IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.No.29987 of 2014
MP.No.3 of 2015

UPS Jetair Express Private Limited
Chennai-83 Petitioner

Vs

1.The Chief Commissioner of Customs,
Chennai Customs Zone,
Customs House, No.60,
Rajaji Salai, Chennai-1

2.The Commissioner of Customs
(Airports & Air Cargo)
New Custom House,
Meenambakkam, Chennai-27 Respondents

Prayer:- This Writ Petition is filed to issue a Writ of Certiorarified Mandamus to call for the records on the file of the 1st Respondent in No.S2/157/2014-CCO (Precv Legal), dated 23.7.2014, confirming the order of the 2nd Respondent vide Order-in-Original No.289/2014-AIR, dated 28.4.2014 and quash the said orders and to restore the Petitioner's courier licence bearing No.25/2001, which was valid till August 1, 2017.

For Petitioner : Mr.Satish Parasaran

For Respondent : Mr.Xavier Felix, SCGSC

ORDER

This Writ Petition is filed to issue a Writ of Certiorarified Mandamus to call for the records on the file of the 1st Respondent in No.S2/157/2014-CCO (Precv Legal), dated 23.7.2014, confirming the order of the 2nd Respondent vide Order-in-Original No.289/2014-AIR, dated 28.4.2014 and quash the said orders and to restore the Petitioner's courier licence bearing No.25/2001, which was valid till August 1, 2017.

2. The case of the Petitioner is as follows:-

a. The Petitioner Company is a subsidiary Company of M/s.UPS International Forwarding Inc. and is carrying on business of transportation and delivery (including export and import) of express documents/parcels and other consignments. On 18.1.2013, some consignments destined for distribution in India were transported through Air India Flight No.AI 343 from Singapore to Chennai for onward distribution by the Petitioner. To undertake the customs clearance of these import consignments, their employee Naveen Kumar was present at the Chennai courier terminal. Upon unloading of air consignments, the flight personnel handed over (58) pieces at the user facility of courier terminal. Based on a specific intelligence, Officer of DRI, Chennai Zonal Unit obtained the house airway bill No.008865200645, dated January 18, 2013 and statement of consignee details from custodian and segregated the Petitioner's import parcels (34 nos.) from other air consignments transported by Air India flight and loaded these consignments for scanning in the presence of the concerned employee.

b. Upon scanning, two cartons were identified for detailed examination. The cartons mentioned the contents as booklets, cables and accessories and printing sheets amounting to SGD 840 and the consignee details were mentioned as Gauri Nandanan in Chennai. However, on opening the cartons, cameras, radio receivers and watches were found. Since the radio receivers were unusually heavy, DRI opened the same to see packets, containing gold jewellery. The DRI assessed the total value of seized goods as Rs.3,32,51,885/- and seized the same since the goods were smuggled into India through a false declaration and in violation of Foreign Trade Policy, 2009-14 and the Customs Act, 1962. Thereafter, the DRI issued summons to various employees and personnel in charge of clearance in the Petitioner's Company and recorded their statements. In his statement, the concerned employee, who had cleared these specific consignments, Naveen Kumar, admitted to criminal act on his part of adopting illegitimate means to manipulate the Petitioner's systems and smuggle goods into the country for personal gain. The Petitioner had immediately terminated his employment on internal investigation of the aforesaid event.

c. Thereafter, the 2nd Respondent issued a show cause notice dated 14.10.2013, bearing Ref.No.S.MISC.322/2013-Courier Cell, requiring the Petitioner to show cause as to why the registration of the Petitioner, as an 'authorised courier' (registration No.25/2001 valid till August 1, 2017) granted by the Commissioner of Customs (Air Port) under Regulation 10 of the Courier Regulations should not be revoked and further the bank guarantee of Rs.10 lakhs furnished by the Petitioner should not be forfeited. Upon receipt of the above said show cause notice, the Petitioner sent a detailed submission dated 9.1.2014, refuting the allegations raised by the 2nd Respondent, pointing out that it was not liable for an unauthorized criminal act of an employee outside the purview of his employment. However, the 2nd Respondent issued the impugned Order-in-Original No.289/2014-AIR dated 28.4.2014, revoking the courier license of the Petitioner together with forfeiting its security deposit to the tune of Rs.10 lakhs. As against the above order, the Petitioner sent a representation dated 18.6.2014 to the 1st Respondent for due consideration on merits, as prescribed under Regulation 14(2) of the Courier Import and Export (Clearance) Regulations. Despite the above representations made by the Petitioner, the 1st Respondent by the impugned order dated 23.7.2014, rejected the above representation of the Petitioner and confirmed the order dated 28.4.2014. Hence, this Writ Petition has been filed for the relief as stated above.

