

Future Express vs.union of India and Ors.

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SooperKanoon Citation : sooperkanoon.com/1223456

Court : Delhi

Decided On : May-27-2019

Appellant : Future Express

Respondent : Union of India and Ors.

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment delivered on:

27. 05.2019 + W.P.(C) 11360/2017 FUTURE EXPRESS Versus UNION OF INDIA AND ORS.

... Petitioner

.....

... RESPONDENTS

Advocates who appeared in this case: For the

... Petitioner

For the

... RESPONDENTS

: Mr Giriraj Subramaniam and Mr Simarpal Singh Sawhney. : Mr Harpreet Singh, Senior Standing Counsel with Ms Suhani Mathur for UOI. CORAM HONBLE MR JUSTICE VIBHU BAKHRU VIBHU BAKHRU, J JUDGMENT1 The petitioner has filed the present petition impugning an order dated 15.09.2017 (hereafter the

impugned order), whereby respondent no.3 (Chief Commissioner of Customs) has rejected the petitioners appeal against an order dated 27.01.2017 passed by respondent no.2 (Commissioner of Customs (General)). By the said order, respondent no.2 had revoked the Authorized Courier License (License No.DEL/POL/COUR/12/2014) granted to the petitioner. In addition, respondent no.2 had also directed forfeiture of the security amount of 10,00,000/- and further imposed a penalty of 50,000/- under Regulation 14 of the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010. W.P.(C) 11360/2017 Page 1 of 19 2. The petitioner is a sole proprietorship concern of Sh. Surender Kumar Sharma. His registration as an Authorized Courier was revoked on the ground that he did not qualify to be an Authorized Courier within the meaning of Regulation 3(1)(b) of the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 (hereafter the 2010 Regulations) and Regulation 3(a) of the Courier Imports and Exports (Clearance) Regulations, 1998 (hereafter the 1998 Regulations).

3. The principal controversy involved in the present petition is whether the petitioner falls within the definition of an Authorized Courier under the 1998 Regulations and the 2010 Regulations and whether the petitioner has complied with his obligations under those Regulations. The principal allegation against the petitioner is that he is not performing functions of a courier but is merely acting as a Custom Clearing Agent. The petitioner disputes the same and states that all non- core functions relating to pick-up or local delivery of export/import courier packages/ shipments and housekeeping activities are not necessarily required to be performed by an Authorized Courier and the same can be outsourced. He claims that outsourcing of such activities does not render the petitioner ineligible for being considered as an Authorized Courier.

4. The petitioner is engaged in the business of acting as a courier since the year 2014. The petitioner claims that he enjoys a good reputation in the market. The petitioner applied for and was granted license as an Authorized Courier under the 2010 Regulations and 1998 W.P.(C) 11360/2017 Page 2 of 19 Regulations. The said license dated 05.11.2014 was valid for a period of two years and expired on 30.09.2016.

5. The petitioner claims that he has vast experience and expertise and has created an infrastructure by entering into Memoranda of Understanding (MoUs) with various parties overseas.

6. The petitioner states that on 01.05.2015, he submitted a letter dated 30.04.2015 seeking permission under Regulation 13(j) of the 1998 Regulations for outsourcing various services. According to the petitioner, the same was necessary to complete the process of door to door delivery of packages / shipments.

7. The petitioner states that thereafter, it entered into a MoU dated 14.05.2015 with M/s Budget Courier Private Limited (hereafter Budget) for the purposes of augmentation of his business. The petitioner submitted a copy of the said MoU to respondent no.2 on 14.01.2016 as an addendum to the application dated 30.04.2015 under Regulation 13(j) of the 1998 Regulations, which was filed by the petitioner for seeking permission to outsource non-core operations. Subsequently, on 18.02.2016, the petitioner entered into a fresh MoU with Budget in terms of which Budget took over the business of the petitioner. This was also communicated to respondent No.2 under cover of a letter dated 18.02.2016.

