IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

FRIDAY, THE 17TH DAY OF JULY 2015/26TH ASHADHA, 1937

Cus.Appeal.No. 2 of 2014

AGAINST THE ORDER IN FINAL NO.26951/2013 of CUSTOMS, EXCISE & SERVICE TAX APP. TRIBUNAL, BANGALORE, DATED 31-10-2013

APPELLANT:

M/S. A.B.AGENCIES,
CUSTOM HOUSE AGENTS, GROUND FLOOR, UNITY CENTRE
RAILWAYGOODS SHED ROAD, COCHIN -3, PIN: 682 003.

BY ADVS.SRI.G.SUBRAMANIAN
SRI.SAJI VARGHESE KAKKATTUMATTATHIL
SRI.N.SUKUMARAN (SR.)

RESPONDENTS:
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1. CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, FKCCI, WTC BUILDING
1ST FLOOR, K.G.ROAD, BANGALORE - 560 009
REPRESENTED BY ITS ASSISTANT REGISTRAR.

2. COMMISSIONER OF CUSTOMS,
WLLINGTON ISLAND, COCHIN 9, PIN: 682 009.

R2 BY ADV. SRI.JOHN VARGHESE,SC,CEN.BOARD OF EXCIS
R BY SRI.THOMAS MATHEW NELLIMOOTTIL,SC,CB EX

THIS CUSTOMS APPEAL HAVING BEEN FINALLY HEARD ON 17-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Cus.Appeal.No. 2 of 2014

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A1: SUSPENSION ORDER NO.FNO.S9/8/19877- I & B CUS.

ANNEXURE A2: ORDER IN ORIGINAL NO.20/12 DATED 1.11.2012.

ANNEXURE A3: SHOW CAUSE NOTICE ISSUED UNDER REGULATION 22 OF CHALR 2004.

ANNEXURE A4: REPLY TO THE SHOW CAUSE NOTICE.

ANNEXURE A5: ENQUIRY REPORT DATED 18.3.2013.

ANNEXURE A6: REPRESENTATION DATED 23.5.2013 AGAINST THE INQUIRY REPORT BY THE APPELLANT.

ANNEXURE A7: WRITTEN SUBMISSIONS BEFORE COMMISSIONER DURING PERSONAL HEARING ON 31.5.2013.

ANNEXURE A8: ORDER NO.15/2013 DATED 31.5.2013 PASSED BY THE COMMISSIONER.

ANNEXURE A9: FINAL ORDER NO.26951/2013 DATED 31.10.2013 PASSED BY THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, BANGALORE.

ANNEXURE A10: STATEMENT DATED 27.9.2012 FROM M.JAMSHEER OF TRIVANDRUM WITH ENGLISH TRANSLATION.

ANNEXURE A11: STATEMENT DATED 1.3.2013 FROM M.JAMSHEER OF TRIVANDRUM WITH ENGLISH TRANSLATION.

ANNEXURE A12: STATEMENT DATED 27.9.2012 FROM ANILKUMAR ALEX SON OF ALEX WITH ENGLISH TRANSLATION.

ANNEXURE A13: STATEMENT DATED 25.9.2012 FROM ANIL KUMAR OF A B AGENCIES.

ANNEXURE A14: STATEMENT DATED 8.10.2012 FROM ANIL KUMAR OF A B AGENCIES.

ANNEXURE A15: TRUE COPY OF THE DECISION REPORTED AS 2010 (253) ELT 190 (BOMBAY) BOMMISSIONER OF CUSTOMS VS. WORLD WIDE CARGO MOVERS.

ANNEXURE A16: TRUE COPY OF THE DECISION REPORTED AS 2007 (212) ELT 97 (MUMBAI) NEPTUNE CLEARING AGENCY VS. COMMISSIONER.

ANNEXURE A17: TRUE COPY OF THE DECISION REPORTED AS 2006 (202) ELT 829 PB NAIR C &F (P) LTD., VS. COMMISSIONER OF CUSTOMS, MUMBAI.

// TRUE COPY //

P.A. TO JUDGE

ANTONY DOMINIC & SHAJI P.CHALY, JJ.

