

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date :01.10.2015

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

C.M.A.No.1623 of 2015

and

M.P.No.1 of 2015

M/s. Chandra CFS and Terminal
Operators Pvt.Ltd.,
Kammavari Palayam Road,
Nallur Post, Minjur,
Chennai-601 203.

...Appellant/Appellant

Versus

1. The Commissioner of Customs,
Chennai VIII Commissionerate,
Custom House,
No.60, Rajaji Salai,
Chennai-600 001.

2. The Customs Excise and Service Tax
Appellate Tribunal, South Zonal Branch,
Haddows Road, Shastri Bhawan,
Chennai-600 006.

...Respondents/Respondents

Prayer: This appeal is filed for the relief as stated therein.

For Appellant : Mr.Vijayanarayanan,
Senior Counsel,
for M/s.Hari Radhakrishnan

For Respondents : Mr.K.Mohanamurali

JUDGMENT

(Judgment of the Court delivered by T. MATHIVANAN, J.)

Challenging the final order No.40710 dated 29.06.2015 and made in the Appeal No.40458 of 2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal(CESTAT), South Zonal Bench at Chennai, this appeal is preferred by the appellant after invoking the provisions of Section 130 of the Customs Act, 1962.

2. The edifice of the entire case hinges around the pivot of the order of the first respondent, dated 23.12.2014 and thereby, the custodianship vested on the appellant's CFS was suspended with immediate effect by virtue of the powers conferred upon him under Regulations 11(2) of HCCAR, 2009.

3. In this appeal, we would like to highlight the point that the potentiality of our Nation is being exploited for exportation to get unlawful self enrichment.

4. It is known fact that, of late, the global ball, while moving around, has been wobbling. The reason why is, the drastic change in the environmental condition as the prohibitory activities of eco-cide has been continuing unbridledly by certain section of people by removing the valuable and precious timbers, which are absolutely necessary for maintaining the ecological balance and for economic growth.

5. It is unfortunate that no special law to deal exclusively with the offences relating to red sanders and to combat red sanders smuggling, has been enacted by the law-makers.

6. Though the above facts may superficially appear to be irrelevant, still they are absolutely relevant, as they are intertwinedly connected with the factual scenario of the present case.

7. The appellant viz., M/s.Chandra Container Freight Station(CFS) and Terminal Operators Private Ltd., was appointed by the first respondent as the custodian for the import and export goods as per Section 45 of the Customs Act, 1962 vide Public Notice No.77/2007 dated 02.06.2007 at Nallur Village, Minjur, Chennai-601 203.

8.The appellant, as a custodian, is bound to be diligent enough in discharging their duties and obligations under the prevailing customs laws and Handling of Cargo in Customs Area Regulations, (hereinafter it may be referred to as "HCCAR, 2009" wherever the context so require).

9.In so far as the present case is concerned, the container bearing No.SEGU 1697558 containing Red Sander logs weighing 9430 kgs was sized by the Directorate of Revenue Intelligence Unit (DIU) under a mahazar, dated 6.3.2014 and entrusted with the appellant for safe and secured custody.

10.That on 19.12.2004, the said container was removed unauthorisedly from the custody of the appellant by using forged documents.

11.Prima facie, it appeared that the alleged removal of seized goods was due to the gross negligence and utter failure on the part of the appellant for not ensuring safety and security of the seized goods which were kept under their custody.

12.Since the nature of offence was very serious and caused a reasonable doubt on the bona fides of the appellant, the first respondent viz., the Commissioner of Customs, Chennai, by exercising the powers vested under Regulation 11 (2) of HCCAR, 2009, had passed an order on 23.12.2014 suspending the custodianship of the appellant.

13.Challenging the order of suspension of the custodianship, the appellant had preferred an appeal before the CESTAT, South Zonal Bench, Chennai and that appeal was dismissed on 29.06.2015 on the ground that, "the bonafide and credibility of conduct of custodian - appellant raised a serious doubt and the investigation by customs and police authorities was still pending and yet to be completed and if the appellants were allowed to continue as custodian, it would certainly cause jeopardy and hamper the process of investigation."

14.While dismissing the appeal, the Tribunal has directed the first respondent to complete the investigation proceedings and take appropriate action under HCCAR, 2009 as expeditiously as possible preferably within three months subject to receiving the investigation report from the police authorities.

15. Alleging that the principles of natural justice has been violated in their case, the appellant has preferred the present appeal.

16. Heard, Mr. Vijaya Narayanan, learned Senior Counsel appearing on behalf of Mr. Hari Radha Krishnan, learned counsel, who is on record for the appellant and Mr. K. Mohana Murali, learned Standing Counsel for the first respondent, viz., the Commissioner of Customs.

17. From the grounds of appeal as well as from the materials placed before us, the following substantial questions of law arise for our consideration:-

(a) whether the order of suspension of custodianship dated 23.12.2014 was passed in violation of the principles of natural justice?

(b) Whether the Commissioner of Customs was justified in invoking the provisions of Regulation 11(2) of Handling of Cargo in Customs Area Regulations 2009, when no enquiry against the appellant was pending or contemplated?

