

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

Reserved on: 12.03.2014
Pronounced on: 14.03.2014

+ CUS.AA.24/2012, C.M. APPL. 19694/2012

M/S. ASHIANA CARGO SERVICES Appellant
Through: Sh. C. Hari Shankar and Sh. S. Sunil,
Advocates.

Versus

COMMISSIONER OF CUSTOMS (I&G) Respondent
Through: Sh. Kamal Nijhawan, Sr. Standing
Counsel with Sh. Dinesh Patel, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal challenges an order of the Customs, Excise and Service Tax Appellate Tribunal (“*CESTAT*”), by which the CESTAT upheld the revocation of the license of the appellant under the Custom House Agents Licensing Regulations, 1984.

2. The brief facts are that the appellant had obtained its Custom House Agents (“*CHA*”) License in terms of the Custom House Agents Licensing Regulations, 1984 – which was subsequently replaced in

2004. Sometime in 2003, at the request of one M/s. V.K. International, G Cards were issued to two employees of this concern, i.e. Sh. Naveen Mishra and Sh. Jawed Kamal (hereafter referred to as “V.K.’s employees”). During the course of investigation, it was discovered that V.K.’s employees were misusing their G Cards and indulging in illegal narcotics export. During the course of investigation, the proprietor of the appellant, in his statement under Section 108 of the Customs Act, 1962, admitted that V.K.’s employees were holding G Cards and misrepresenting themselves to be his employees but were in reality carrying on work on behalf of M/s. V.K. International. He further stated that this presented VK’s employees the opportunity to misuse the G Cards and indulge in the illegal activities. He also admitted to receiving ₹15,000/- per month from M/s. V.K. International for granting facility of G Cards to its employees. This was in contravention of Sections 13(b) and 13(e) and 19(8) of the Custom House Agents Licensing Regulation, 2004 (hereafter referred to as “the Regulations”). On 24.01.2005, the Commissioner of Customs deemed this to be sufficiently grave to suspend the appellant’s license. Thereafter, enquiry proceedings were initiated, by which the order-in-original of 08.08.2007 revoked the appellant’s license under Regulation 20(1). The order also forfeit ₹50,000/-. The appellant challenged this order before the CESTAT. Before the Tribunal, there was a difference of opinion – the Member (Judicial), Ms. Archana Wadhwa was of the opinion that the suspension and subsequent revocation of appellant’s license was too harsh a punishment and it had the effect of taking away the proprietor’s (and

his dependants') means of livelihood for the rest of their life. She further stated that:

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8. *Keeping in view the contravention committed by the appellant, we find that the suspension and subsequent revocation of his licence is too harsh a punishment to be awarded to him. The revocation of licence has the effect of taking away the means of livelihood of that person for the rest of his livelihood. The same effects not only the person concerned but his family as also the staff, workers of CHA. Keeping in view that the appellant was not directly connected with the illegal export and did not have the knowledge of mis-use of G cards, we think it fit to hold that suspension and revocation of his licence for the last 6 years is sufficient and adequate punishment for the contravention committed by him.*

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4. The Technical Member, Sh. Mathew John, further differed from this approach and was of the opinion that a CHA operated on the basis of trust. He acts as an agent of the Customs House as well as of the exporter and importer. Being so placed, the CHA or its employees would have access to sensitive information that can be potentially misused for smuggling. The Technical Member was of the opinion that the appellant virtually rented out the CHA license to V.K.'s employees and facilitated their access to the places which afforded them the opportunity to indulge in illegal behaviour. These facts, in his opinion, did not absolve the appellant and thus, the penalty was proportionate. In view of the plurality of opinion, the appeal was

referred to a third Member under Section 129(5) of the Customs Act, 1962. The third Member, Sh. Rakesh Kumar, agreed with the conclusions of the Technical Member and held that the revocation was justified under the circumstances. He concurred with the Technical Member's reliance upon the judgment of the Andhra Pradesh High Court in *The Commissioner of Customs and Central Excise v. H.B. Cargo Services*, (2011) 268 ELT 448 (AP).