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Customs Appeal No.2 of 2014

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Dated this the 17th day of July, 2015

JUDGMENT

Antony Dominic, J.

This appeal is filed against Annexure A9 order passed by the Customs, Excise and Service Tax Appellate Tribunal, Bangalore confirming Annexure A8 order passed by second respondent, the Commissioner of Customs, Cochin whereby the Custom House Agents License No.236 (ABGPA1333F) issued to the appellant was ordered to be revoked under Regulation 20(1) of the Custom House Agents Licensing Regulations, 2004 (hereinafter referred to as 'Regulations 2004') and the Security of Rs.50,000/- deposited by the appellant was also ordered to be forfeited.

2. We heard the senior counsel appearing for the appellant and the learned Standing Counsel appearing for the respondents.

3. Briefly stated, the facts of the case are that the appellant was the holder of a license issued under the Regulations 2004. It would appear that apart from its office in Cochin, the appellant had 12 other branches. Among the various persons employed by the appellant to transact its business in the Cochin Custom House, one of them was Sri.Vipin Kumar who was issued an identity card and 'G' card bearing Sl.No.48 which was

valid upto 22.8.2014.

4. It appears that Bill of Entry No.7690810 dated 17.8.2012 on behalf of M/S Madeena Dates, Trivandrum was filed in the name of appellant for clearance of goods which required Clearance Certificate from Plant Quarantine Agencies and Port Health Officers. The required documents were produced and the goods were cleared. On investigation, it was revealed that Sri.Vipin Kumar, the 'G' card holder of the appellant had submitted the forged certificate of the Port Health Officer to clear the goods. It was also revealed that the signature of the proprietor of the appellant was forged in the Bill of Entry by Sri.Vipin Kumar. Enquiry also revealed that Sri.Vipin Kumar had submitted forged application for 'H' card and 'G' card in the Customs Office and on the basis of these applications, cards were obtained in the name of two persons by name Kannan and Anil Kumar Alex.

5. Alleging that these actions of Vipin Kumar, the employee of the appellant, amounted to irregularities in terms of the provisions contained in the Regulations 2004, the license issued to the appellant was suspended by Annexure A1 order dated 18.1.2012. Subsequently,

Annexure A2 order was issued by the Commissioner ordering continuance of suspension of the licence.

6. Thereafter, Annexure A3 show cause notice dated 19.11.2012 was issued to the appellant requiring it to show cause why the Custom House Agents License issued to it should not be revoked and security deposited not forfeited. On receipt of the notice, the appellant submitted Annexure A4 reply. Finally, the second respondent issued Annexure A8 order revoking the licence and forfeiting the security deposit. The conclusions on the basis of which this order was passed reads thus:

> *"15. I have gone through the Show Cause Notice, reply of M/S A.B. Agencies dated 11.12.2012, submissions made during the personal hearing on 15.02.2013 before the Inquiry Officer, inquiry report dated 18.03.2013, the reply submitted by M/S A.B.Agencies dated 24.05.2013 and the submissions made during the personal hearing on 31.05.2013.*
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> *16. Brief facts of the case are as follows:-*
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> *M/S A.B.Agencies was issued Custom House Agents License No.236 (ABGPA1333F) under Regulation 9(1) of Custom House Agents Licensing Regulations, 2004)CHALR, 2004). M/S A.B.Agencies filed Bill of Entry No.7690810 dated 17.8.2012 on behalf of the importer, M/S Madeena Dates, Thiruvananthapuram for clearance of goods like Dates, Jefi Juice, Power Drinks, Red Bull, Power Plus etc. Investigation conducted has brought to light that Port Health*