18. What it transpires from the records is that an information was received by the Directorate of Revenue Intelligence Unit, Chennai Zonal Unit on 13.12.2014 saying that Red Sanders (prohibited for Export) were being attempted to be smuggled by M/s. Jayam Plast Co., having its registered office at Old No. 217, New No. 84, Room No. 9-A, Angappan Naicken Street, vide Shipping Bill No. 9913305, dated 6.2.2014 in container No. HDMU 2601255 consigned to M/s. TEKAD Enterprise, International Container Freight Station, Pasir Gudang, Johar, Malaysia.

19. On receipt of this information, the officers of Docks Intelligence Unit (DIU) had verified the seals of the container No. HDMU 2601255 in the presence of the independent witnesses and found it intact. Then the container was opened and found to contain wooden logs suspected to be Red Sanders which were prohibited for export. Thereafter, the said container was closed with Customs one time seal and moved to the appellant's CFS, viz., M/s. Chandra CFS for the detailed examination.

20. That on 14.2.2014 the above said container was examined by the appellant CFS in the presence of

CHA, Surveyor and two independent witnesses.

21.While so, the container was found to contain 348 numbers of red sander logs totally weighing about 11945 kgs, which were valued at Rs.1,19,45,000/- and three gunny bags each weighing 25 kgs, containing the plastic granules. The container with the cargo was seized along with the trailer bearing No.TCE 9972 under a mahazar, dated 14.2.2014.

22.Nextly, on an information provided by one Mr.B. Vijayabalan, KMK Shipping, a previous consignment pertaining to M/s.Jayam Plast which was already shipped to Malaysia covered under the Shipping Bill No. 9768912, dated 30.1.2014 vide container No.SEGU 1697558 through Shipping Lines M/s.PIL India Pvt. Ltd., was recalled.

23.On examination of the container No.SEGU 1697558, it was found to contain 304 Red Sanders logs weighing about 9430 Kgs and 51 bags of Cement with markings (Penna Cement). The container along with the cargo were seized under a mahazar, dated 6.3.2014.

24.On investigation, it was revealed that one Mr.Akbar @ Hakkeem had played a vital role in diverting the stuffed, sealed container from the CFS to the godown and substituted the declared cargo with Red Sander logs.

25.The above two seized containers were handed over to the authorities of M/s.Chandra CFS (appellant herein) for safe custody as they were the custodians appointed by the first respondent.

26.Since the investigation was at the final stage, the period for issuance of Show Cause Notice had also been extended under Section 110(2) of the Customs Act, 1962.

27.Under the above circumstances, on 19.12.2014, A.C. (Docks) had informed that one of the seized container No.SEGU 1697558 seized by DIU under the mahazar, dated 6.3.2014 containing red sanders, was removed unauthorisedly from the appellant's CFS.

28.In this connection, a file note was placed by the Joint Commissioner (Docks) saying that, "it was a serious and very urgent matter and required intervention by DIU as there was a pressure on those goods. It also

prima facie appeared that there was a role for custodian in that case and therefore, necessary orders were solicited."

29. On the next day, i.e., on 20.12.2014, this fact was informed to the first respondent by one M.V. Sathyanarayana, who was the Assistant General Manager of the appellant CFS, through a letter, dated 20.12.2014.

30. Apart from this information, he had also lodged a police complaint with E3 Minjur Police Station, on the same date.

31. Based on his complaint, a case in Cr.No.558/14 under Sections 420 and 380 I.P.C. was registered on the file of E3 Minjur Police Station on 22.12.2014.

32. At about 3.15 p.m. on the same day, the Inspector of Police attached to E3 Minjur Police Station had seized the container trailer lorry bearing Registration No.AP 2 TT 3399 along with 304 Red Sander logs with the duplicate container No.GESU 1896575 under the cover of a seizure mahazar and thereafter, it was kept at the appellant's CFS under the police custody.

33. That on 23.12.2014, the first respondent, viz., Commissioner of Customs by virtue of the powers conferred on him under the Regulation 11(2) of HCCAR 2009, had passed an order for immediate suspension of the custodianship vested on the appellant, vide the Public Notice 77/2007, dated 2.6.2007 until further orders.

34. It is pertinent to note here that on 29.12.2014 a Corrigendum to the order of suspension of Custodianship, dated 23.12.2014 was issued by the first respondent, wherein, it is stated that, "the existing Import and Export Goods available in the CFS will be allowed to be cleared/exported after completion of necessary Customs formalities."

35. In the interregnum, on a petition filed by the Assistant General Manager of the Appellant under Sections 451 and 457 Cr.P.C., the learned Judicial Magistrate No.II, Ponneri, had passed an order on 4.2.2015 and thereby, interim custody of the said container containing the stolen cargo, namely, 304 Red Sander logs along with 51 bags of cement each containing 50 kgs was given to the appellant CFS on condition that they shall execute a bond to the extent of

Rs.2.00 crores, as the first respondent police had no objection.

36.Subsequently, on 5.2.2015, the first respondent had issued a show cause notice to various persons, i.e., as nearly as 11 persons including the appellant CFS alleging that the appellant CFS had contravened various provisions of HCCAR, 2009 as well as certain provisions of Customs Act, 1962.