8. Subsequently, an audit/inspection team was deployed to conduct an audit/inspection of the records of the petitioner. The said team reported that it appeared that the petitioner was doing work only of W.P.(C) 11360/2017 Page 3 of 19 custom clearance, and most of the other operations as well as delivery system were controlled by Budget. On examination of the said report, it appeared that the petitioner was not fulfilling the requisites of an Authorized Courier as defined under 1998 Regulations or 2010 Regulations.

9. In view of the above, an inquiry officer was appointed to inquire into the grounds for rejection of the petitioners license as an Authorized Courier.

10. Respondent no.2 also issued a show cause notice cum suspension order dated 18.02.2016 calling upon the petitioner to show cause as to why his courier license not be cancelled. By the same order, the petitioners courier license was also suspended. The petitioner states that the said Show cause notice cum suspension order was received on 22.02.2016, as it was dispatched on

20.02.2016.

11. On receipt of the aforesaid Show cause notice, the petitioner filed a representation dated 02.03.2016 before respondent no.2. The petitioner was afforded a personal hearing on 14.03.2016. Thereafter, the petitioner filed a writ petition being W.P.(C) 3485/2016 captioned M/s. Future Express and Anr. V. Union of India and Ors. challenging the Show cause notice cum suspension order.

12. While proceedings were pending before this Court, the Inquiry Officer appointed by the respondents concluded the inquiry and passed an order dated 17.05.2016 concluding that the petitioner does not fulfill W.P.(C) 11360/2017 Page 4 of 19 the attributes on an Authorized Courier. The said report was communicated to the petitioner on 14.06.2016.

13. Respondent no.2 also concluded the proceedings initiated pursuant to the Show cause notice and passed the order dated 27.01.2017 revoking the petitioners license as an Authorized Courier; forfeiting the security deposit of 10,00,000/- ; and imposing a penalty of 50,000/-.

14. In view of the above, the writ petition preferred by the petitioner (W.P.(C) 3485/2017) was rendered infructuous and was, accordingly, disposed of by an order dated 23.08.2017.

15. The petitioner preferred an appeal against the order dated 27.01.2017 before respondent no.3, which was rejected by an order dated 15.09.2017 (the impugned order). The said order is challenged in the present petition. Submissions 16. Mr Giriraj Subramaniam, learned counsel appearing for the petitioner submitted that the order dated 27.01.2017 and the impugned order had proceeded on an erroneous premise that the Authorized Courier was required to perform all functions by itself and could not outsource any of its activities. He submitted that the said assumption was wholly erroneous as that would mean that apart from three large courier agencies, no other courier agency could be recognized as courier. He submitted that it is common in this trade, for various courier W.P.(C) 11360/2017 Page 5 of 19 agencies to collaborate with one another and outsource various activities in the supply chain. He submitted that insofar as the Custom

Authorities are concerned, the core activity to perform was custom clearance and there was no dispute that the petitioner was performing the said activity. Other activities pertaining to delivery and transportation of parcels/shipments prior to entering into the custom area and after custom clearance, were not core activities and could be outsourced by any courier agency. He earnestly contended that it was not necessary for the petitioner to carry out the door to door delivery services, and outsourcing such activity to Budget did not disqualify the petitioner from being considered as an Authorized Courier either under the 1998 Regulations or 2010 Regulations.

17. He referred to Regulation 13 of the 1998 Regulations and contended that Clause (j) of the said Regulations prohibited an Authorized Courier to sub-contract or outsource the functions required to be carried out by an Authorized Courier without the permission of the Commissioner of Customs. He submitted that in view of the aforesaid Clause, the petitioner had applied for permission to outsource part of the functions to Budget. However, it received no response to the said application. He contended that the same was not necessary as the respondents had by a subsequent Circular (Circular No.59 of 2016 Customs dated 02.12.2016), recognized that no permission was required to outsource non-core activities. He contended that in terms of the said notification, the petitioner was only required to submit prior W.P.(C) 11360/2017 Page 6 of 19 intimation for outsourcing the non-core functions of pick-up, local delivery and housekeeping activities.

