IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO. 50 OF 2014

Chandrakant Thakkar	}	**Appellant**
versus		
The Commissioner of Customs	}	
(Exports)	}	**Respondent**

WITH
CUSTOMS APPEAL NO. 51 OF 2014

Ashte Logistic Pvt. Ltd.	}	**Appellant**
versus		
The Commissioner of Customs	}	
(Exports)	}	**Respondent**

WITH
CUSTOMS APPEAL NO. 52 OF 2014

George Joseph Thokalath	}	**Appellant**
versus		
The Commissioner of Customs	}	
(Exports)	}	**Respondent**

Mr. V. Sridharan-Senior Advocate with Mr. Jas Sanghavi and Mr. Ashish Philips i/b. M/s. PDS and Associates for the Appellants.

Ms. S. I. Shah i/b. M/s. S. I. Shah and Co. for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.

DATED :- MARCH 3, 2015

ORAL JUDGMENT:-(Per S.C.Dharmadhikari, J.)

Having heard both sides and perusing the order passed by the Tribunal, we are of the view that the Appeals raise substantial questions of law. Since there are three Appeals and which involve a common point, we have taken them together. We would take the facts from Appeal No. 51 of 2014.

2) The substantial questions of law can be formulated as under:-

> "(i) Whether in the facts and circumstances of the case and in law, was the Tribunal justified in maintaining the order imposing penalty on the Appellants by taking recourse to section 158(2)(ii) of the Customs Act, 1962 in the absence of any specific Regulation or any power in that regard?
>
> (ii) Assuming that the regulation of Handling of Cargo in Customs Area Regulations, 2009 providing for imposition of penalties could, in the facts and circumstances of the case, can it be held that the Appellants before us have violated Regulation 6(n) and Regulation 9 of the Regulations?"

3) The facts are few and simple and in the light of the order that we propose to pass, we do not wish to keep the Appeals pending. By consent, they are taken up for final disposal.

4) The company Ashte Logistics Pvt. Ltd. Applied for and obtained, in terms of a policy, a permission to set up a Container Freight Station near Nhava Sheva with an area of 3.661 hectares. The survey numbers and area in hectares were mentioned in the

application/proposal. That proposal was placed before the Inter-Ministerial Committee of the Ministry of Commerce, in which officials from the Ministry of Finance, Ministry of Railways and Ministry of Shipping are members. The policy was to reduce the congestion and speed clearance of imported goods and export goods. The private sector was called upon to participate in setting up Inland Container Depots (ICD) and Container Freight Stations (CFS). The proposals of the Appellants for setting CFS were approved and a letter of intent dated 5th May, 2008 came to be issued, copy of which is at Annexture 'B' to the Appeal paper book.

5) Thereafter, an application was made on 4th November, 2008 to the Commissioner of Customs, Nhava Sheva for notifying the entire area of 3.661 hectares situated at Ashte Village, Taluka Panvel as a CFS under section 8 of the Customs Act, 1962. A breakup of survey numbers and hectares was given. The ground plan was also submitted and with the areas being demarcated therein and in possession of the Appellants. The Commissioner was requested to notify these facilities as a CFS under section 8 and 45 of the Customs Act, 1962. The case of the Appellants is that they secured and safeguarded the entire area of CFS by erecting a compound wall along with barbed wire fencing at the outer boundary.

6) The Appellants rely upon these permissions which have been granted and notifying the area as a CFS. The Appellants were also notified as Custodians and Customs Notifications are relied upon in that regard. The Regulations, *inter alia* Handling of Cargo in Customs Area Regulations, 2009 (HCCAR) are referred and to rely upon the physical verification of the CFS premises carried out by the Deputy Commissioner of Customs, CFS Management Cell, Nhava Sheva on 2nd April, 2012. This physical verification, according to the Department, revealed that the area of 4389 square meters in Survey No. 117 was not specified in Customs Notification dated 13th January, 2009. Therefore, the goods kept in the said premises were detained. Thereafter, the approval granted by the Customs Department came to be suspended by an order dated 4th April, 2012. The containers were directed to be shifted to authorised area. A direction was also given to the Appellants for erection of the wall demarcating and indicating the unauthorised portion from the authorised one. The Appellants wished to comply with this order, but prayed for revocation of the suspension. The suspension was then revoked. However, an inquiry was conducted, after which, a notice styled as show cause notice dated 25th June, 2012 was issued alleging violation of the Regulations and the permission to operate as CFS. The show cause notice *inter alia* proposed penalty on the Managing Directors of the companies. A reply was given to the show

cause notice denying the allegations. Thereafter, the matter was placed before the adjudicating authority and he had on record even the written submissions. Yet, the order-in-original of the Commissioner of Customs proposed penalties. That order came to be challenged before the Tribunal and the Tribunal, while affirming it by the impugned order dated 30th December, 2013, concluded that the companies and the Managing Directors have not adhered to the Regulations. The facts have been referred to till paragraph 3 of the impugned order and all that has been observed and reasoned is in para 5. That para reads as under:-

> "5. The ld. Counsel failed to produce the copy of application for registration. Moreover, in the Registration certificate survey no.117 was not entertained, therefore although the appellant may have applied for Survey no. 117 but without they have been granted to operate from works from Survey no. 117, the appellant is not entitled to operate from Survey no. 117. In these circumstances, I do not find any infirmity with the impugned order. Further, penalty on the appellant are highly excessive, therefore, the same is reduced to 50% in the case of M/s. Ashte Logistics P. Ltd. The contention of the appellant that penalty under Section 158 is not imposable. I do not agree with this contention. Therefore, I hold that penalty under Section 158 is rightly imposable."