37.Despite repeated requests made by the appellant vide their letters, dated 24.12.2014 and 1.1.2015, the first respondent did not come forward to revoke the order of suspension of the custodianship of the appellant CFS.

38.It is also revealed from the records that during the course of investigation, one of the accused Mr.Kanagavelan was taken into police custody and based on his information, the police had seized the container No.SEGU 1697558, which was fraudulently brought into the premises of the appellant's CFS with a sticker, under the cover of a seizure mahazar, dated 8.1.2015.

39.This fact was informed to the first respondent by the appellant, vide their letter, dated 9.1.2015 along with a copy of the seizure mahazar, dated 8.1.2015.

40.Ultimately, the appellant had addressed a letter to the first respondent, viz., the Commissioner of Customs, dated 16.2.2015, requesting to revoke the order of suspension of custodianship granted to them and to permit them to operate as custodian pending enquiry, if any.

41.Since the first respondent had not revoked the order of suspension of the custodianship granted on the appellant, they had filed an appeal before the second respondent Tribunal, which was dismissed on 29.6.2015. Challenging the legality of the order, present appeal is filed.

42.It is obvious to note here that the Commissioner of Customs, who is the first respondent herein, by her letter, dated 23.12.2014 had suspended the custodianship of the appellant CFS in terms of the provisions of the Regulation 11 (2) of HCCAR, 2009, alleging that the appellant had contravened the provisions of Regulations 6(1)(f), 6(1)(i) and 6(1)(q) of HCCAR, 2009.

43.It is also significant to note here that on 29.12.2014, a corrigendum to the said order was issued by the first respondent, wherein, it is stated that:-

"the existing Import and Export Goods available in the CFS will be allowed to be cleared/exported after completion of necessary Customs formalities."

44.According to Mr.Vijayanarayanan, learned Senior Counsel appearing for the appellant, the impugned order, dated 23.12.2014, is an unilateral one as no enquiry was contemplated as against the appellant CFS.

45. Mr.Vijayanarayanan, has projected his arguments on the following grounds:-

a. The order of suspension of custodianship of the appellant's CFS was absolutely a gross violation of the tenets of natural justice as the appellant was neither given any pre-decisional nor any post decisional hearing. At present the law was well settled that the principles of natural justice had to be adhered to when any order was passed to the detriment of any person unless the statute had either specifically or by necessary implication excluded the application of principles of natural justice.

46. In support of his contention, he has placed reliance upon the following decisions:-

a.Freightwings and Travels Ltd. vs. Commissioner of Customs, Mumbai (2001 (129) ELT 226 (Tri-LB)).

b. Automative Tyre Manufacturers Association vs. Designated Authority (2011 (263) ELT 481 (S.C.)).

c. Pinkcity Logistics Ltd. vs. Commissioner of Customs (2015 (320) ELT 241 (Raj.)).

d. International Cargo Services vs. Union of India (2006 (193) ELT 546 (Del.)).

e. Commissioner of Customs (Gen), Mumbai vs. Raj Clearing Agency (2006 (199) ELT 602 (Bom.)).

47. In Freightwings and Travels Ltd., cited first supra, the Larger Bench of the Tribunal at New Delhi, in paragraph No.5.4 has held as under:-

"According to the parameters of the rule of natural justice as set by the Hon'ble Supreme Court, a person against whom punitive or damaging action is taken by any authority in its quasi-judicial capacity must at least be given the minimal fairness of a post decisional hearing. In the present case, admittedly, the Commissioner has not given even such a hearing after passing the impugned order suspending the appellant's CHA licence under Regulation 21(2). Therefore, we are inclined to hold that the impugned order of the Commissioner does not pass the test of the rule of natural justice laid down by the apex Court and, further, that the order was issued in colourable exercise of power. We, therefore, direct the Commissioner of Customs to give personal hearing to the appellants and pass a speaking order under the Sub Regulation (2) of Regulation 21."

48. In the very same decision, the Larger Bench has made reference to the observations of Hon'ble Mr. Justice V.R.Krishna Iyer, in Maneka Gandhi's case, in which, His Lordship, has expounded his views on the subject as under:-

"Hearing is obligatory-meaningful hearing, flexible and realistic, according to circumstances, but not ritualistic and wooden. In exceptional cases and emergency situation, interim measures may be taken, to avoid the mischief of passportee becoming an escapee before the hearing begins. 'Bolt the stables after the horse has been stolen' is not a command of natural justice. But soon after the provisional seizure, a reasonable hearing must follow, to minimise procedural prejudice."

49. In Automative Tyre Manufacturers Association, cited second supra, while speaking on behalf of the Division Bench of the Apex Court, Hon'ble Mr. Justice D.K.Jain, in paragraph 58 has observed as under:-

"58. It is thus, well settled that unless a statutory provision, either specifically or by

necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a strait-jacket nor is it a general rule of universal application. Undoubtedly, there can be exceptions to the said doctrine. As stated above, the question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of these matters that the question of application of the said principle can be properly determined. (See: Union of India Vs. Col. J.N. Sinha & Anr.66.)"