18. He submitted that in view of the aforesaid notification, the order rejecting the petitioners license and the impugned order, could not be sustained. Reasons and Discussion 19. The Central Board of Excise and Custom (CBEC) has framed the 1998 Regulations for assessment and clearance of goods by Authorized Couriers. Subsequently, CBEC also framed the 2010 Regulations for enabling electronic filing and processing of customs declaration with regard to import and export consignments carried by courier companies. Consequential changes were also made in the 1998 Regulations, which regulates the procedure for clearance of courier consignments in a manual mode.

20. As is apparent from the above, the principal question to be addressed is whether the petitioner is entitled to be considered as an Authorized Courier within the meaning of the aforesaid Regulations. Regulation 3(a) of the 1998 Regulations defines Authorized Courier in the following terms:-

"3. Definitions.-In these regulations, unless the context otherwise requires - (a) Authorised Courier in relation to import or export goods means a person engaged in the international transportation of the goods on express door to door W.P.(C) 11360/2017 Page 7 of 19 delivery basis and is registered in this behalf by a Commissioner of Customs; 21. Regulation 3(1)(b) of 2010 Regulations defines Authorized Courier as under:-

"3(1)(b) Authorised Courier, in relation to imported or export goods, means a person engaged the international transportation of time-sensitive documents or goods on door-to-door delivery basis and is registered in this behalf by a Commissioner of Customs in charge of a Customs airport; in 22. It is clear from the aforesaid definitions that an Authorized Courier is a person who is engaged in transportation of documents or goods on a door to door delivery basis. Indisputably, the main function of a courier agency is to collect and deliver documents / goods couriered through it.

23. Regulation 13 of the 1998 Regulations sets out the obligations of an Authorized Courier. The said Regulation is set out below:-

"13. Obligations of Authorised Courier. An Authorised Courier shall- a) obtain an authorisation, from each of the consignees of the import goods for whom such courier has imported such goods or consigners of such export goods which such courier proposes to export, to the effect that the Authorised Courier may act as agent of such consignee or consigner, as the case may be for clearance of such import or export goods by the proper officer; , provided that for import consignments having a declared value of ten thousand rupees or less, the authorization W.P.(C) 11360/2017 Page 8 of 19 may be obtained at the time of delivery of the consignments to consignee (b) advise his client to comply with the provisions of the Customs Act 1962 (52 of 1962) and rules and regulations made thereunder and in case of non-compliance thereof shall bring the matter to the

notice of the Assistant Commissioner of Customs or Deputy Commissioner or Customs. (c) exercise due diligence to ascertain the correctness and completeness of any information which he submits to the proper officer with reference to any work related to the clearance of import goods or of export goods; (d) not withhold information communicated to him by an officer of customs, relating to assessment and clearance of import goods as well as inspection, examination and Clearance of export goods, from a client who is entitled to such information; (e) not withhold any information relating to assessment and clearance of imported goods or of export goods, from the Assessing Officer; (f) not attempt to influence the conduct of any officer of Customs in any matter pending before such officer or his subordinates by the use of threat, false accusation, duress or offer of any special inducement or promise of advantage or by the bestowing of any gift or favour or other thing or value; (g) maintain records and accounts in such form and manner as may be directed from time to time by an Assistant Commissioner of Customs or Deputy Commissioner or Customs and submit them for inspection to the Assistant Commissioner of Customs or an officer authorised by him, wherever required. W.P.(C) 11360/2017 Page 9 of 19 (h) file declarations, for clearance of imported or export goods, through a person who has passed the examination referred to in regulation 8 or regulation 19 of the Customs House Agents Licensing Regulations, 2004 and who are duly authorised under section 146 of the Act: Provided that a transition period of six months from the date of publication of these regulations shall be allowed to the Authorised Courier for fulfillment of the obligation. (i) verify the antecedent, correctness of Importer Exporter Code (IEC) Number, identity of his client and the functioning of his client in the declared address by using reliable, independent, authentic documents, data or information; (j) not sub-contract or outsource functions permitted or required to be carried out by him in terms of these regulations to any other person, without the written permission of the Commissioner of Customs. 24. Regulation 12 of the 2010 Regulations also provides for the obligations of Authorized Courier in more or less similar terms as Regulation 13 of the 1998 Regulations. Regulation 12 of the 2010 Regulations is set out below:-

