IN THE HIGH COURT OF MADRAS

Case Tracker
UNIK TRADERS Vs ADDL CC [High Court]

WP No.15575 of 2019
WMP Nos.15476, 15479, 15481 and 15484 of 2019

M/s UNIK TRADERS
NO.140, OLD THARAGUPET ROAD
BANGALORE-560053

Vs

1) THE ADDITIONAL DIRECTOR GENERAL
DIRECTORATE OF REVENUE INTELLIGENCE
27, GN CHETTY ROAD, T NAGAR
CHENNAI-600017

2) THE DEPUTY DIRECTOR
DIRECTORATE OF REVENUE INTELLIGENCE
27, GN CHETTY ROAD, T NAGAR
CHENNAI-600017

3) THE COMMISSIONER OF CUSTOMS
COMMISSIONERATE OF CUSTOMS-II, CUSTOM HOUSE
NO.60, RAJAJI SALAI
CHENNAI-600001

M Sundar, J

Dated: July 09, 2019

Appellant Rep by: Mr P Chidambaram, Sr. Counsel for Mr B Satish Sundar Dr S Krishnanandh
Respondent Rep by: Mr G Rajagopalan, Addl. Solicitor General assisted by Mr V Sundareswaran, Sr. Panel Counsel for RR1 and 2, Ms R Hemalatha, Sr. Panel Counsel (Customs) for R-3

Cus - Raising doubts about 'Certificates of Origin' (COO) produced by the writ petitioner to demonstrate the said consignment originates from Sri Lanka, inter alia, SCN was issued on 05.05.2019 - Petition filed against the same.

Held: Court deems it appropriate to not to interfere with the impugned SCN by holding that it is open to respondents to issue an addendum or corrigendum to impugned SCN adverting to CMA agreement and mentioning as to how COOs were verified and as to why they are unacceptable, in an appropriate manner without disclosing the contents of aforesaid communications dated 23.4.2018 and 15.5.2018 (immunity / privilege for which has been sustained) - If it is done, it will give adequate opportunity to writ petitioner noticee to meet the impugned SCN better

with greater specificity on merits - If respondents do not issue addendum / corrigendum within a fortnight from the date of receipt of a copy of this order, it is open to writ petitioner to respond to impugned SCN raising this issue also - Reason why this court refrains from interfering with the impugned SCN is owing to the principle that writ jurisdiction under Article 226 of the Constitution being a discretionary jurisdiction will ordinarily not be exercised for quashing a SCN and that it will be done only in rare and exceptional cases, if a SCN is found to be wholly without jurisdiction or wholly illegal for one reason or the other - Writ petition fails, hence dismissed: HC [para 21, 22, 25]

Petition dismissed

Case laws cited:

State of Punjab Vs. Sodhi Sukhdev Singh reported in (1961) 2 SCR 371 : AIR 1961 SC 493... Para 13

Union of India v. Kunisetty Satyanarayana reported in (2006) 12 SCC 28... Para 22

JUDGEMENT

Per: M Sundar:

Short facts shorn of elaboration qua details / particulars or in other words, factual matrix in a nutshell (as can be culled out from the case file and submissions made in the hearings) imperative for appreciating this order is as follows:

(a) In October and November of 2018, writ petitioner whom this court is informed is in the trade of import and local sales of spices, condiments, betel nuts, etc., imported 45 consignments in 90 containers.

(b) Out of aforesaid 45 consignments, 44 consignments in 88 containers is Aracknut and one consignment in two containers is black pepper (these 45 consignments shall hereinafter be collectively referred to as 'said consignment' and wherever they need to be referred to based on the consignment, 44 consignments in 88 containers shall be referred to as 'Aracknut consignment' and one consignment in two containers shall be referred to as 'Black pepper consignment').

(c) With regard to said consignment, writ petitioner filed 45 Bills of Entry for clearance of said consignment on the basis of 'South Asian Free Trade Agreement' ('SAFTA' in brevity) and 'Indo Sri Lanka Free Trade Agreement' ('ISFTA' for brevity). To be noted, relevant statute in this regard is 'Customs Act, 1962 [Act 52 of 1962]' (hereinafter 'Customs Act' for brevity) and the 'Customs Tariff Act, 1975' (hereinafter 'Customs Tariff Act).

(d) Contending that said consignment originates from Sri Lanka, concessional rate of duty was claimed by the importer as SAFTA provides

for concessional rate of duty for Black pepper and ISFTA provides for concessional rate of duty for Aracknut, if consignments originate from Sri Lanka.

(e) Raising doubts about 'Certificates of Origin' ('COO' for brevity) produced by the writ petitioner to demonstrate the said consignment originates from Sri Lanka, said consignment was seized inter-alia vide a Seizure Memorandum dated 01.12.2018. Aggrieved by the seizure, writ petitioner moved this Court by way of writ petitions being W.P.Nos.540 of 2019 etc., Suffice to say that these writ petitions were disposed of by Hon'ble Single Judge of this court in and by order dated 22.01.2019 interalia ordering provisional release of said consignment of writ petitioner on furnishing bank guarantee or security deposit to the extent of 30% of differential duty.