50. In Pinkcity Logistics Ltd., cited third supra, a Division Bench of Rajasthan High Court (Jaipur Bench), in paragraph No.51, has observed that.....

"the powers under Regulation 21 are required to be seen essentially as those of a preventive measure, and hence, it cannot be said that in no case such powers could be exercised without previous notice to the person concerned. True it is that generally and ordinarily, the principles of natural justice warrant pre-decisional one would be permissible."

51. In International Cargo Services, cited fourth supra, a Division Bench of the Delhi High Court, has observed in paragraph No.7 as under:-

".....Where the legislative scheme of provisions of a statute suggest that the intent of the legislature is to take emergent action, in that event and subject to fulfilment of ingredients of the provisions, an order could be passed without affording pre-decisional hearing and an expeditious post-decisional hearing may amount to substantial compliance with the basic rule of law."

52. In Commissioner of Customs (Gen), Mumbai, cited fifth supra, a Division Bench of Bombay High Court, has held that,

"it is not mandatory that in all cases of suspension, Regulation 22(1) ought to be followed. Whereas in cases where immediate action is necessary the Commissioner of Customs is fully empowered to suspend the licence where an enquiry against such an agent is pending or contemplated as per Regulation 20 (2).

53. Secondly, Mr. Vijayanarayanan, learned Senior Counsel has argued that the customs have already completed their investigation and a show cause notice, dated 5.2.2015 was issued for confiscation of the impugned seized goods and also for imposing penalty on the appellant for the alleged violation of the provisions of HCCAR, 2009, without any reference to the order of suspension or any proposal either to continue with the suspension or to cancel the custodianship of the appellant's CFS.

54. He has also laid emphasis on the point that the show cause notice, dated 5.2.2015 was issued without even referring to the order of suspension of custodianship of the appellant, dated 23.12.2014 after the completion of detailed investigation and after recording the statement of all concerned and that the conclusion of the Tribunal was absolutely wrong to say that the investigation was yet to be completed.

55. Thirdly, he would submit that it was true that the Regulation 11(2) empowers the Commissioner in appropriate cases, where immediate action was necessary to suspend the approval granted to a Customs Cargo Service Provider. However, before exercising the power under

Regulation 11(2) of HCCAR, 2009, the Commissioner ought to have taken into consideration as to whether an enquiry against such Customs Cargo Service provider was pending or contemplated.

56. In this connection, the learned Senior Counsel has indicated that in the present case, after suspending the custodianship of the appellant on 23.12.2014, neither a show cause notice was issued under the provisions of Regulation 12 of HCCAR, 2009, nor any enquiry was initiated and that the Commissioner, had therefore, wrongly stated in the suspension order, dated 23.12.2014 that an enquiry was pending or contemplated. Since the Regulation 11(2) was wrongly invoked by the Commissioner, who is the first respondent herein, Mr.Vijayanarayanan, has urged that the impugned order of suspension of custodianship of the appellant's CFS might be set aside.

57. Further, he would submit that no person's right to carry on his profession could be stopped for a prolonged period through a suspension order and that such an approach was against the provision of Regulation 11.

58. Fourthly, with regard to the unauthorised removal of seized container, Mr.Vijayanarayanan, learned Senior Counsel has pointed out that the appellant alone had brought it to the notice of the Customs department about the missing of the container.

59. Finally, he would submit that the first respondent/Commissioner had not proved that the removal of the seized container was done with the knowledge of the appellant's CFS and therefore, the impugned order, dated 23.12.2014 suspending the custodianship of the appellant was absolutely erroneous and against the principles of natural justice and hence, he has urged to allow the appeal after setting aside the order of the Tribunal.

60. In this connection, Mr.Vijayanarayanan, has drawn the attention of this Court to the file noting, dated 19.12.2014, which reads as under:-

"Today at about 1800 hours, Shri. Baskar, GM, Gateway CFS, informed over phone (9840363622) that container No.SEGU 1697558 (20') which was seized by DIU on 6.3.2014 and containing red sanders, was removed unauthorisedly from Chandra CFS..."

61. With reference to the informant V.Baskaran, he would submit that he was the representative of the appellant company and it was quite apparent that it was the appellant company, who had brought it to the knowledge of the department and not by the Superintendent, who was on duty at the CFS.

62. The learned Senior Counsel has also drawn our attention to the letter, dated 22.12.2014 addressed to the Commissioner, by the appellant.

63. This letter reveals that in pursuant to the registration of the case in Cr.No.558 of 2014, dated 22.12.2014, the investigating officer had seized the container and brought it back to the appellant's CFS and due information was also given to the Assistant Commissioner of Customs (Docks).

64. It is also revealed that two employees of the appellant's CFS were arrested with reference to the unauthorised removal of the seized container and subsequently, remanded to judicial custody and thereafter, they were also placed under suspension.

65. The appellant in the above said letter has stated that in the midnight hours the persons posted at the CFS Gate, could not find out as to whether the documents used for transporting the containers out of the CFS were forged and fabricated. They have also stated that the said act was neither wilful nor wanton and that it was happened under the unforeseen circumstances, which were beyond their control.

66. In this regard, Mr.Vijayanarayanan, has argued that the alleged removal of seized container from the appellant's CFS was not aware of by them and that for the acts committed by their employees, the appellant could not be held responsible.

