) He was threatened and coerced by one Shri Sunil Kumar Agrawal to transfer the money in the account of Shri Sunil Kumar Agrawal;
x) He is willing to return the rest of money (Rs. 1,33,000) to the exchequer.

16. The Order-in-Original mainly relies upon the statements of the above noted two exporters. The right of cross-examination has been recognized under Regulation 17 (4) of the CBLR Regulations, 2018, which requires Inquiry Officer to give reasons if he intends to deny such right to the Customs Broker. Recognizing the right of cross-examination, the Division Bench of this Court in the case of **Flevel International Vs. Commissioner of Central Excise 2015 SCC OnLine Delhi 12173: (2016) 332 ELT 416** held as under:-

> *"42. It is settled law that the denial of an opportunity of cross-examination of a witness whose statements have been relied upon in the adjudication order would vitiate the order of adjudication. In Basudev Garg v. Commissioner of Customs 2013 (294) ELT 353 (Del), this Court referred to Section 9D of the CE Act and noted that even while upholding its constitutional validity in J & K Cigarettes Ltd. v. Collector of Central Excise (2011) 22 STR 225 (Del), a Division Bench of this Court had observed that the circumstances under which the right of cross-examination can be taken away would have to be 'exceptional'. This would include circumstances where the person who had given the statement was dead or cannot be found or is incapable of giving evidence or is kept out of the way by adverse party or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances, the Court considers unreasonable. It was held by the Court in Basudev Garg (supra) that "it is clear that unless such circumstances exist the noticee would have a right to cross-examine the person whose statements are being relied upon even in quasi judicial proceedings."*

17. In yet another case, the Division Bench of this Court in **HIM Logistics Pvt. Ltd. Vs. The Principal Commissioner of Customs, 2016 SCC On Line Del 1236,** observed as under:-

> *"16. In the present case, it is an admitted fact that the Respondent Department is placing considerable reliance on the statements of Mr. Shyam Lal and Ms. Preeti, the partners of the importer, in support of the case made out in the SCN. The impugned order of the AA does not indicate that any prejudice would be caused to the Department by providing the Petitioner the right of cross-examination. On the other hand the denial of such right would prejudice the Petitioner since the said statements are adverse to the Petitioner. In the circumstances, the denial of the Petitioner's right of cross-examination is held contrary to the law explained in Basudev Garg (supra)."*

18. In the present case, the petitioner questioned the integrity of the statements of the two exporters recorded under Section 108 of the Customs Act, 1962. Such statements were required to be tested through cross examination. Despite specific request by the petitioner to cross examine such witnesses, no attempt was made to secure their presence in the adjudication proceedings. As per regulation 17 (4) of CBLR, 2018, if the Deputy Commissioner of Customs or Assistant Commissioner of Customs declines the permission to examine any person on the ground that his evidence is not relevant or material, he needs to record the reasons in writing for doing so but the Inquiry Officer assigned no reason what so ever. The Commissioner of Customs ignored the error on the part of the Inquiry Officer to grant an opportunity of cross examination of the exporters and rather observed that the object behind cross examination of the witnesses appeared to be to merely prolong/discredit the investigation and the denial of cross examination by the Inquiry Officer has not impacted the objectivity of

the Inquiry. Such an observation, in our view is based on incorrect understanding of regulation 17 (4) of CBLR, 2018. Provisions of Regulation 17 (4) were given a complete go-by. Not allowing the Customs broker an opportunity to cross examine the persons examined in support of the grounds forming the basis of these proceedings has resulted in serious prejudice to the petitioner.

19. As per reports of jurisdictional GST authorities, enquiries were conducted at the addresses of the exporters in February, 2021 i.e. more than six months from the date of export of the goods of the respective exporters. The Commissioner of Customs failed to appreciate that there was no specific finding of the jurisdictional GST authorities that such exporters were not in existence on the date of export. Therefore, it cannot be concluded that the exporters who engaged the petitioner to handle the clearance of the goods, were not in existence on the date of export. Moreover, once the IEC particulars as mentioned are verified from the system as maintained by the Customs, there is no requirement statutorily placed upon the CHA to undertake an independent exercise in order to verify the details as furnished by the exporter. Reliance in this regard may be placed upon the following observations rendered by the Division Bench of this Court in **Kunal Travels (Cargo) vs Commissioner of Customs (Import & General) New Customs House, IGI Airport, New Delhi [2017 SCC OnLine Del 7683]**:-