(f) Aforesaid order of Hon'ble Single Judge was carried in appeal by both sides, i.e., by writ petitioner as well as official respondents. This is vide W.A.Nos.236 of 2019 etc., All writ appeals, i.e., writ appeals filed by writ petitioner as well as State appeals came to be disposed of by a common order dated 25.02.2019 made by Hon'ble Division Bench of this court. Suffice to say that State appeals were allowed and writ petitioner's appeals were dismissed.

(g) Writ petitioner carried this to Hon'ble Supreme Court by way of Special Leave Petitions being S.L.P.(Civil) No.7096 of 2019 etc., Hon'ble Supreme Court issued notice and official respondents were before Hon'ble Supreme Court. The matter was progressing in Hon'ble Supreme Court by way of listings and hearings. Suffice to say that while the matter was progressing, enquiry by Customs department also proceeded and the same culminated in a 'Show Cause Notice' ('SCN' for brevity) dated 05.05.2019.

(h) On 08.05.2019, on noticing that SCN has been issued, Hon'ble Supreme Court passed an order interalia to the effect that writ petitioner was permitted to assail the SCN including filing of writ petition before High Court, making it clear that if such a course is chosen by writ petitioner, the matter will be decided on its own merits and in accordance with law. Pursuant to this order, instant writ petition has been filed by writ petitioner, assailing the aforesaid SCN dated 05.05.2019, which shall hereinafter be referred to as 'impugned SCN' for the sake of brevity.

2. To be noted, factual matrix shorn of elaboration set out supra, besides giving short facts has also captured the trajectory of legal proceedings thus far.

3. This Court now proceeds to advert to the submissions made in the hearings and embarks upon the exercise of dispositive reasoning qua such submissions for returning a verdict.

4. Mr.P.Chidambaram, learned Senior Counsel appearing on behalf of counsel on record for writ petitioner, learned Additional Solicitor General Mr.G.Rajagopalan leading Mr.V.Sundareswaran, learned Senior Panel

Counsel for respondents 1 and 2 besides Ms.R.Hemalatha, learned Senior Panel Counsel (Customs) for third respondent were heard.

5. When this writ petition was listed for admission on 10.6.2019, limited notice was issued vide proceedings / orders came to be passed. This court considers it appropriate to extract and reproduce the said proceedings / orders as it captures the nature of limited notice that was issued by this court and more importantly, it captures the pivotal and primordial submission of the writ petitioner in assailing the impugned SCN. 10.6.2019 proceedings of this court reads as follows :

"Mr.P.Chidambaram, learned Senior Counsel, leading the counsel on record for the sole writ petitioner, is before this Court.

2. This writ petition pertains to import of Black Pepper and Arecanuts (Betelnuts).

3. The crux and gravamen of the entire dispute is that while the writ petitioner contends that aforesaid consignment is of Sri Lankan origin and claims certain benefits qua duty, that the consignment is of Sri Lankan origin is disputed by the Customs Department.

4. To be noted, this is the second round of litigation.

5. Suffice to say that consignments have been seized and this Court was moved assailing such seizure.

6. A Hon'ble Single Judge of this Court, vide order dated 18.12.2018, directed release of seized consignments on certain terms. The writ petitioner as well as the Revenue carried the matter in appeal by way of an Intra Court Appeal and the Intra Court Appeal came to be disposed of by an order dated 25.02.2019 made by a Hon'ble Division Bench of this Court. Suffice to say that the Hon'ble Division Bench of this Court in the Intra Court Appeal ruled in favour of Revenue qua seizure.

7. Aggrieved, writ petitioner carried the matter to Hon'ble Supreme Court by way of Special Leave Petitions, being Special Leave to Appeal (C) No(s).7096/2019 with SLP(C) No.7310/2019, SLP(C) No.7320/2019, SLP(C) No.7325/2019, SLP(C) No.7332/2019 etc.

8. Notice was issued in aforementioned Special Leave Petitions and the same were progressing by successive listings before Hon'ble Supreme Court. Pending Special Leave Petitions, a show cause notice dated 5.5.2019, bearing Ref F.No.DRI/ CZU/VIII/48/ENQ-1/INT-36/2018 came to be issued by the first respondent. When this was brought to the notice of Hon'ble Supreme Court, Hon'ble Supreme Court, on 8.5.2019, passed an order in aforementioned SLPs which reads as follows:

"During the pendency of these Special Leave Petitions, show cause notice came to be issued by the competent authority, which has been duly served on the petitioner(s).

In view of this development, the petitioner(s) may have to assail the said show cause notice in the first instance. We permit the petitioner(s) to pursue such remedies, including filing of Writ Petition before the High Court, as may be available against the said show cause notice, which be decided on their own merits and in accordance with law. If the Writ Petition is filed before the High Court, we request the High Court to consider the prayer for interim directions expeditiously on its own merits after hearing all concerned.

Special Leave Petitions are disposed of in the above terms.

Pending applications, if any, stand disposed of."
[Underlining made by Court to highlight and supply emphasis]

9. It was submitted by learned Senior Counsel for writ petitioner that the instant writ petition has been filed assailing the aforesaid show cause notice dated 5.5.2019 bearing Ref F.No.DRI /CZU/VIII/48/ENQ-1/INT-36/2018 (hereinafter 'impugned SCN' for brevity), pursuant to the aforesaid order of Hon'ble Supreme Court dated 8.5.2019.