67. In this connection, he has placed reliance upon the decision in Seetharam Molial Kalal vs.Santanuprasad Jaishaknar Bhat (1996 ACJ 89 (SC)).

68. In this case, the Apex Court has held that,

"the law is settled that a master is

vicariously liable for the acts of his servant acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable. In other words, for the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorized mode of doing some act authorized by the master...."

69. He has also adverted to that the first respondent/Commissioner had not proved that the removal of the seized container was done with the knowledge of the appellant's CFS and therefore, the impugned order, dated 23.12.2014 suspending the custodianship of the appellant was absolutely erroneous and against the principles of natural justice and hence, he has urged to allow the appeal after setting aside the order of the Tribunal.

70. Countering his arguments, Mr.K. Mohanamurali, learned Standing Counsel for the first respondent has submitted that the offence committed in contravention of the provisions of HCCAR, 2009 by the appellant was not new and that they had been repeatedly violating the provisions of HCCAR, 2009.

71. He has also drawn our attention to the show cause notice, dated 12.9.2014 issued to the appellant's CFS as well as other persons with reference to their previous violations.

72. It appears from the above said show cause notice that an offence case was registered against one M/s.Point to Point, the appellant and one Shri M.B.Sathyam, the AGM of the appellant for an alleged attempt to export Muriate of Potash (MoP), a restricted item, for which, they, including the appellant, were penalised vide O-in-On No.15880/2011, dated 5.5.2011 for their role in permitting entry and storing of the goods inside the CFS without any export documents like shipping Bill and invoice.

73. Mr.K.Mohanamurali, has also argued that the appellant challenging the above said order had preferred an appeal before CESTAT vide C/252 and 253 of 2011 and the Tribunal, vide Miscellaneous Order No.405752013-405762013, dated 28.2.2013, had directed the appellant and the said employee of the appellant to deposit an amount of

Rs.5,00,000/- and Rs.2,00,000/- respectively and to report compliance on 23.4.2013 .

74. He has also referred to yet another offence case, which was registered against one M/s.M.M.Industries, an exporter, for the alleged illegal export of red sanders logs about 14.750 MTs. The investigation in this case revealed that the containers, which were stuffed under customs supervision and sealed with Customs Seal at the appellant's premises, had been given way for substitution of the declared cargo with red sanders, an item prohibited for export, enroute to the Chennai Harbour.

75. He has also pointed out that since the appellant had not complied with the regulation 6(k) of HCCAR, 2009, a notice, dated 12.9.2014 was issued to the appellant to show cause as to why penal action should not be initiated under Section 114 of the Customs Act, 1962.

76. He has also pointed out that the same modus operandi was applied in the offence case registered against M/s.Jayam Plast, an exporter, who had made an attempt to export the red sanders logs in the container HDMU 2601255 and the same was detained at the container yard of the Chennai Port before loading in the vessel.

77. The said container was also stuffed at the appellant's premises and that the investigation had further revealed that the same modus operandi was adopted in the past for exporting red sanders logs through the container SEGU 1697558, which had already left the country and was called back to India.

78. Upon examination, the container, which is in question in the present case, was found to contain red sanders logs and it was also stuffed at the appellant's premises and the declared cargo was substituted with red sanders logs enroute to Chennai Harbour by tampering the container door but keeping the seals intact.

79. He has also submitted that in so far as the present case is concerned, the conduct of the appellant's CFS had revealed that due to the complete failure of the security system in the appellant's premises, the decoy container, which entered the appellant's premises as an empty container, was found later containing coconut tree trunks and mango tree trunks and this would go to show that the container when it had entered the appellant's premises was neither

opened nor checked properly or weighed by the officials of the appellant's CFS.

80. Mr.Mohanamurali, learned Standing Counsel for the first respondent has also argued that there was lack of supervision on the part of the appellant's CFS and no surprise checks were conducted during the night time to ensure that the staffs were on night duty would remain vigilant.

81. He has also indicated that the appellant had admitted the role of his employees in the illegal act of removal of the seized container from their premises and therefore, the appellant was responsible for every act of omission and commission made by their employees and the appellant could not isolate themselves from the acts committed by its employees.

82. Apart from this, he has also maintained that the appellant had also violated the Regulation 6(2) of HCCAR, 2009 by employing the persons for security service from outside without obtaining prior permission from the Commissioner of Customs.

83. In support of his contentions, he has placed reliance upon the following decisions:-

a. Commissioner of Customs (Gen), Mumbai vs. Raj Clearing Agency (2006 (199) ELT 602 (Bom.).

b. Pinkcity Logistics Ltd. vs. Commissioner of Customs (2015 (320) ELT 241 (Raj.).

c. S.R. Sale & Co. vs. Union of India (2013 (296) ELT 289 (Bom.).

d. Ujwal International Ltd. vs. Commissioner of Customs, Kochi (2015 (319) ELT 490 (Ker.).