> ***"12.*** *Clause (e) of the aforesaid Regulation requires exercise of due diligence by the CHA regarding such information which he may give to his client with reference to any work related to clearance of cargo. Clause (l) requires that all documents submitted, such as bills of entry and shipping bills delivered etc. reflect the name of the importer/exporter and the name of the CHA*

prominently at the top of such documents. The aforesaid clauses do not obligate the CHA to look into such information which may be made available to it from the exporter/importer. The CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect to clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area. What is noteworthy is that the IE Code of the exporter M/s H.M. Impex was mentioned in the shipping bills, this itself reflects that before the grant of said IE Code, the background check of the said importer/exporter had been undertaken by the customs authorities, therefore, there was no doubt about the identity of the said exporter. It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE Code given to it by a client for each import/export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e. KYC etc. would have been done by the customs authorities. There is nothing on record to show that the appellant had knowledge that the goods mentioned in the shipping bills did not reflect the truth of the consignment sought to be exported. In the absence of such knowledge, there cannot be any mens rea attributed to the appellant or its proprietor. Whatever may be the value of the goods, in the present case, simply because upon inspection of the goods they did not corroborate with what was declared in the shipping bills, cannot be deemed as mis-declaration by the CHA because the said document was filed on the basis of information provided to it by M/s H.M. Impex, which had already been granted an IE Code by the DGFT. The grant of the IE Code presupposes a verification of facts etc. made in such application with respect to the concern or entity. If the grant of such IE Code to a non-existent entity at the address WZ-156, Madipur, New Delhi - 63 is in doubt, then for such erroneous grant of the IE Code, the appellant cannot be faulted. The IE Code is the proof of locus standi of the exporter. The CHA is not expected to do a background check of the exporter/client who approaches it for facilitation services in export and imports. Regulation 13(e) of the CHALR 2004 requires the CHA to:"exercise due diligence to ascertain the correctness of any

information which he imparts to a client with reference to any work related to clearance of cargo or baggage" (emphasis supplied). The CHAs due diligence is for information that he may give to its client and not necessarily to do a background check of either the client or of the consignment. Documents prepared or filed by a CHA are on the basis of instructions/documents received from its client/importer/exporter. Furnishing of wrong or incorrect information cannot be attributed to the CHA if it was innocently filed in the belief and faith that its client has furnished correct information and veritable documents. The mis-declaration would be attributable to the client if wrong information were deliberately supplied to the CHA. Hence there could be no guilt, wrong, fault or penalty on the appellant apropos the contents of the shipping bills. Apropos any doubt about the issuance of the IE Code to M/s H.S. Impex, it was for the respondents to take appropriate action. Furthermore, the inquiry report revealed that there was no delay in processing the documents by the appellant under Regulation 13(n).

20. It is thus evident from the legal position as enunciated in **Kunal Travels** (*supra*), Customs Broker is entitled to proceed on the basis that IEC has come to be generated in favour of the exporter after appropriate background check having been conducted by the customs authorities. The further details that may have been captured and form part of IEC Registration of an importer are aspects which have to be verified by the customs authorities themselves. Moreover, it is also not the case of the De partment that IEC, GSTIN, PAN & Authorized Dealer Code of the exporters were not genuine. In the aforesaid backdrop the Court in **Kunal Travels** (*supra*) held that the obligation of the CHA under Section 13 (e) of the CHALR, 2004 cannot be stretched to it being obliged to undertake a further background check of the client. As such, as a Customs Broker, the petitioner cannot be held

liable because exporters were not traceable, after the issuance of 'Let Export Orders' and export of the goods out of the country.

21. In our considered opinion, the Commissioner of Customs erred in accepting the findings of the Inquiry Officer regards the failure of Customs Broker to comply with the provisions of Regulation 10(d), 10 (m), 10 (n) & 10 (q) of the CBLR, 2018.

22. The Writ Petition shall stand allowed. The impugned order dated 29.06.2022, insofar as, it revokes the CB License of the petitioner and levies penalty upon the petitioner shall stand quashed and set aside.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

JANUARY 30 , 2024
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