10. As the writ petition is one assailing the show cause notice i.e., impugned SCN, the writ petitioner was called upon to make submissions on whether the case on hand falls within well carved out exceptions adumbrated in a long line of authorities where writ petition will be entertained against a SCN. To be noted, learned Senior Counsel submitted that there can be no disputation that aforesaid order of Hon'ble Supreme Court dated 8.5.2019 and more particularly, the underlined portion is subject to writ petitioner making out a case for interference qua writ jurisdiction at SCN stage.

11. In this backdrop, it was submitted by the learned Senior Counsel for writ petitioner, that pivotal ground, on which impugned SCN is assailed, is that the same has been issued by the first respondent without jurisdiction. It was also argued that both respondents 1 and 2 do not have jurisdiction qua impugned SCN. It was further argued that besides jurisdiction, there is a procedure to be followed in cases of this nature and that the procedure has also not been followed.

12. Be that as it may, with regard to the pivotal submission regarding jurisdiction qua impugned SCN, learned Senior Counsel referred to an instruction, being Instruction No.31/2016, dated 12.9.2016, issued by the Central Board of Excise and Customs and a Office Memorandum issued by the same Board dated 11.7.2017, bearing reference F.No.A- 11013/20/2017-Ad.IV.

13. Adverting to instruction dated 12.9.2016, it was submitted that the instant case falls under Clause (b) of paragraph 2 regarding Free/Preferential Trade Agreements, which reads as follows:

"2. Rules of Origin are notified under each of the Agreements which require the importer to, inter alia, make a claim for preferential tariff at

the time of importation, and submit a Certificate of Origin (COO) in the prescribed form. The Rules of Origin under the FTAs, as notified under Section 5(1) of the Customs Tariff Act, 1975, provide for verifying the authenticity of the Certificates of Origin and also the information contained therein. The grounds provided for verification are:

a. x x x x x

b. In case of a doubt on the accuracy of information regarding origin, i.e., where a doubt arises on whether the product qualifies as an originating good under the relevant Rules of Origin. In other words, these are cases where there is a reasonable belief that a product is not grown or not produced/ manufactured in a particular country or required value addition/ change in CTH/ PSR, etc., as the case may be, has not been achieved for the goods to qualify as originating;

c. x x x x x"
14. Adverting to paragraph 9 of the said Instruction, it was submitted that once there is a dispute pertaining to the 'Certificate of Origin' ('COO' for brevity), powers are vested only with the Director (International Customs Division) and paragraph 9 reads as follows:

"9. All requests for verification under Free/Preferential Trade agreements/CECA/CEPA should be addressed in the Board to:

Director (International Customs Division)

Central Board of Excise & Customs,
Department of Revenue,
Ministry of Finance,
Room No.49,
North Block, New Delhi-110001.
011-2309 3380 (off); 011-2309 3760 (fax.)
Email: diricd-cbec@nic.in."
15. Adverting to the aforementioned Office Memorandum dated 11.7.2017, it was submitted that the aforesaid Director (International Customs Division) is now part of a Directorate, which is headed by a Principal Commissioner Headquartered in Delhi. Specific reference was drawn to paragraph 2.1.C. captioned (FTA) and subclause (iv) thereto of the Office Memorandum dated 11.7.2017 in this regard.

16. In sum and substance, it was contended that the impugned SCN has been issued without jurisdiction by the first respondent. To be noted, it is the specific submission of learned Senior Counsel for writ petitioner that both respondents 1 and 2 do not have jurisdiction to issue the impugned SCN, as it pertains to a disputation qua COO. Impugned SCN is inter alia primarily under section 124 of 'The Customs Act, 1962' ('said Act' for brevity). For issuing of SCN under section 124 of said Act, it is imperative that the goods should prima facie be confiscatable under section 111 of said Act is learned Senior Counsel's say. In the instant case, the only ground on *which the consignment is said to be confiscatable pertains to disputation qua COO and any disputation pertaining to COO, i.e., Country of Origin can be decided only by the Principal Commissioner vide aforesaid circular and Principal Commissioner is part of a Directorate vide aforesaid office memorandum is learned Senior Counsel's further say. Therefore, the first respondent who has issued the impugned SCN lacks jurisdiction to issue the impugned SCN is the sequitur is his emphatic say. This is the summation of legal submission of learned Senior Counsel for writ petitioner in a nutshell.*

17. Mr.V.Sundareswaran, learned Senior Panel Counsel for Directorate of Revenue Intelligence on behalf of respondents 1 and 2 and Mr.Pramod Kumar Chopda, learned Senior Standing Counsel for Central Board of Indirect Tax and Customs on behalf of the third respondent, who are present in Court, seek time to get instructions and to respond to the aforesaid submissions made on behalf of writ petitioner.

18. Therefore, in the light of the narrative supra, this Court is issuing limited notice, which is confined to the aforesaid submission that impugned SCN has been issued by the first respondent without jurisdiction.

19. The aforesaid two Revenue counsel accept this limited notice on behalf of aforesaid respective respondents.

20. After accepting notice, learned Revenue counsel for respondents 1 and 2 sought time to get instructions and make submissions on the aforesaid aspect of the matter.