5. Sh. C. Hari Shankar, learned counsel for the appellant argues that there is no finding of culpability or *mens rea* on the part of the appellant. No doubt, as CHA, the appellant concerned committed a wrong in allowing the outsiders, i.e. V.K.'s employees, into restricted premises by the issuance of G cards. However, unlike in the cases relied upon by the Revenue, there was no element of *mens rea*, or any direct or indirect involvement. Learned counsel relied upon the order reported as *Sanco Trans Ltd. v. Collector of Customs*, 1996 (83) ELT 557; *A.N. Bhat v. Collector of Customs*, 1991 (55) ELT 580 (Tri-Chennai); *Samrat Shipping Services v. Commissioner of Customs*, 2007 (213) ELT 103 and the Bombay High Court judgment in *Commissioner of Customs (G) v. K.M. Ganatra and Co.*, 2010 (254) ELT 454. He also relied upon *Falcon Air Cargo and Travels (P) Ltd. v. Union of India*, 2002 (140) ELT 8 (Del). Sh. Kamal Nijhawan, learned Senior Standing Counsel for the Revenue, relied upon the majority opinions of the Tribunal and submitted that there is no question of the penalty being disproportionate. Whilst direct or indirect involvement of the CHA in the nefarious activities of V.K.'s

employees was not established, or proved, its role as a facilitator, which enabled those individuals to indulge in such behaviour, was sufficient to justify the penalty imposed. Learned counsel relied upon the rulings of the Madras High Court in *Sri Kamakshi Agency v. Commissioner of Customs, Madras*, 2001 (129) ELT 29 (Mad); *OTA Kandla Pvt. Ltd. v. UOI*, 2011 (269) ELT 457 (Guj.); *Santon Shipping Services v. Commissioner of Cus. (Gen), Mumbai*, 2012 (280) ELT 75 (Tri-Mumbai) and *Eagle Transport Services v. Commissioner of Customs, Mumbai*, 1997 (96) ELT 469 (Trib). It was emphasized that in all these cases, the CHA's role as one holding a position of trust was underlined and the penalty of revocation was uniformly upheld. It was contended that having regard to the well-established principle that it is the administrative authority which is charged with considering the question of proportionality, the Court should substitute that decision only in rare circumstances. For this, learned counsel relied upon the judgment reported as *Deputy Commissioner Kendriya Vidyalaya Sangathan and Ors. v. J. Hussain*, 2013 (10) SCC 106. Further, relying on Clause 8 of the Custom House Agents Licensing Regulations, 2004 ("*CHA Regulations*"), learned counsel emphasized that the grant of a CHA license involves a rigorous process of interviews and evaluation, and that the authority placed upon the shoulders of a CHA are substantial. Given this, any infraction, especially as regards the illegal export of narcotics, should not be viewed lightly.

6. The conduct of a CHA is regulated by the CHA Regulations. Clause 13 records the obligations of a CHA, for which Clause 19

permits the CHA to employ persons to provide assistance. However, Clause 19(8) states that the CHA “*shall exercise supervision as may be necessary to ensure the proper conduct of any such employees in the transaction of business as agents and be held responsible for all acts or emissions of his employees in regard to their employment*”. The CHA’s obligation to supervise activities and ensure compliance with the regulations is thus clear. Regulation 20(1) concerns the revocation of a CHA license in the following terms:

“Suspension or revocation of license:

(1) The Commissioner of Customs may, subject to the provisions of regulation 22, revoke the licence of a Customs House Agent and order for forfeiture of part or whole of security, or only order forfeiture of part or whole of security, on any of the following grounds, namely :—

(a) failure of the Customs House Agent to comply with any of the conditions of the bond executed by him under regulation 10;

(b) failure of the Customs House Agent to comply with any of the provisions of these regulations, within the jurisdiction of the said Commissioner of Customs or anywhere else;

(c) any misconduct on his part, whether within the jurisdiction of the said Commissioner of Customs or anywhere else which in the opinion of the Commissioner renders him unfit to transact any business in the Customs Station.”

7. The appellant today does not question the findings leading to revocation of the license. Neither does the appellant dispute the fact that VK’s employees were wrongly granted G Cards, which were subsequent used by them to engage in the illegal export of narcotics.

Rather, the appellant only impugns the quantum of punishment (revocation of license) imposed by the majority opinion of the CESTAT, which is the maximum punishment prescribed by the CHA Regulations. The appellant is thus barred from becoming a CHA.