3. The Respondents filed a counter affidavit, wherein it is averred as follows:-

a. On receipt of specific intelligence that gold jewellery and other commercial goods are being smuggled from Singapore through courier parcels booked through the Petitioner Company and arrived by Flight AI 343 on 1.01.2013, the DRI officers mounted surveillance on the courier parcels arrived by the said flight and obtained the relevant house airway bill No.09865200645 dated 18.1.2013 from Shri Vijay of M/s.Esquire Express Pvt. Limited, the custodian of the courier terminal at Chennai Airport. As per the said air way bill, 58 pieces of courier parcels have been shipped by M/s.Universal Courier Express Pvt Limited, Singapore to M/s.Esquire Pvt. Limited, Chennai.

b. The DRI Officers identified 58 pieces covered by the said airway bill and the same were found to be packed in cartons, packets, woven poly bags etc. Shri Vijay submitted a statement showing the courier wise break up of the said 58 pieces. The Officers based on the said statement segregated 34 pieces of courier parcels booked through M/s.UPS and scanned each of them in the presence of Shri Naveen Kumar. Then, out of the said 34 pieces, cartons with tag numbers SQ289988 and SQ289986 were taken up for detailed examination, as the declarations did not match with the images in the scan and on reasonable suspicion that possibly there could be gold jewellery and other contraband goods in the cartons. On the outside of the packing, the said cartons had airway bill bearing numbers H9358721379 and H9358720718 along with invoice and packing list bearing No.57487 dated 17.01.2013. The shipper of the two consignments covered by the said two airway bills was found to be M/s.JRG TEC Pvt. Limited, Singapore and the receiver was shown as Mr.Gauri Nandanam, 47 DSR Vishnu Plaza,JN Road, Thiruvallur, Chennai 602001. As per the said invoice cum packing list, the cartons were declared to contain 50 numbers of booklets, 10 numbers of cables and accessories and 50 numbers of printing sheets, with a total value of 840 SGD (INR36800). No specific import documents towards import of the said goods (bills of entry) were filed in respect of the said two airway bills. On detailed examination, the said two cartons were found to contain 10 numbers of sony high definition digital video cameras without battery and accessories, 204 numbers of Titan branded watches of various models and 10.475 kgs of 22 carat gold jewellery concealed in one martin roland brand audio receiver by removing its inside components. The total value of the impugned goods were arrived at Rs.3,32,51,885/-. As the impugned goods were out rightly smuggled into India without any declaration and by concealment, the officers seized the same under a mahazar dated 18.01.2013.

c. Verification at the consignee address i.e. 47, DSR Vishnu Plaza, JN Road, Tiruvallur, Chennai 602001 for GauriNandanam, revealed that no such person was available by the said name at the said address. The case was investigated by the Officers attached to the Directorate of Revenue Intelligence, Chennai Zonal Unit and on the basis of the investigation report, a show cause notice dated 14.10.2013 was issued to the Petitioner to show cause as to why the licence No.25/2001 valid till 1.8.2017 should not be revoked under the provisions of the Regulation 14 of the Courier Imports and Exports (Clearance) Regulation, 1998 and why the security furnished in the form of bank guarantee No.0159310BB0000211 valid till 1.8.2017 for Rs.10 lakhs should not be forfeited on the grounds mentioned under the provisions of Regulation 14. After following due procedure, the adjudicating authority vide Order-in-Original No. 289/2014/AIR, dated 28.4.2014, held that the authorised courier has failed to observe the obligations as listed in Regulation 13 and ordered revocation of registration granted to the Petitioner in terms of Regulation 14(1) and further ordered forfeiture of Rs.10 lakhs from the security deposit of the Petitioner under Regulation 14(1).

d. As against the same, the Petitioner made a representation dated 13.6.2014 to the 1st Respondent and after giving a personal hearing to the Petitioner on 9.7.2014, the said representation of the Petitioner was rejected by the impugned order dated 23.7.2014.