21. The writ petitioner has to file response to the impugned SCN and the time frame would elapse today.

22. Therefore, there will be a limited interim order in the relevant miscellaneous petition, being WMP No.15476 of 2019.

23. It is submitted that in the light of limited notice, restricted to the aforesaid aspect being issued, it may not be necessary for the third respondent to make submissions, but it is open to learned counsel for third respondent to file counter-affidavit, if the third respondent chooses to do so. If the same is not done by next listing, the matter will be heard based on the pleadings of respondents 1 and 2.

24. Revenue Counsel undertakes to file counter-affidavit by 14.6.2019, after giving advance copies to learned counsel for writ petitioner and counsel for writ petitioner may file rejoinder, if any (which shall be entertained only if it contains new facts), by 17.6.2019, with advance copies to Revenue counsel.

25. List on 17.6.2019 under the caption 'NOTICE REGARDING ADMISSION'."

6. It is important to note that learned Senior counsel for writ petitioner fairly submitted that there is no disputation that though instant writ petition has been filed pursuant to aforementioned order of Hon'ble Supreme Court dated 08.05.2019, it is subject to writ petitioner making out a case for interference qua writ jurisdiction at SCN stage. This is captured in the last few lines / last sentence in paragraph 10 of the aforesaid order / proceedings of this Court dated 10.06.2019. Likewise, the crux and gravamen of writ petitioner's submission or in other words, primordial and pivotal submission of learned Senior Counsel for writ petitioner is captured in paragraph 16.

7. It is also to be noted that along with instant writ petition, more than one writ miscellaneous petitions have been taken out. To be precise, four writ miscellaneous petitions have been taken out and they are W.M.P.Nos.15476, 15479, 15481 and 15484 of 2019. Notice was issued in main writ petition, however, owing to limited notice being issued, in W.M.P.No.15476 of 2019 with a prayer for interim stay of impugned SCN, there was an interim order to keep the impugned SCN in abeyance till next listing, which was on 17.6.2019. On 17.6.2019, pleadings were completed and interim order was extended until further orders. To be noted, interim order is operating now.

8. Before this court proceeds further and deals with the merits of the matter by referring to submissions made by learned Senior Counsel and learned Solicitor (to be noted, Ms.R.Hemalatha, learned Senior Panel Counsel appearing for third respondent adopted the submissions made by learned Solicitor), it is necessary to make a reference to two sets of rules. One set of rules goes by the name 'Customs Tariff (Determination of origin of goods under the Free Trade Agreement between the Democratic Socialistic Republic of Sri Lanka and the Republic of India) Rules, 2000' ('ISFTA Rules' for brevity) and it is regarding Aracknut consignment. The second set of rules go by the name 'Rules of Determination of Origin of Goods under the Agreement on South Asian Free Trade Area (SAFTA)' ('SAFTA Rules' for brevity) and this relates to black pepper consignment. To be noted, ISFTA rules have been made by the Central Government in exercise of rule making powers conferred on the Central Government by section 5(1) of the Customs Tariff Act. ISFTA rules have been notified vide Notification: 19/2000-Cus.(NT) dated 06.03.2000. As far as SAFTA rules are concerned, the same has been notified vide Notification:75/2006-Cus.(N.T.) dated 30.06.2006. SAFTA rules placed before this Court as part of case file does not explicitly say that it has been made by Central Government in exercise of its rule making power under section 5(1) of Customs Tariff Act, but there is no disputation or disagreement before this Court that SAFTA rules have also been made by the Central Government in exercise of its rule making power under section 5(1) of Customs Tariff Act.

9. Elaborating on his pivotal and primordial submission, learned senior counsel for writ petitioner drew the attention of this Court to Rules 4,11,12 and 13 of ISFTA Rules and Rules 14 and 15 of SAFTA Rules. Considering the

significance of these provisions, this Court extracts the aforesaid rules and the same reads as follows :

"Rules 4, 11, 12 and 13 of ISFTA Rules :

4.Claim at the time of importation.- The importer of the product shall, at the time of importation-

(a) make a claim that the products are the produce or manufacture of the country from which they are imported and such products are eligible for preferential treatment under the India-Sri Lanka Free Trade Agreement, (hereinafter referred to as the Agreement), and

(b) produce the evidence specified in these rules.
Explanation:- For the purposes of this notification,"Preferential treatment" in relation to any product means the exemption granted under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.26/2000- Customs dated 1st March, 2000 and includes preferential concessions.

11. Certificates of origin.- Products eligible for a Certificate of origin in the form annexed shall support Preferential treatment issued by an authority designated by the Government of the exporting country and notified to the other country in accordance with the certification procedures to be devised and approved by both the Contracting Parties.

12. Prohibitions.- Either country may prohibit importation of products containing any inputs originating from States with which it does not have economic and commercial relations.

13.Co-operation between contracting parties:-

(1)The Contracting Parties will do their best to co-operate in order to specify origin of inputs in the Certificate of origin.

(2)The Contracting Parties will take measures necessary address, to investigate and, where appropriate, to take legal and/or administrative action to prevent circumvention of this Agreement through false declaration concerning country or origin or falsification of original documents.

(3)Both the Contracting Parties will co-operate fully, consistent with their domestic laws and procedures, in instances of circumvention or alleged circumvention of the Agreement to address problems arising from circumvention including facilitation of joint plant visits and contacts by representatives of both Contracting Parties upon request and on a case-by-case basis.