"12. Obligations of Authorised Courier. (1) An Authorised Courier shall (i) obtain an authorisation, from each of the consignees or consignors of the imported goods for

whom or from whom such Courier has imported such goods; or consignees or consignors of such export goods which such Courier proposes to export, to the effect that the Authorised Courier may act as agent of such W.P.(C) 11360/2017 Page 10 of 19 consignee or consignor, as the case may be, for clearance of such imported or export goods by the proper officer; Provided that for import of documents, gifts and samples, and low value dutiable consignments for which declaration have been filed in, Form-B or the Courier Bill of Entry-XI (CBE-XI), Form C or the Courier Bill of Entry-XII (CBE-XII) or Form-D or Courier Bill of Entry-XIII (CBE-XIII) respectively, the authorization may be obtained at the time of delivery of the consignment to consignee subject to the production of consignors authorisation at pre-clearance stage and retention of authorisation obtained from the consignee for a period of one year or date of Audit by Customs, whichever is earlier. (ii) file electronic declarations, for clearance of imported or export goods, through a person who has passed the examination referred to in regulation 8 or regulation 19 of the Customs House Agents Licensing Regulations, 2004 and who are duly authorised under section 146 of the Act; a transition Provided that upto 31st December, 2011 shall be allowed to the Authorised Courier for fulfillment of the obligation in so far as it relates to examination referred to in regulation 8 of the Customs House Agents Licensing Regulations, 2004. period the Act, (iii) advise his consignor or consignee to comply with the provisions of regulations made thereunder and in case of non-compliance thereof, he shall bring the matter to the notice of the Assistant Commissioner of Customs or Deputy Commissioner of Customs; rules and (iv) verify the antecedent, correctness of Importer Exporter Code (IEC) Number, identity of his client and the functioning of his client in the declared address by W.P.(C) 11360/2017 Page 11 of 19 using reliable, independent, authentic documents, data or information; (v) exercise due diligence to ascertain the correctness and completeness of any information which he submits to the proper officer with reference to any work related to the clearance of imported goods or of export goods; (vi) not withhold information communicated to him by an officer of customs, relating to assessment and clearance of imported goods as well as inspection, examination and Clearance of export goods, from a consignor or consignee who to such information; is entitled not withhold any (vii) to assessment and clearance of imported goods or of export goods, from the

Assessing Officer; information relating (viii) not attempt to influence the conduct of any officer of Customs in any matter pending before such officer or his subordinates by the use of threat, false accusation, duress or offer of any special inducement or promise of advantage or by the bestowing of any gift or favour or other thing or value; (ix) maintain records and accounts in such form and manner as may be directed from time to time by an Assistant Commissioner of Customs or Deputy Commissioner or Customs for a period of five years and submit the Assistant Commissioner of Customs or an officer authorised by him, wherever required; and inspection to them for (x) abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder. 25. It is clear from Clause (j) of Regulation 13 of the 1998 Regulations that the petitioner was prohibited from sub-contracting or W.P.(C) 11360/2017 Page 12 of 19 outsourcing any function required to be carried out by the petitioner as an Authorized Courier in terms of the said Regulations. Concededly, the petitioner was granted no such permission to outsource any of its functions. According to the petitioner, he had sought such a permission. However, undisputedly, no such permission was granted by the Commissioner of Customs. Notwithstanding, that such a permission had not been granted, the petitioner had confined his functions only to custom clearance of the couriered packages/shipments; admittedly, the petitioner is not involved in door to door delivery of the couriered goods. Respondent no.2 had, in its order dated 27.01.2017, set out the work flow chart as submitted by the petitioner. The said work flow chart is reproduced below:-