84. In Raj Clearing Agency's case, cited first supra, a Division Bench of the Bombay High Court has observed that,

"In the facts and circumstances of the instant case, it was a case for invoking Regulation 20(2) of the said Regulations which is meant only in cases where immediate action is necessary. In such a case even without giving

notice the licence could be suspended. We make it clear that the observations of the CESTAT that in all cases of suspension the procedure under Regulation 22(1) ought to have been followed in the sense prior notice before suspension ought to be given cannot be sustained. A bare reading of Regulation 20(2) very clearly indicates that where immediate action is necessary the Commissioner of Customs has been granted such a power to suspend such licence where an enquiry against such agent is pending or even contemplated. Accordingly we answer the aforesaid question of law to the effect that it is not mandatory that in all cases of suspension, Regulation 22(1) ought to be followed. Whereas in cases where immediate action is necessary the Commissioner of Customs is fully empowered to suspend the licence where an enquiry against such an agent is pending or contemplated as per Regulation 20(2)."

85. The decision in Pinkcity Logistics Ltd. vs. Commissioner of Customs (2015 (320) ELT 241 (Raj.) has also been relied upon by Mr. Vijayanarayanan, learned Senior Counsel, in support of the case of the appellant. In this case, the Jaipur Bench of Rajasthan High Court has discussed at length about the Customs House Agents Licensing Regulations, 2004 as well as about the requirements of the principles of natural justice. Since this decision has already been discussed in detail in the foregoing paragraphs, it would be redundant to discuss the same here again.

86. In S.R.Sale's case, cited third supra, a Division Bench of the Bombay High Court has observed that,

"even when a statute or statutory regulation is silent in regard to compliance with natural justice, such principles of natural justice are to be read into the provision. However, where an urgent action is required, particularly, in public interest, it may not always be appropriate or efficacious to furnish a pre-decisional hearing. Regulation 21 CHA licence has to be so interpreted so as to balance the requirement of fairness to the Customs House Agent on one hand which would warrant compliance with principles of natural justice together with the

need, on the other hand, to protect public interest essentially where immediate action is warranted. It is open to the Commissioner under Regulation 21 to pass an immediate prohibitory order for a limited period and to afford to CHA, in the meantime, an opportunity of being heard."

87. It has been further observed that, where immediate action is warranted to prevent a customs house agent from carrying out activities which are prejudicial, a prohibitory order can be passed under Regulation 21 for a limited period. During that period an opportunity of hearing can be afforded in compliance with the principle of natural justice. Where immediate action is necessary, a pre-decisional hearing can be dispensed with if such a hearing will defeat the requirement of public interest in the orderly and proper functioning of the Customs Station. On the other hand, where immediate action is not required, a prohibitory order can await compliance with the requirements of natural justice. Ordinarily, a pre-decisional hearing must be the rule. Dispensation is to be an exception.

88. In Ujwal International Ltd., cited fourth supra, the learned Single Judge of Kerala High Court has held that,

"No specific opportunity of hearing is intended in prohibition proceedings as per Regulation 23 of Customs Brokers Licensing Regulations, 2013. However, the Regulations being silent, the necessity to give opportunity of hearing has to be interpreted widely and has to be read into it. Moreover, such order, which is an interim measure, cannot be permitted to exist forever, and its operation has to be restricted to a limited period, as it would adversely affect the rights and interests of the parties."

89. We have considered the submissions made by Mr. Vijayanarayanan, learned Senior Counsel for the appellant and Mr. K. Mohanamurali, learned Standing Counsel for the first respondent.

90. From the submissions made by both the learned counsels, we felt that it has become necessary for us to have reference to Clause 'b' of Regulation 2 of HCCAR, 2009

91. Regulation 2(b) is extracted as under:-

"(b) "Customs Cargo Services provider" means any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian as referred to in Section 45 of the Act and persons as referred to in sub-section (2) of section 141 of the said Act."

92. Regulation 6 contemplates the, "Responsibilities of Customs Cargo Service Provider":-

93. Clauses (a), (f), (i), (k), and (q) of sub-regulation (1) of Regulation 6 assume more importance and read as under:-

"(1) The Customs Cargo Service provider shall-

(a) keep a record of imported goods, goods brought for export or transhipment, as the case may be, and produce the same to the Inspector of Customs or Preventive Officer or Examining Officer as and when required;

(f) not permit goods to be removed from the Customs area, or otherwise dealt with, except under and in accordance with the permission in writing of the Superintendent of Customs or Appraiser;

(i) be responsible for the safety and security of imported and export goods under its custody;

(k) be responsible for the secure transit of the goods from the said customs care to any other customs area at the same or any other customs station in accordance with the permission granted by the Deputy Commissioner or Assistant Commissioner of Customs;

(q) abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder."

94. Sub-Regulation (2) of Regulation 6 reads as under:-

"The Customs Cargo Service provider approved for custody of imported or export goods and for handling of such goods shall not lease, gift, sell or sublet or in any other manner transfer any of the premises in a customs area; or sub contract or outsource functions permitted or required to be carried out by him in terms of these regulations to any other person, without the written permission of the Commissioner of Customs."

95. In so far as the present case on hand is concerned, we are in consensus to endorse the finding of the CESTAT that the appellant being the custodian of the seized container, viz., SEGU 1697558 containing red sanders had violated the Regulations enshrined in 6(1)(a), 6(1)(f), 6(1)(i), 6(1)(k) and 6(1)(q) of HCCAR, 2009.