(4)If either Party believes that the rules of origin are being circumvented, it may request consultation to address the matter or matters concerned with a view to seeking a mutually satisfactory solution. Each party will hold such consultations promptly.

Rules 14 and 15 of SAFTA Rules :

Rule 14 : Procedures for Issuance and Verification of Certificate of origin

Detailed Operational Certification Procedures for implementation of these Rules of Origin are at Annex-B.

Rule 15 : Prohibitions

Any Contracting State may prohibit importation of products containing any inputs originating from States with which it does not have economic and commercial relations."

10. With regard to Rule 4 of ISFTA Rules extracted supra, emphasis was laid on sub-rule (b) of Rule 4. Thereafter, by adverting to relevant instruction No.31/2016 dated 12.09.2016, it was submitted that when there is a dispute regarding COO, request for verification under preferential trade agreements (SAFTA and ISFTA in this case) should be addressed to the Director (International Customs Division). To be noted, these aspects of the submission have been captured in paragraphs 12, 13 and 14 of 10.6.2019 proceedings which have been extracted and reproduced supra.

11. Furthering his submission in this direction, it was submitted that SAFTA and ISFTA rules are treaties between two sovereign States and therefore they have to be treated with utmost sanctity and should be regarded as sacrosanct.

12. Responding to the aforesaid submissions, learned Solicitor submitted that there is an agreement styled 'Agreement between the Government of the Republic of India and the Government of the Democratic Socialist Republic of Sri Lanka on Co-operation and Mutual Assistance in Customs matters' ('CMA Agreement' for brevity) dated 13.3.2015 between the Governments of India and Sri Lanka, vide two communications dated 23.04.2018 and 15.05.2018, officers have been appointed by name (not designation) inter-alia for exchange of information qua COO under CMA Agreement. Learned Solicitor submitted that this CMA agreement is traceable to section 151B of Customs Act.

13. Adverting to sub-section (5) of section 151B of Customs Act, it was submitted by learned Solicitor that post 29.3.2018 when section 151B was brought into statute books, i.e., Customs Act, any action taken in pursuance of any agreement, i.e., CMA agreement in the instant case shall be deemed to have been taken under the provisions of this section. Respondents claimed privilege / immunity qua this CMA agreement dated 13.3.2015 and the two communications thereunder. An affidavit dated 25.6.2019 sworn to by first respondent, namely Additional Director General, Directorate of Revenue Intelligence ('DRI' for brevity) on behalf of respondents 1 and 2 was filed, the CMA agreement and the two communications were filed in a sealed envelope along with this affidavit. To this, a reply affidavit being reply affidavit dated 29.6.2019 was filed by the writ petitioner. Along with this reply affidavit, a hard copy of aforesaid CMA agreement dated

13.3.2015 was annexed. It was submitted that the same has been downloaded from the relevant official website of the Government of India. When this issue of privilege / immunity was taken up, it was fairly submitted that the said CMA agreement dated 13.3.2015 is in fact available in the official website of respondents and therefore, it is in public domain. Therefore, privilege / immunity claimed qua CMA agreement became a damp squib. However, with regard to aforesaid communications dated 23.4.2018 and 15.5.2018 made under the said CMA agreement dated 13.3.2015, they will not fall in this category. However, with regard to these two communications, learned senior counsel for writ petitioner pressed into service a Constitution Bench judgment of Hon'ble Supreme Court in *State of Punjab Vs. Sodhi Sukhdev Singh reported in (1961) 2 SCR 371 : AIR 1961 SC 493*. Attention of this Court was drawn to relevant portion in paragraph 23 of Sukhdev Singh case and the same reads as follows :

"23. ...... We think that in such cases the privilege should be claimed generally by the Minister in charge who is the political head of the department concerned; if not, the Secretary of the department who is the departmental head should make the claim; and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary the court may, in a proper case, require an affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are a series of documents included in a file it should appear from the affidavit that each one of the documents, whose disclosure is objected to, has been duly considered by the authority concerned. The affidavit should also indicate briefly within permissible limits the reason why it is apprehended that their disclosure would lead to injury to public interest. This last requirement would be very important when privilege is claimed in regard to documents which prima facie suggest that they are documents of a commercial character having relation only to commercial activities of the State. If the document clearly falls within the category of privileged documents no serious dispute generally arises; it is only when courts are dealing with marginal or borderline documents that difficulties are experienced in deciding whether the privilege should be upheld or not, and it is particularly in respect of such documents that it is expedient and desirable that the affidavit should give some indication about the reasons why it is apprehended that public interest may be injured by their disclosure."

14. In the aforesaid backdrop, immunity / privilege claimed qua 13.3.2015 CMA agreement is rejected as it is available in official website of respondents and it is in public domain. The immunity / privilege claimed qua communications dated 23.4.2015 and 15.5.2018 appointing officers by name (not designation) under CMA agreement is sustained. It is sustained as in the considered opinion of this Court sufficient reasons have been given as to why the disclosure would lead to injury to public interest. It has

been averred in the affidavit that if there is disclosure of modes of verification between two countries is provided to parties, particularly exporters, it will affect the process of verification and that it will not be in the interest of both countries to disclose the contents of such communications and the names of officers. This in the considered opinion of this Court is sufficient reason that disclosure of these two letters, more particularly, names of officers would lead to injury to public interest, more so, as the officers have been appointed by names and not by designations. In other words, in the considered opinion of this Court, reasons are good enough within the meaning of Sukhdev principle, as it is noticed that the deponent has sworn to the affidavit after verification with Government of India. Therefore, this court is directing the Registry to return the sealed envelope to the counsel on record, i.e., Mr.V.Sundareswaran, who is counsel for respondents 1 and 2.