Officer's endorsement on the said Bill of Entry was altered by Shri.L.Kannan, 'H' Card holder, at the instigation of said Shri.Vipin Kumar, a 'G' card holder of the CHA, so as to clear the goods from Customs. Further investigation has broght out that Shri.Vipin Kumar had forged the signature of the Proprietor Shri.Anil Kumar on the Bill of Entry, in the applications for issue of H card and G cards for Shri.Kannan L and Shri.Anil Kumar Alex, respectively and various documents submitted to Customs. Since, it appeared that an employee of M/S A.B.Agencies has committed irregularities in the clearance of goods imported vide Bill of Entry No.7690810 dated 17.8.2012 by forging the endorsement of Port Health Officer and signature of Shri.Anil Kumar in the said Bill of Entry and the said employee had also submitted various other forged documents, the license issued to M/S A B Agencies was suspended with immediate effect under Regulation 20(2) of the CHALR, 2004 vide order F No.S9/8/1987 I & B dated 18.10.2012. Thereafter a notice was issued on 19.11.2012 to M/S A B Agencies seeking to show cause as to why license issued to them should not be revoked and the security deposited not forfeited under Regulation 20 (1) of CHALR, 2004.

17. I find that after considering the submissions of M/S A B Agencies made in reply to the Show Cause Notice and at the time of personal hearing, the Inquiry Officer had arrived at the conclusion that M/S A B Agencies had failed to exercise proper supervision and to ensure proper conduct of its employee in the transaction of business as CHA and had thereby violated Regulation 19(8) of CHALR, 2004.

18. The fact that the endorsement of the Port Health Officer on Bill of Entry No.7690810/17.8.2012 that "the item ie., vigor power energy drink, monster energy drink, power plus energy drink, kratingdaeng Redbull, ***does not conforms*** *to FSSAI specification" was forged by Shri.L.Kannan, 'H' card holder of the CHA on instigation of another employee and 'G' card holder Shri.Vipin Kumar, to read as "the item, vigor power energy drink, monster energy drink, power plus energy drink, kratingdaeng Redbull* ***conforms to*** *FSSAI specification" so as to clear the goods from* *customs stands admitted. It is also admitted that said Shri.Vipin Kumar had forged the signature f Shri.Anil Kumar, Proprietor on various documents submitted to the Customs, including the above said Bill of Entry, the applications for issue of H card and G card for Shri.L.Kannan and Anil Kumar Alex respectively. I also find that during the investigation Shri.Vipin Kumar had deposed that he had been indulging in forging of the signature of the proprietor in several Bills of Entry submitted by him in the Bill of Entry.*

19. I find that the defense put forth by Shri.Anil Kumar, Proprietor of M/S A B Agencies is that the above forgery of documents and irregularities were committed by Shri.Vipin Kumar without their knowledge with the help of his associates S/Shri.L.Kannan and Anil Kumar Alex, who were not their employees; that the consignment belonged to a friend of Shri.Vipin Kumar; that the said irregularities were committed outside their office clandestinely; that it is impossible to detect such forgery by normal supervision and even customs official had failed to notice the clandestine activities during clearance. On the other hand I find that Shri Anil Kumar, the Proprietor himself had admitted in his statements under Section 108 of the Customs Act, 1962 dated 25.9.2012 and 8.10.2012 that he had not taken the precaution of meeting the importer personally to verify the genuinity and that he allowed the documents for import to be handled by his Employee Shri Vipin Kumar on behalf of his firm.

20. From the facts of the case it is evident that the forgery committed by Shri.Vipin Kumar with the help of Shri.L.Kannan, is not a one off instance and Shri.Vipin Kumar had been indulging in the nefarious activity for a long time. It is alarming to note that Shri.Vipin Kumar was able to obtain 'H' card and 'G' card for his associates Shri.L.Kannan and Anil Kumar Alex respectively. As held by the Inquiry Officer, this clearly shows that Shri.Anil Kumar, Proprietor had completely failed to exercise the supervisory responsibility cast upon him under the CHALR, 2004, Regulation 19(8) states that "the Customs House Agent shall exercise such 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 omissions of his employees in regard to their employment." Thus, the Regulation is very clear about the responsibility of the CHA on the acts and omissions of his employees. Further, Shri.Anil Kumar had, by allowing his employee to handle import documents without verification of the genuineness of the importers, also failed to discharge the obligation under Regulation 13(o) of the CHALR, 2004.*