"Work Flow chart Step wise door to door delivery activities:

1. Pickup and security check at Customer location in overseas location managed by Overseas Partner i.e. Fardar Express / AJ Worldwide etc.
2. Bagging / Manifesting Export of Consolidated courier Material in overseas locations- Managed by overseas partner i.e. Fardar Express / AJ Worldwide etc.
3. Import receiving / clearance at EICI Terminal IGI; Delhi Managed by Future Express
4. The consignment is then handed over to Budget Courier Pvt. Ltd. by Future Express with complete documentation of hand over.
5. Pincode wise segregation of deliveries at warehouse managed by Budget Courier Pvt. Ltd.
6. Final Delivery to Receivers location in NCT- Managed by

Budget Courier Pvt. Ltd. 1. Final Delivery to receiver location of Rest of India Managed by Budget Courier Pvt. Ltd. 26. In addition to the above, the petitioner had also set out its obligations and that of Budget under the MoU, in his submissions. The same is set out in the order dated 27.01.2017 and is reproduced below:-

"Responsibility (Operational & Financial) of Each Company as described below:
Joint Responsibility: Both M/s Budget Couriers Pvt. Ltd and M/s Future Express are jointly responsible for KYC & various documentation as required by any agency of Govt. of India and in case of any irregularities both shall be equally responsible 1. Operational Responsibility: Budget: (a) Budget is responsible for all customers interface (including contracts (marketing & rates) for Budget customers and all operational interaction with, Customers of both (Budget & Future Express). W.P.(C) 11360/2017 Page 14 of 19 (b) Budget is responsible for all operational instructions and interface with international agents /partners of Future who service (pickup c& delivery) both the clients of Budget & Future through their International network and consign the shipment to Future. (c) Budget arranges to take into custody all shipments once cleared by Future (be it Budget clients or Future clients) and are then brought to warehouse for sorting repacking and delivery through own/ leased vans as the case may be within NCT & rest of India. Future Express: Future is responsible for Customs clearance of shipments once it arrives into India and ensure all documents and processes are adhered to. 27. It is apparent from the above that the petitioner had confined himself to custom clearance of shipments and had no operational responsibility for either interfacing with the customers or international partners. Thus, in view of this Court, there can be no doubt that the petitioner was not engaged in the business of acting as a courier as contemplated under the 1998 Regulations or the 2010 Regulations.

28. The contention that the petitioner had merely outsourced some of its non-core activities as a courier, is unmerited. Admittedly, the agreement between the petitioner and Budget (MoU) was on a principal to principal basis. It is also brought on record that the petitioner used to also raised invoices on Budget for the activities performed by it (Custom clearance). It is, thus, apparent that the petitioner also performed the service of custom clearance for Budget. In other

words, Budget had outsourced the activities performed by the petitioner to it. If the activities carried on by Budget and the petitioner are examined, it W.P.(C) 11360/2017 Page 15 of 19 is at once clear that the role of the petitioner was not that of a courier agency but merely of a service provider engaged in the activity of custom clearance. The activity of a courier includes that of delivery of goods / shipments to customers, and clearance of customs is only an incidental part of the said business. In the present case, the principal business of the petitioner is assistance in custom clearance and not of collection and delivery of goods on a door to door basis.

29. At this stage, it is also relevant to refer to paragraph 4 of the Circular No.33/2010 dated 07.09.2010, which explains the rationale for granting license to Authorized Couriers. Sub-paragraph (i) of Paragraph 4 of the said Circular is relevant and is set out below:-