7) Mr. Sridharan-learned Senior Counsel appearing for the Appellants submits that the Tribunal has failed to apply its mind, firstly to the crucial issue and as to whether the Act and the Regulations empower imposition of penalties. The Act only enables vide section 158(1) framing of a Regulation, which may contain a stipulation with

regard to imposition of penalty for contravening or aiding a contravention of the Rules or Regulations. There is no specific Regulation. Assuming that there are Regulations in the field which would denote that the title documents have to be verified and if there is a limited right in the land or area in the person managing the CFS, he would be dis-entitled to either seek approval or continuation thereof. In other words, all the areas are in physical possession of the Appellants. The demarcation together with the map in that behalf was placed on record prior to the approval being obtained. There was nothing objectionable found and on physical verification. Merely because the boundary wall has been erected so as to protect and safeguard the area, according to Mr. Sridharan, could not bring about a violation of the Regulations so as to impose penalty. These are all relevant and germane matters and completely left out of consideration by the Tribunal. Therefore, its order is vitiated by non application of mind and can safely be termed as perverse.

8) On the other hand, Ms. Shah appearing for the Respondent would submit that the Tribunal has in its discretion reduced the penalty and brought it down. The penalty was imposable because the record indicates as to how the portion admeasuring 4389 square meters was not part of the CFS and as approved and yet the goods or containers

were stored therein. In these circumstances, the Appeals does not raise any substantial question of law and the factual finding cannot be re-appreciated and re-appraised in our limited jurisdiction. Therefore, the Appeal be dismissed.

9) Having perused the Appeal paper book and Annexures thereto, we find that the Tribunal had before it an Appeal questioning the legality and validity of the show cause notice. The allegations in the show cause notice, copy of which is at pages 50 to 52 of the Appeal paper book, would reveal as to how the boundary wall of the CFS encompasses the whole area of Survey Nos. 117 and some 145 containers are stacked in the unauthorised area. The whole show cause notice is premised on the fact that the Customs operations have been carried out in the area outside the demarcated CFS. Therefore, unauthorised area has been brought in within the purview of the CFS.

10) The Directors of the Appellants had clarified that Survey No.117 was not a part of notified area, however they stated that while constructing the wall of the CFS they did not pay particular attention to the various survey numbers mentioned in the Notification. The Directors further informed that the initial wall of the CFS was constructed including the area of Survey No. 117. The legal owner of Survey No. 117 is Shri.Ramesh Gharat and they have a lease agreement

with him for 15 years. The reply to this allegation in the show cause notice reveals that all the directions have been complied with and the total area together with the boundaries has been indicated in the reply to the show cause notice. Thus, the land Survey No. 117 was, according to the Appellants, already used by them as open warehouse for storing various goods and which was enclosed by 10 feet wall. The land 1 acre was owned by one Ramesh Gharat, who has given the said land to the Appellants on 15 years' lease. This land together with the rest of the land, about which there is no dispute, was enclosed by 10 feet wall and as such was presented for inspection and notification by the Customs. The only mistake or error and unintentional, if any, is not including in the application the Survey No. 117. Now, in the light of such a reply, it was incumbent upon the Tribunal to find out whether the allegations in the show cause notice and particularly of violation of Regulation 6(n) and Regulation 9 could be held to be established and proved. Regulation 6(n) sets out the responsibility of Customs Cargo Service Provider not to make any alteration in the entry or exit points or boundary wall without the permission of the Commissioner of Customs. Regulation 9 provides for an application for approval of Customs Cargo Service Provider and the details in which it has to be made.

11) If the show cause notice alleges violation and breach of these Regulations and section 8(b) and 141(2) of the Customs Act, 1962, then, we do not see how the Tribunal, in a single paragraph reasoning, makes no reference to any of these provisions or the clauses of the Regulations, but only section 158. That is a section which enables the competent authorities to proceed and impose penalty in terms of a Regulation or Rule. However, Rules and Regulations which are made under the Act and either by the Central Government or the Board may provide for levy of fees in respect of application, amendment of documents etc. and by Act 18 of 2008 Clause (ii) of Sub-section (2) of section 158 is substituted so as to permit imposition of penalty on any person, who contravenes any Rule or Regulation or abets such contravention or who fails to comply with any provision of Rule or Regulation which it was his duty to comply. Therefore, whether there are Regulations in the field and whether these Regulations provide for imposition of penalty or not and assuming everything is complied with and there are indeed such Regulations, which of them have been violated or breached. Even if they have been so breached or violated, whether that was intentional or deliberate. All such matters are extremely relevant so as to impose penalty or justify such imposition. An imposition of penalty has a far reaching effect and consequence and may result in suspension of the approval or withdrawal of it or non-

renewal thereof. Therefore, all such matters have to be gone into and considered meticulously, minutely and seriously. That having not been done and the Tribunal failing to apply its mind to some of the most important and crucial factors that we are constrained to set aside the impugned order.

12) We accordingly allow these Appeals. We quash and set aside the impugned order and restore each of the Appeals to the file of the Tribunal for being decided afresh on their own merits and in accordance with law uninfluenced by the earlier conclusions. It is only with a view to emphasise the importance of the matter that we have noted the facts of the case and the rival versions. Beyond that, we express no opinion thereon. Each one of them are open for being raised and considered by the Tribunal irrespective of our order passed and the conclusions reached by us.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**