15. Before this Court proceeds further with the other aspects of the matter, this court is constrained to observe that the affidavit claiming immunity / privilege should have been sworn to with more responsibility and immunity / privilege ought not to have been claimed with regard to CMA agreement which is in public domain. One more aspect of the affidavit dated 25.6.2019 is that it refers to an order of Hon'ble Division Bench and says that these two communications were placed before Hon'ble Division Bench and that these communications have not been made under Rule 11 of ISFTA Rules as recorded by Hon'ble Division Bench. This is the averment in the affidavit. Such a submission cannot be made before a Single Judge of this court and it is a matter of judicial discipline that correctness or otherwise of a Division Bench recording cannot be examined by a Single Judge. It is for the respondents to seek a review before Hon'ble Division Bench. Admittedly, no such review has been filed before Hon'ble Division Bench. Therefore, such a submission ought not to have been made that too on a sworn affidavit before a Single Judge, i.e., this Court and this court as a matter of judicial discipline refrains from examining this aspect and this court eschews this submission of respondents 1 and 2. In this regard, this court considers it appropriate to extract relevant portion of paragraph 6 of this affidavit, which reads as follows:

"6... It is further submitted that the two communications referred to above whereby the nodal officers were nominated are appointed under the agreement of the year 2015 and not under rule 11 of the Notification No.19/2000-Cus NT dated 06/03/2000 as observed by the Division Bench in WA No.329/2019 and in the circumstances this Hon'ble Court may be pleased to record the objection for disclosure and thus render justice."
In other words, the issue of immunity / privilege has been decided by this Court on the basis that it is not desirable to disclose officers appointed by name irrespective of whether they have been so appointed under CMA agreement or for the purpose of Rule 11 of ISFTA Rules.

16. This takes us to a very interesting and intriguing aspect of the matter.

17. Impugned SCN does not refer to CMA agreement dated 13.3.2015, but merely says that correspondence was made with Nodal office of Sri Lankan Customs. Even with regard to correspondence, paragraphs 10 to 13 of impugned SCN make interesting reading and throw up more conundrums than answers. A perusal of these paragraphs reveals that in one communication, according to respondents, Sri Lankan Customs has said that 62 containers out of 82 containers with regard to Aracknut consignment were transshipped and later, Director of Exports, Exports Directorate, Sri Lanka Customs communicated that the word transshipment in the earlier communications was an inadvertent error and that the same is sincerely regretted. Impugned SCN also says that it has been reaffirmed that all Aracknuts exported from Sri Lanka referred to in the earlier emails are of Sri Lanka origin only and ISFTA certificates issued by the Ministry of Commerce are genuine. Considering the importance, this court deems it appropriate to extract entire paragraphs 10 to 13 of impugned SCN and the same read as follows :

"10. In the meantime, correspondence was made with the nodal office of Sri Lankan Customs for verification, i.e. Director of Customs, Central Intelligence Unit, Sri Lankan Customs, by CZU-DRI in respect of 44 consignments of areca nuts imported in 88 containers in five different vessels and one consignment of black pepper of quantity 54000 Kg arrived in vessel OEL Shravan voyage no.18060 in 40 ft containers TCNU3476980 (seal no.G4266296) and TLLU5204024 (seal no.G4266295) imported by the importer. In response to CZU-DRI letters, the folowing responses were elicited from Director of Customs, Central Intelligence Unit, Sri Lankan Customs.

i. The Sri Lankan Customs vide letter no.CIU/DRI/INF/08/2018 dated 09/11/2018 (RUD-11) in respect of 62 containers of subject 88 containers of areca nuts confirmed that the consignments were transshipped through Sri Lanka. The letter further enclosed the details of the vessels in which the 62 containers had arrived at Sri Lanka, offloaded for transshipment and the details of vessels loaded onto for transshipment of the containers to India. As per the letter the 62 containers had arrived to Sri Lanka for transshipment in four vessels namely Northern Jupiter, Em Astoria, City of Beijing and Ever Dynamic and got loaded onto three vessels namely MSC Maria Laura, Ever Delight & OEL Shravan (voyage no.18060) destined to India. For ease of understanding, the details furnished by Sri Lanka Customs for the 62 containers is shown in Table 1 below in respect of one of the 62 containers

Table 1

S/N	Container No.	Status	Discharge vessel / voyage	Loading vessel / voyage	Load Date
1	XINU1366335	Transshipment	Northern Jupiter /	Ever Delight	16-10-18

			803E	*V.124E*	

ii. Director of Customs, Central Intelligence Unit, Sri Lankan Customs vide further letter CIU/DRI/INF/08/2018 dated 19/11/2018 (RUD-12) in respect of 26 (88-62) containers of areca nuts also confirmed that the consignments were transshipped through Sri Lanka by providing additional details of discharge vessel, discharge date, loading vessel and loading date. As per the letter the 26 containers had arrived to Sri Lanka for transshipment in four vessels namely Em Astoria, Barbara, Honolulu Bridge & Ever Decent and got loaded onto four vessels namely MSC Maria Laura, MSC Lucia, ALS Fides & OEL Shravan (voyage no.18062) destined to India. For ease of understanding, the details furnished by Sri Lanka Customs for the 26 containers is shown in Table 2 below in respect of one of the 62 containers