"the Authorised Courier wants 4. Apart from the changes as outlined at Para 2 above, some additional changes have been brought in the Regulations for the manual mode: (i) On the lines of similar requirement for Customs Cargo Service Providers (CCSP) under the Handling of Cargo in Customs Areas Regulations, 2009, a provision has been made prescribing the requirement of prior permission of customs to sub- let/outsourcing any of the components in the door-to-door supply chain. This is necessary since an Authorized Courier is defined as one, who, in relation to import or export of goods, international transportation of goods for export and imports on door-to- door delivery basis, and is registered in this behalf by the jurisdictional Commissioner. Also, the basic reason for expeditious clearance facilities being extended to them is that express companies have put in place verifiable and secure work processes on a global basis backed by an elaborate IT infrastructure for knowledge and information management. These companies have their own in-house is a person engaged if in the W.P.(C) 11360/2017 Page 16 of 19 mechanisms to guard against use of express supply chain by unscrupulous elements. Therefore, any unauthorized sub- letting or outsourcing of any of the components in the door- to-door supply chain may defeat the very purpose behind facility of expeditious clearance. Hence, the Commissioners of Customs should review the facilities available with the

Authorised Couriers appointed under their charge to ensure compliance. Further, while allowing, any sub-letting or outsourcing due care should be taken to ensure that it does not go against the very purpose behind facility of expeditious clearance. 30. It is clear from the above that the purpose of framing the 2008 Regulations and 2009 Regulations is to extend expeditious clearance facilities to couriers on the premise that couriers have an elaborate infrastructure for knowledge and information management and such courier companies used their inhouse mechanism to guard against use of supply chain by unscrupulous elements. Plainly, if the petitioner was not in touch with the customers and was merely acting in a custom clearance agent, the question of extending expeditious clearance facilities on reliance of the petitioners infrastructure and knowledge of its customers, does not arise.

31. In view of the above, this Court finds no infirmity with the order dated 27.01.2017 passed by respondent no.2 and the impugned order passed by respondent no.3. In view of the above, it is not necessary to examine the question whether the petitioner was required to obtain the permission of the Commissioner of Customs under Regulation 13(j) of the 1998 Regulations. However, for the sake of completeness, this Court considers it apposite to examine the said question as well. W.P.(C) 11360/2017 Page 17 of 19 32. It is contended on behalf of the petitioner that he was not required to obtain permission as contemplated under Regulation 13(j) of the 1998 Regulations in view of the Circular dated 02.12.2016. At this stage, it would be necessary to refer to paragraphs 4 and 5 of the said Circular (Circular No.59 of 2016 - Customs dated 02.12.2016) which are set out below:-

"4. An authorised courier performs varieties of activities during the process of assessment and clearance of the goods followed by delivery at the door. Some of these are core activities and critical to his role as an authorised courier whereas some are non-core activities. Like other sectors, it is understandable that an authorised courier would like to outsource some its non-core activities without the rigour of obtaining permission each time.

5. In view of this, Board is of the view that relaxation from such permission merits consideration with regard to certain components of the supply chain before entry inwards/after clearance of the imported courier shipments and before carting in/after 'Let Export' of the export shipments. Accordingly, Board has decided that for functions namely local delivery of export/imported courier pick-up or packages/shipments, and housekeeping activities permission will not be required. Prior intimation would suffice. Needless to add, the authorised courier will ensure that due diligence is exercised and necessary checks carried out before outsourcing these activities. for officials transportation 33. It is, at once, clear that the import of the said Circular is to exempt courier agencies from seeking permission to outsource certain non-core activities; is not to enable a person carrying on the activity of custom clearance to masquerade as a courier. Outsourcing of activities, W.P.(C) 11360/2017 Page 18 of 19 essentially means, that a person carrying on a business is not required to perform all activities himself. However, it is essential that the person outsourcing the activities maintains the integrity of the business. In the present case, it is difficult to accept that the petitioner was carrying on the business of a courier and had outsourced certain components of his business. The petitioner was merely involved in custom clearance; he had no interface with customers using courier services and was also not involved with other business activities. In view of the above, the Circular dated 02.12.2016 is of little assistance to the petitioner.

34. In view of the above, the present petition is unmerited and is, accordingly, dismissed. MAY27 2019 RK VIBHU BAKHRU, J W.P.(C) 11360/2017 Page 19 of 19