8. The issue before the Court is the proportionality of the penalty awarded in this case. The CHA Regulations prescribe two penalties: suspension of the license for a particular period of time, and revocation of the license, such that it irretrievably loses its currency. Once the Commissioner reaches a decision, the CESTAT, and this Court, would not ordinarily interfere with the award of punishment, denuding the disciplinary power of the designated authority. That said, the course of action taken by the Commissioner of Customs must depend on the gravity and nature of the infraction by the CHA, and thus, the punishment must be proportional to the violation. Given the civil consequences of revocation for the CHA, read in the background of its freedom under Article 19(1)(g), this principle of law is undisputed. Casting some clarity on the meaning of proportionality, especially at the second appellate stage, the Supreme Court in *Management of Coimbatore District Central Co-operative Bank v. Secretary, Coimbatore District Central Co-operative Bank Employees Association and Anr.*, (2007) 4 SCC 669, held as under:

“18. 'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of

decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise the elaboration of a rule of permissible priorities.”

In the context of revocation of a CHA license, this ordering or priorities, or the proportionality doctrine, was considered recently by the Andhra Pradesh High Court in *Commissioner of Customs and Central Excise v. HB Cargo Services*, 2011 (268) ELT 448 (AP) in the following terms:

“12.....For minor infraction, or infractions which are not of a serious nature, an order of suspension may suffice. On the contrary, when revocation is directed it has to be only in cases where the infraction is of a serious nature warranting exemplary action on the part of the authorities for, otherwise, two types of actions would not have been provided for. Primarily it is for the Commissioner to decide as to which of the actions would be appropriate but, while choosing any one of the two modes, the Commissioner has to consider all relevant aspects, and draw a balance sheet of the gravity of the infraction and the mitigating circumstances. The difference in approach for consideration of cases warranting revocation or suspension has to be borne in mind while dealing with individual cases. The proportionality question is of great significance as action is under a fiscal statute, and may ultimately lead to a civil death.”

9. The consequences of revocation being serious, the proportionality doctrine must inform the Commissioner’s analysis.

This is also the exercise the Court must undertake, though with a measure of deference towards the Commissioner's conclusions.

10. Beginning with the facts, there is virtually no dispute. There is a concurrent finding of fact by the Commissioner and the CESTAT that the appellant did not have knowledge that the illegal exports were effected using the G cards given to VK's employees. There was no active or passive facilitation by the appellant in that sense. Undoubtedly, the provision of the G cards to non-employees itself violated the CHA Regulations. This is an admitted fact, but it is not the Revenue's argument (nor is it the reasoning adopted by the Commissioner or the CESTAT) that this violation in itself is sufficiently grave so as to justify the extreme measure of revocation. Not any and every infraction of the CHA Regulations, either under Regulation 13 ("*Obligations of CHA*") or elsewhere, leads to the revocation of license; rather, in line with a proportionality analysis, only grave and serious violations justify revocation. In other cases, suspension for an adequate period of time (resulting in loss of business and income) suffices, both as a punishment for the infraction and as a deterrent to future violations. For the punishment to be proportional to the violation, revocation of the license under Rule 20(1) can only be justified in the presence of aggravating factors that allow the infraction to be labeled grave. It would be inadvisable, even if possible, to provide an exhaustive list of such aggravating factors, but a review of case law throws some light on this aspect. In cases where

revocation of license has been upheld (i.e. the cases relied upon by the Revenue), there has been an element of *active* facilitation of the infraction, i.e. a finding of *mens rea*, or a gross and flagrant violation of the CHA Regulations. In *Sri Kamakshi Agency* (supra), the licensee stopped working the license, but rather, for remuneration, permitted his Power of Attorney to work the license, thus in effect transferring the license for money. As the CESTAT noted, “9.....[a]pplicant instead of discharging his functions as a Custom House Agent in accordance with the Regulations, in flagrant violation of those Regulations went to the extent of encashing the facilities made available to him as a CHA by selling it for a price”. Moreover, the Power of Attorney was – as a matter of fact – “actively involved in the fraudulent act in connivance with the importers and others and that as per the Power of Attorney Bond executed by Sri K. Natarajan, all acts, deeds and things done by Sri D. Sukumaran were to be construed as if they were done by himself. Therefore virtually all the fraudulent activities carried out by the Power of Attorney of Thiru Natarajan were to be treated as having been carried out by Thiru K. Natarajan himself”, i.e. the licensee. In *OTA Kandla*, too, *mens rea* (i.e. knowledge) of the licensee was established. By a statement of the petitioner under Section 108, Customs Act, followed by the inquiry, it was clear that the licensee was aware that the consignment contained gypseous alabaster, a prohibited substance, but nonetheless, participated in its release from the Kandla Port. In