Table 2

Container No.	*Seal No.*	*Status*	*Discharge vessel/ voyage*	*Discharge Date*	*Loading vessel / voyage*	*Load Date*
MAXU2419598	*Not available*	*Transshipment*	*Em Astoria / 1LW1*	*16-Oct-18*	*Msc Maria Laura / 843A*	*20-Oct-18*

iii. Apart from the above, the said letter CIU/DRI/INF/08/2018 dated 19/11/2018 in respect of 26 containers also provided evidence of transhipment by enclosing documents titled"Transhipment Container and Other Transhipment Handling Declaration-outward","Re-shipment Application","Transhipment Container Handling Re-shipment Application-outward"filed at the Sri Lankan Port Terminals which detailed the vessels in which the containers had arrived to Sri Lanka and the vessels in which they were loaded from Sri Lanka to India after offloading for transshipment. These transhipment declarations also captured the actual Port of Loading (POL) of these containers as Singapore / Port Klang and actual port of destination (POD) as Madras.

iv. Further, the Sri Lankan Customs vide their letter no.CIU/DRI/INF/08/2018 dated 27/11/2018 (RUD-13) in respect of subject 2 containers of black pepper, have confirmed that the goods of Vietnamese Origin were exported under the said containers to the consignree M/s.Unik Traders, Bangalore and enclosed the export declaration filed by the exporter with Sri Lankan Customs in their Automated System For Customs Data (ASYCUDA) system. The letter further added that Customs declaration bearing number E 92004 dated 10/10/2018 had been made wherein the exporter was shown as Hayleys Free Zone Ltd, Colombo and the country of origin of goods in the said document has been shown as Vietnam. On scrutiny of the said Customs declaration E 92004 dated 10/10/2018 it is seen that the consignee is M/s.Unik Traders, No.140, Old Tharagupet, Ground Floor, Bangalore-560 053, commodity is black pepper, Country of Export is Sri Lanka, Country of Origin is Vietnam,

Country of destination is India, Vessel is OEL Shravan, Voyage No./Date is 18060 – 14/10/2018, 1080 Bags of black pepper, quantity as 54000 Kg and in 40 ft containers TCNU3476980 & TLLU5204024. The system generated Cargo Dispatch Notes bearing numbers C26325 and C26324 enclosed along with them show the seal numbers of the containers as G4266296 and G4266295 respectively.
11. In pursuance of the above as well as the independent evidences mustered (discussed in subsequent paragraphs below at paras 19 to 32), all the 44 consignments (88 containers) of areca nuts and 1 consignment of black pepper (2 containers) totally valued at RS.49.28 Crore were placed under seizure vide seizure memorandum dated 01/12/2018 (RUD-14) on the reasonable belief that the country of origin of the goods has been mis-declared and therefore the goods are liable for confiscation under the provisions of the Customs Act 1962.

12. Subsequently, two letters which were not solicited were received in this office from the Director of Exports, Export Directorate, Sri Lanka Customs, suo moto. The first letter no.CUS/EXP/MISC/04 dated 30/11/2018, the Director of Exports, Sri Lanka Customs (RUD-15), inter alia stated that consequent to an appeal by the relevant exporters from Sri Lanka, exports directorate of the Sri Lanka Customs had authorized the Director General of Customs in Sri Lanka to conduct a detailed investigation into (i)the circumstances under which the emails from Sri Lanka customs were sent (referred to in para 10 above) and (ii) the true status of the said exports whether they were in fact transshipped or originated in Sri Lanka; that Exports Directorate is conducting investigation into all aspects of the exportation including records available at export cargo examination yards as well as the three container terminals of port of Colombo; that they would reply with the true picture of the total exportations, whether they were of Sri Lankan origin or not giving the individual containers numbers etc. and the earlier communication regarding the above may be ignored and discarded.

13. The Director of Exports, Export directorate, Sri Lanka Customs vide his second letter no.CUS/EXP/MISC/04 dated 06/12/2018 (RUD-16) stated that they have conducted detailed inquires further to CZU-DRI emails regarding import of Areca nuts from Sri Lanka, in respect of the containers sent as an attachment to the said emails; that their investigation and verification has revealed that all the containers of Areca nuts mentioned in CZU-DRI emails are of Sri Lankan origin and have been exported from Sri Lanka with certificates issued under the ISFTA; that the word transshipment in the earlier emails was an inadvertent error, which is sincerely regretted; that they reconfirm that all the Areca nuts exported from Sri Lanka referred to in earlier emails are of Sri Lankan origin only and the ISFTA certificates issued by the Ministry of Commerce are genuine."

[underlining made by this Court to supply emphasis and highlight]

18. To be noted, aforesaid differing communications does not apply to Black pepper consignment. In other words, it applies only to Aracknut consignment.

19. In the considered view of this Court, the most critical question which constitutes the crux and gravamen of this instant lis is whether CMA agreement dated 13.3.2015 will substitute SAFTA and ISFTA rules qua verification of COO.