96. Regulation 11 of HCCAR, 2009 contemplates, "Suspension or revocation of approval for appointment of a Customs Cargo Service provider".

97. Sub-Regulation (1) and (2) of Regulation 11 reads as under:-

a. Sub-Regulation (1) of Regulation 11 says that, "if there is any failure to comply with any of the provisions of the Act and the rules, regulations, notifications and orders made thereunder on the part of the custodian, the Commissioner of Customs may suspend or revoke the approval granted to the Customs Cargo Service provider subject to the observance of procedure prescribed under Regulation 12 and also order for forfeiture of security, if any."

b. As per Sub-Regulation (2) of Regulation 11, in appropriate cases where immediate action is necessary, the Commissioner of Customs may suspend the approval granted to a Customs Cargo Service provider where an enquiry against such Customs Cargo Service provider is pending or contemplated.

98. Regulation 12 deals with the, "Procedure for suspension or revocation of approval and imposition of penalty".

99. Sub-Regulation 8 of Regulation 12 enacts that, "If any Customs Cargo Service provider contravenes any of the provisions of these regulations, or abets such contravention or who fails to comply with any provision of the regulation with which it was his duty to comply, then, he shall be liable to a penalty which may extend to fifty thousand rupees."

100. As we have stated in the foregoing paragraphs, the first question of law is relating to violation of principles of natural justice.

101. What Mr.Vijayanarayanan, learned Senior Counsel has argued is that no showcause notice was issued to the appellant before suspending the custodianship.

102. He has also argued that on 5.2.2015, a showcause notice under Section 124 of the Customs Act, 1962 was issued by the customs authority for the alleged violation of the provisions of HCCAR, 2009 without any reference to the order of suspension or any proposal either to continue with the suspension or to cancel the custodianship of the appellant.

103. He has also indicated that the said showcause notice, dated 5.2.2015 was issued after detailed investigation and after recording the statement of all concerned. While referring to the earlier showcause notice, dated 12.9.2014 issued to the appellant by the customs authorities, Mr.Vijayanarayanan, has pointed out that there was no allegation of any complicity of the appellant in the export of red sanders and that the reply, dated 27.11.2014 given by the appellant for the above said showcause notice was still pending adjudication and hence, it was premature to come to the conclusion that the appellant had adopted similar modes operandi as submitted by the learned Standing Counsel appearing for the first respondent.

104. Further, he would submit that as per the settled principle of law, a pre-decisional hearing ought to have been given to the appellant to explain his position and atleast minimal fairness should have been given to the appellant. But in this case, neither pre-decisional hearing nor post decisional hearing was given to the appellant by the customs authorities and therefore, he has urged that the Commissioner had violated all the tenets of natural justice.

105. This portion of argument is discernible. In this connection, we find that it may be more appropriate to have reference to the decision in Automative Tyre Manufacturers Association vs. Designated Authority, cited supra.

106. In this case, a Division Bench of the Apex Court, while speaking through the Hon'ble Mr. Justice D.K. Jain, in paragraph No.55, has observed as under:-

"55. It is trite that rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evoked under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. In A.K. Kraipak (supra), it was observed that the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice."

107. Again, we find it better to make reference to Paragraph No.58 in the above said decision, which has already been extracted in the foregoing paragraphs.

108. In this paragraph, His Lordship has observed that unless the statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event, the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property personal rights and material deprivations for the party affected.

109. On coming to the given case on hand, the impugned order, dated 23.12.2014 was issued by the Commissioner of Customs by virtue of the powers conferred on him under Regulation 11(2) of HCCAR, 2009.

110. The operative portion of the impugned order reads that, "I order for immediate suspension of the Custodianship vested on the Chandra Container Freight Station and Terminal Operators Pvt. Ltd., vide the Public

Notice 77/2007, dated 2.6.2007, until further orders.

111. Regulation 11(2) envisages that the Commissioner of Customs may in appropriate cases where immediate action is necessary, suspend the approval granted to a Customs Cargo Service provider where an enquiry against such Customs Cargo Service provider is pending or contemplated.

112. From the above context, it is thus made clear that where immediate action is necessary, the Commissioner of Customs can suspend the approval granted to a Customs Cargo Service provider.

113. In the given case on hand, the earlier showcause notice, dated 12.9.2014 reveals the previous antecedents of the appellant. On three occasions, the appellant had violated the Regulations of HCCAR, 2009 and in one case, the appellant was also penalized with penalty.

114. As per the Regulation 6(k) of HCCAR, 2009, the custodian is responsible for the secure transit of the goods from the said customs area to any other customs area at the same or any other customs station in accordance with the permission granted by the proper officer.

115. In this case, obviously, the appellant had not complied with the Regulation 6(k) and that was why the showcause notice, dated 5.2.2015 was issued to showcause as to why the seized container should not be confiscated and penalty should not be imposed on the appellant.

116. From the perusal of the materials available on record, we find that there was laxity in the supervision on the part of the appellant and no surprise checks were conducted during night hours to ensure that the staffs were on night duty would remain vigilant.