Santon Shipping (supra), the adjudicating authority came “to the conclusion that the fraud in this case has been committed in so many consignments over a long period of time and the same could not have happened without the connivance of the CHA”. The revocation of the license was again informed by the fact of connivance (i.e. *mens rea* as to the infraction) of the CHA. In *Eagle Transport* (supra), the CHA transferred the license altogether. As the CESTAT noted, “... the activities of the appellant firm were controlled day to day, not by Shrimankar but by employees of Amol Shipping Agency. We do not see how this does not amount to transfer of the licence in all but name. Hence, we must hold that the first and second articles of charge have been rightly held as proved.” Moreover, more than 100 blank shipping bill forms were sent to a third-party. Following these aggravating factors, the penalty of revocation was justified by the CESTAT. Similarly, in *HB Cargo* (supra), relied upon by the majority of the CESTAT, the case did not concern any ordinary infraction of the CHA Regulations, but “an act of corruption”, where blank shipping bills were issued by the partner and authorized representative of the CHA for a consideration of ₹150 per shipping bill.

11. Viewing these cases, in the background of the proportionality doctrine, it becomes clear that the presence of an aggravating factor is important to justify the penalty of revocation. While matters of discipline lie with the Commissioner, whose best judgment should not second-guessed, any administrative order must demonstrate an

ordering of priorities, or an appreciation of the aggravating (or mitigating) circumstances. In this case, the Commissioner and the CESTAT (majority) hold that “*there is no finding nor any allegation to the effect that the appellant was aware of the misuse of the said G cards*”, but do not give adequate, if any weight, to this crucial factor. There is no finding of any *mala fide* on the part of the appellant, such that the trust operating between a CHA and the Customs Authorities (as a matter of law, and of fact) can be said to have been violated, or be irretrievably lost for the future operation of the license. In effect, thus, the proportionality doctrine has escaped the analysis.

12. Learned Senior Standing Counsel for the Customs has stressed that the infraction in this case is not a routine matter, but rather, illegal smuggling of narcotics by the G card users. However, given the factual finding that the CHA was not aware of the misuse of the G cards (and thus, also unaware of the contents being smuggled), no additional blame can be heaped upon the CHA on that count alone. Rather, the *only* proved infraction on record is of the issuance of G cards to non-employees, as opposed to the active facilitation of any infraction, or any other violation of the CHA Regulations, whether gross or otherwise. Neither have any such allegations been raised as to the past conduct of the appellant, from the time the license was granted in January, 1996. Equally, it is important to note that the appellant has – as of today – been unable to work the license for 8 years, and thus been penalized in this manner. This is not to say that

the trust operating between the Customs Authorities and the CHA is to be taken lightly, or that violations of the CHA Regulations should not be dealt with sternly. A penalty must be imposed. At the same time, the penalty must – as in any ordered system – be proportional to the violation. Just as the law abhors impunity for infractions, it cautions against a disproportionate penalty. Neither extreme is to be encouraged. In this case, in view of the absence of any *mens rea*, the violation concerns the provision of G cards to two individuals and that alone. A penalty of revocation of license for this contravention of the CHA Regulations unjustly restricts the appellant's ability to engage in the business of the CHA for his entire lifetime. As importantly, it skews the proportionality doctrine, substantially lowering the bar for revocation as a permissible penalty, especially given the dire civil consequences that follow. On the other hand, the minority Opinion of the CESTAT, delivered by the Judicial Member, correctly appreciates the balance of relevant factors, i.e. knowledge/*mens rea*, gravity of the infraction, the stringency of the penalty of revocation, the fact that the appellant has already been unable to work his license for a period of 6 years (now 8 years), and accordingly sets aside the order of the Commissioner dated 24.01.2005.

13. In light of the above discussion, the majority Opinion of the CESTAT is hereby set aside. The Minority Opinion of the Judicial Member, Ms. Archana Wadhwa, is restored, and the revocation of

the license of the appellant is quashed. There shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

MARCH 14, 2014