20. Though SAFTA and ISFTA agreements go by the nomenclature of 'Free Trade Agreement' ('FTA' for brevity), for all practical purposes, they are treaties within the meaning of Article 73(1)(b) of the Constitution of India and they are traceable to Entry 14 of List I of Seventh Schedule to the Constitution of India. In this regard, Article 51(c) of the Constitution of India is also of relevance. SAFTA rules and ISFTA rules in contradistinction are municipal laws in international law parlance. Be that as it may, the same cannot be said of CMA agreement dated 13.3.2015 between Governments of India and Sri Lanka. Being an agreement made between two sovereign States, this CMA agreement also certainly qualifies as part of treaties (if not a treaty by itself) for the purpose of mode of implementation of treaties. Therefore, in the light of section 151B(5) of Customs Act which has been alluded to supra, this Court has no hesitation in coming to the conclusion that CMA agreement dated 13.3.2015 will prevail over the procedure for verification of COO adumbrated in SAFTA Rules and ISFTA Rules as this CMA agreement also has been signed by two sovereign States. As already alluded to supra, entire section 151B was brought into the Customs Act on and with effect from 29.03.2018 by the Finance Act, 2018 (Act 13 of 2018) and this court deems it appropriate to extract entire Section 151B of Customs Act, which reads as follows :

"151B. Reciprocal arrangement for exchange of information facilitating trade

(1) The Central Government may enter into an agreement or any other arrangement with the Government of any country outside India or with such competent authorities of that country, as it deems fit, for facilitation of trade, enforcing the provisions of this Act and exchange of information for trade facilitation, effective risk analysis, verification of compliance and prevention, combating and investigation of offences under the provisions of this Act or under the corresponding laws in force in that country.

(2) The Central Government may, by notification, direct that the provisions of this section shall apply to the contracting State with which reciprocal agreement or arrangements have been made, subject to such conditions, exceptions or qualifications as may be specified in that notification.

(3) Subject to the provisions of sub-section (2), the information received under sub-section (1) may also be used as evidence in investigations and proceedings under this Act.

(4) Where the Central Government has entered into a multilateral agreement for exchange of information or documents for the purpose of verification of compliance in identified cases, the Board shall specify the procedure for such exchange, the conditions subject to which such exchange shall be made and designation of the person through whom such information shall be exchanged.

(5) Notwithstanding anything contained in sub-section (1) or sub-section (2) or sub-section (3), anything done or any action taken or purported to have been done or taken, in pursuance to any agreement entered into or any other arrangement made by the Central Government prior to the date on which the Finance Bill, 2018 receives the assent of the President, shall be deemed to have been done or taken under the provisions of this section. Explanation.-For the purposes of this section, the expressions,-

(i)"contracting State" means any country outside India in respect of which agreement or arrangements have been made by the Central Government with the Government or authority of such country through an agreement or otherwise;

(ii)"corresponding law" means any law in force in the contracting State corresponding to any of the provisions of this Act or dealing with offences in that country corresponding to any of the offences under this Act.]"
21. Therefore, this court deems it appropriate to not to interfere with the impugned SCN by holding that it is open to respondents 1 and 2 to issue an addendum or corrigendum to impugned SCN adverting to CMA agreement and mentioning as to how COOs were verified and as to why they are unacceptable, in an appropriate manner without disclosing the contents of aforesaid communications dated 23.4.2018 and 15.5.2018 (immunity / privilege for which has been sustained). If it is done, it will give adequate opportunity to writ petitioner noticee to meet the impugned SCN better with greater specificity on merits. If respondents 1 and 2 do not issue addendum / corrigendum within a fortnight from the date of receipt of a copy of this order, it is open to writ petitioner to respond to impugned SCN raising this issue also.

22. The reason why this court refrains from interfering with the impugned SCN is owing to the principle that writ jurisdiction being a discretionary jurisdiction will ordinarily not be exercised for quashing a SCN and that it will be done only in rare and exceptional cases, if a SCN is found to be wholly without jurisdiction or wholly illegal for one reason or the other. This principle has been laid down Hon'ble Supreme Court in Kunisetty Satyanarayana case being *Union of India v. Kunisetty Satyanarayana reported in (2006) 12 SCC 28*. Relevant paragraphs are paragraphs 15 and 16 and the same reads as follows :

"15.Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16.No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

(underlining made by this court to supply emphasis and highlight)

23. In the instant case, in the light of the narrative and dispositive reasoning thus far, this Court is of the considered view that this is not a rare and exceptional case where impugned SCN is wholly illegal, warranting interference of this court in the discretionary writ jurisdiction under Article 226 of Constitution of India.

24. Before parting with this case, it is made clear that this court is not adverting to some orders of other Hon'ble High Courts which were placed before this Court by learned senior counsel for writ petitioner, as the same do not pertain to CMA agreement situations. This is more so, as in the instant case owing to facts and circumstances of the case on hand, this court is returning a finding that CMA agreement substitutes SAFTA and ISFTA rules insofar as verification of COOs are concerned.

25. Instant Writ Petition, i.e., W.P.No.15575 of 2019, fails and the same is dismissed. Consequently, connected miscellaneous petition, i.e., W.M.P.No.15476 of 2019 is dismissed and other writ miscellaneous petitions are closed. There shall be no order as to costs.