117. In the counter filed by the first respondent before the Tribunal, it is stated that apart from the violation of Regulation 6(k), the appellant had also violated Regulation 6(2) of HCCAR, 2009 by outsourcing the security functions without obtaining permission from the Commissioner of Customs as stipulated in Regulation 6(2) of HCCAR, 2009.

118. It is an admitted fact that there was illegal removal of seized container from the CFS of the appellant and thereafter, based on the complaint lodged by the General

Manager of the appellant's CFS, a case was registered and while proceeding with the case, the investigating officer had seized the container. Subsequently, in pursuant to the order of the learned Judicial Magistrate No.II, interim custody of the seized container was given to the appellant on condition that the appellant shall deposit a sum of Rs.2.00 crores.

119. As argued by Mr.Mohanamurali, these are all the circumstances, which warranted the Commissioner of Customs to order for the immediate suspension of custodianship vested on the appellant.

120. Further, we find that the Commissioner of Customs did not bring the operation of the appellant in a standstill in view of the order passed in corrigendum, dated 29.12.2014 and that the appellant was not prejudiced in any way by the impugned order, dated 23.12.2014.

121. Keeping in view of the above facts, we have made up our mind to answer the first question of law as against the appellant by holding that the principles of natural justice has not been violated in the case of the appellant.

122. On perusal of the grounds of appeal and the impugned order of CESTAT, dated 29.6.2015 against which this appeal is filed and the order, dated 23.12.2014, we find that the action of the Commissioner of Customs was fully justified in invoking the provisions of Regulation 11(2) of HCCAR, 2009.

123. It cannot be heard to say that the appellant was not aware of the illegal removal of the seized container from their CFS. Equally, it is not able to be countenanced that the appellant could not be held responsible for the acts committed by their employees.

124. It is trite law that the employer is vicariously liable for the acts of its employee acting in the course of his employment. There are grounds to believe that the alleged act was done in the course of the employment by their employees and therefore, the appellant must be ready to take the responsibility.

125. As adumbrated supra in the earlier paragraphs, in appropriate cases, where immediate action is necessary, the Commissioner of Customs may suspend the approval granted to a Customs Cargo Service provider. This principle is laid down in sub-regulation (2) of Regulation 11 of HCCAR, 2009.

126. From the situation as it appear, in the present case, we understand that the intent of the legislature is to take emergent action and in that event and subject to fulfilment of the ingredients of the provisions enunciated under Regulation 11(2) of HCCAR, 2009, an order could very well be passed by the Commissioner of Customs without affording pre decisional hearing and subsequently, immediate post decisional hearing may amount to substantial compliance with the basic rule of law (Ref: International Cargo Services, cited supra).

127. The appellant, as a custodian appointed by the Commissioner of Customs under Section 45 of the Customs Act, 1962, is bound to be diligent enough in discharging their duties and obligations as per the provisions of HCCAR, 2009.

128. The Tribunal in its order has observed that, "in the present case, the Commissioner of Customs already issued SCN dated 5.2.2014 where the appellant is a co-noticee for contravention under the Customs Act, we also noticed the appellant had outsourced the security CFS to other persons without approval/permission from competent authorities. The above repeated instances of smuggling of goods in the appellant CFS confirms that there are serious lapses on the part of custodian and this cannot be overlooked or treated as isolated incident as claimed by the appellant. In the interest of Government revenue and safety and security of Customs goods, the Department has the right to take action under Regulation 11(2) of HCCAR, 2009.

129. The finding of the Tribunal does not require our interference and therefore, we answer the second question of law as against the appellant.

130. While concluding the order, the Tribunal has directed the Commissioner of Customs, who is the first respondent herein to complete the investigation proceedings and take appropriate action under HCCAR as expeditiously as possible preferably within 3 months subject to receiving the report from Police Authorities.

131. Mr.K.Mohanamurali, learned counsel appearing for the first respondent has also submitted that the investigation is under progress and on completion of the investigation, a showcause notice would be issued to the appellant without fail and the procedures would be followed as

contemplated under Regulation 12 of the HCCAR, 2009.

132. Keeping in view of the above facts, we direct the first respondent, viz., the Commissioner of Customs, Chennai to complete the investigation proceedings and pass orders as contemplated under Regulations of HCCAR, 2009 and in accordance with law, as expeditiously as possible preferably within a period of three months from the date of receipt of a copy of this order without getting influenced by the observations made by us in this order.

In the result, the appeal filed by the appellant is dismissed and the order of the Tribunal is confirmed. However, there will be no order as to costs. Connected M.P. is also dismissed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

rnb

To

1. The Commissioner of Customs,
Chennai VIII Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-101.
2. The Customs Excise and Service Tax
Appellate Tribunal,
South Zonal Branch, सतयमेव जयते
Haddows Road, Shastri Bhavan,
Chennai - 600 006.

1 CC to M/s.Hari Radhakrishnan, Advocate SR.No. 53756

1 CC to Mr.K.Mohanamurali, Advocate SR.No. 53453

C.M.A.No.1623 of 2015
and
M.P.No.1 of 2015

NM (CO)
PSI (27.10.2015)