21. Shri.Anil Kumar cannot absolve him from the above responsibility and his failure by stating that irregularities were committed Sri.Vipin Kumar, without his knowledge and in a clandestine manner outside their office. In fact the negligence from his part and lack of proper scrutiny of the activities of his employees had encouraged Shri.Vipin Kumar and his associates to indulge in such nefarious activities. Thus the observation made by the Inquiry Officer that the principles of vicarious liability of a master would apply in this case merits acceptance. The principles of vicarious liability states that an employer can incur liability for the acts and omissions of an employee, if committed by the employee in the course of employment and if the employer has the right to control the way in which the employee carries out his or her duties. In the instant case, by the provisions of the CHALR, 2004, employer is required to exercise control over the way in which his employee carries out his or her duties. The question regarding applicability of the principles of vicarious liability of the CHA for the actions of his employee, has been decided by the Hon'ble High Court of Bombay in the case of Commissioner of Customs (General) vs. Worldwide Cargo Movers [2010 (253) ELT 190 (Bom)], where in the Hon'ble High Court held that revocation of CHA License by the Commissioner of Customs for involvement of the employee in smuggling activity is valid. Further, the Hon'ble CESTAT Bombay in the case of M/S Tara Jewels Export Ltd., vs. Commissioner of Customs CSI Airport, Mumbai [2011(273)ELT 0554 Tri.(Bom)] has held that the employer has vicarious liablity for the actions of the employee. Hence, the submission of Shri.Anil Kumar that the principles of vicarious liability of master are not applicable to this case is devoid of any merit and hence rejected.

2. M/S A B Agencies has contended that the ratio of the case law relied by the Inquiry Officer viz. Kamakshy vs. Commissioner [2001 (129) ELT 29 (Mad), 2001 (142) ELT A87 (SC)] cannot be applied in the instant case as the said case law refers to fraud committed by the power of attorney holder. As per Regulation 19(8) of CHALR, 2004, the responsibilities of CHA is not limited to the acts and omissions of the power of attorney holder alone but encompass all employees employed by him in transaction of business as agents. In fact Shri.Vipin Kumar is a 'G' card holder of the CHA employed in transaction of the business of the CHA. Hence, the above contention of M/S A B Agencies is rejected.

23. From the above it emerges that M/S A B Agencies has violated sub regulation (8) of Regulation 19 of the CHALR, 2004. In view of the above violation, the Custom House Agents License No.236 (ABGPA1333F) issued to them is liable for revocation and the security deposit liable to be forfeited under Regulation 20 (1) CHALR, 2004, which provides that "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 any where else which in the opinion of the Commissioner renders him unfit to transact any business in the Customs Station.

Accordingly I pass the following order:

ORDER

(i) I order revocation the Custom House Agents License No.236 (ABGPA1333F) issued to M/S A.B. Agencies under Regulation 20 (1) of the CHALR, 2004.

(ii) I order forfeiture of security Rs.50,000/- (Rupees fifty thousand only) deposited by M/s A.B.Agencies under Regulation 20 (1) of the CHALR, 2004."

7. This order was confirmed by the Tribunal by Annexure A9 order, in which the Tribunal has placed reliance on the decision of the Bombay High Court in *CC v. Worldwide Cargo Movers [2010 (253) ELT 190 (Bom,)]*. It is in this background, this appeal is filed.

8. Learned senior counsel for the appellant contended that the irregularities which are relied on by the Department to cancel the licence of the appellant were the fraudulent activities of Sri.Vipin Kumar. It is argued that in the impugned order there is no finding that the appellant was either a party to that fraudulent activities of Sri.Vipin Kumar nor is there any finding that the appellant was even aware of his fraudulent activities. Therefore, it is contended that the acts committed by Sri.Vipin Kumar were outside the scope of his employment and that,

therefore, the provisions of 19(8) of the Regulations 2004 are not attracted. It is, therefore, contended that the termination of license ordered by the Commissioner and which has been confirmed by the Tribunal as per Annexures A8 and A9 orders is illegal.

9. On the other hand, the learned Standing Counsel appearing for the respondents referred us to the findings of the Commissioner as confirmed by the Tribunal and contended that it was in the course of the employment that Sri.Vipin Kumar has committed irregularities and according to him, in view of Clause 19 of the Regulations 2004, the agent is responsible for all acts and omissions of his employees and that therefore the appellant cannot be absolved of the consequences for the irregularities committed by its employees.

10. We have considered the submissions made. The license issued to the appellant is under the provisions of the Regulations 2004. Clause 19 of the Regulations regulates 'Employment of Persons'. As per Clause 19(8), it is the responsibility of the Customs House Agent to exercise such supervision as is necessary to ensure the proper conduct of his employees in the transaction of his business as agent. This

provision further provides that the agent shall be held responsible for all acts or omissions of his employees in regard to their employment. The consequence of breach of Clause 19(8) is provided in Regulation 20, which provides that the Commissioner may revoke the licence of a Customs House Agent and order forfeiture of part or whole of the security, or only order forfeiture of part or whole of security.

11. In so far as this case is concerned, admittedly, Sri.Vipin Kumar was an employee of the appellant and he was also issued 'G' card, enabling him to transact the business of the appellant as a Customs House Agent. It was while working in that capacity that he has forged the signature of the proprietor of the appellant on the Bill of Entry, in the applications for issue of 'H' card and 'G' card and various other documents submitted to the Customs Department. He was enabled to do all the forgeries and derive the benefit thereof only because of his employment under the appellant and obviously on account of the failure of the appellant in effectively supervising the activities of his employees to ensure that they conduct themselves properly in the transaction of his business as a Customs House Agent. Therefore, the appellant cannot

be absolved of his lapse of supervision attracting Clause 19 of the Regulations warranting action against him under Regulation 20.

12. The remaining issue to be considered is whether in the facts of the case the extreme penalty of revocation of license and forfeiture of security was warranted.

13. We have already referred to the Annexure A8 order passed by the Commissioner. The relevant findings of the Commissioner, which are extracted herein above, shows that the entire misconducts have been committed by Sri.Vipin Kumar, the employee of the appellant, and Sri.Kannan and Anilkumar Alex who were employed by Sri.Vipin Kumar, on the strength of the 'H' and 'G' cards obtained on the strength of the documents fabricated by Sri.Vipin Kumar himself. This order does not anywhere show that the appellant was even remotely connected with the misconducts of Sri.Vipin Kumar and his team or that the appellant was even aware of what was being done by Sri.Vipin Kumar and two others mentioned above. Department does not also have a case that on any previous occasion, the appellant was proceeded against on the allegation of breach of the provisions of the Regulations.

14. Eventhough the appellant functioned as a Customs Office of Agent on the basis of the license that was issued under the Regulations and was liable to be proceeded against under Clauses 19 and 20 of the Regulations penalty to be levied on the appellant should certainly be proportionate to the gravity of the breach proved to have been committed by him. While examining this issue, the fact that the appellant did not have any role in what was done by Sri.Vipin Kumar and his team and that the lapse found is supervisory lapse assumes importance the absence of any previous misconduct on the part of the appellant has also to be considered. Yet another aspect that is required to be noticed is that from 18.10.2012 when Annexure A1 order was issued, the license issued to the appellant remained suspended and by Annexure A8 order dated 31.5.2013 the license has been terminated. In other words, for the misconduct of his workers, for which the appellant is also responsible, it has suffered the penalty of being kept out of business from 18.10.2012.

15. Considering all these, we feel that termination of the license ordered in Annexure A8 order and confirmed in Annexure A9 order of

the Tribunal is too harsh and disproportionate. This view that we take, is supported by the principles laid down in the judgment in *Ashiana Cargo Services v. Commissioner of Customs (I & G) 2014 (302) ELT 161 (Del)* where the Delhi High Court has held thus:

> *"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 24-1-2005.*"

For the aforesaid reasons, Annexure A8 order as confirmed by Annexure A9 order of the Tribunal to the extent the license of the appellant is revoked is set aside and these orders to the extent security is forfeited is confirmed. Appeal is disposed of accordingly.

SD/-
ANTONY DOMINIC
JUDGE

SD/-
SHAJI P. CHALY
JUDGE

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