e. The Petitioner Company has not obtained authorization in respect of 85 previous consignments and two live consignments referred to in the show cause notice as is required under Regulation 13(1) and the Petitioner has not exercised due diligence to ascertain the correctness and completeness of information and reference to subject import clearance as required under Regulation 13(c) and not furnished complete information to the proper officer as required under Regulation 13. No details were maintained about the consignees in respect of subject 87 consignments and thereby violated the regulation 13(g) and failed to verify the antecedents, correctness, identity of their clients and failed to verify as to whether their clients were functioning at the declared addresses. The Respondents, while passing the impugned orders, have taken into consideration the representation of the Petitioner and his defence and therefore, the allegation of non application of mind is incorrect. In such circumstances, this Writ Petition is liable to be dismissed.

4. The learned counsel for the Petitioner contended that the impugned order of the Respondents 1 and 2 is illegal and contrary to the provisions of the Courier Imports and Exports (Clearance) Regulations, 1998 and the provisions of Section 140 of the Customs Act, 1962 and that when there is no case made out against the Petitioner, revocation of licence and forfeiture of bank guarantee are not sustainable and that the 1st Respondent has repeated the order of the 2nd Respondent verbatim, without considering the issues and the representation of the Petitioner on merits, which shows non application of mind and that the Petitioner cannot be held liable for an unauthorized act of an employee, without the knowledge of the Petitioner and that as per Section 140, in case of offences under the Customs Act, a Company cannot be held responsible if the offence was committed without the knowledge of the Company and that in the absence of any mala fide intention on the part of the Petitioner and in the absence of any knowledge of misdeclaration of contents by the importer, the licence of the Petitioner ought not to be revoked and that as per Section 147(2) of the Customs Act, 1962, for the acts of the agent, the Principal cannot be held liable and that Regulation 2(2)(d)(iv) clearly stipulates that the Courier Regulations will not apply to imports, pertaining to precious and semi-precious stones, gold, silver in any form and hence, the impugned order is liable to be set aside.

5. The learned Standing Counsel for the Respondents contended that on earlier occasions also, it was detected that similar courier parcels were smuggled for 85 times for the past several months in the same modus by the Petitioner and that the Petitioner cannot claim to be unaware of the happenings when their employee was manipulating the system and entries made therein for over a period of several months, as the Petitioner has not exercised due diligence as per Section 140 and therefore, it can be said that the act of omissions and commissions on the part of the Petitioner have aided the smuggling of high value electronic goods and gold jewellery valued at Rs.3,32,51,885/- seized from the two live courier parcels that the Petitioner failed to comply with Regulations 13(a), (c), (e), (g) and (i) of the Regulations and that the 1st Respondent, considering the facts of the case, representation of the Petitioner and also the order of the 2nd Respondent, passed the impugned order in detail, rejecting the representation of the Petitioner. The learned standing counsel further contended that the impugned order has been passed for revocation of the licence of the Petitioner and forfeiture of security deposit, barring the Petitioner from doing business, as it was proved beyond doubt that the Petitioner has not carried out courier operations with due diligence and not complied with the Regulations under which the Petitioner was issued with the licence and therefore, the acts of the Respondents is legal and justifiable and further, there is an alternative and efficacious appeal remedy

available to the Petitioner and in such circumstances, prayed for dismissal of this Writ Petition.

6. This court heard and considered the submissions made by the learned counsel on either side and also perused the materials placed on record.

7. According to the Petitioner, without considering the issues and the representation of the Petitioner on merits, the impugned order has been passed and the Petitioner cannot be held liable for an unauthorized act of an employee, without the knowledge of the Petitioner and they had no knowledge of misdeclaration of contents by the Importer.

8. On the contrary, it is contended by the Respondents that it was detected that similar courier parcels were smuggled for 85 times for the past several months in the same modus by the Petitioner and that the Petitioner cannot claim to be unaware of the happenings when their employee was manipulating the system and entries made therein for over a period of several months. It is the specific case of the respondents that the Petitioner has not carried out the courier operations with due diligence and not complied with the Regulations under which the Petitioner was issued with the licence and has violated the provisions of the Act and that there is an alternative and efficacious appeal remedy available to the Petitioner.

9. The following decisions have been relied on by the learned counsel for the Petitioner:-

1. 2014 302 ELT 161 Del (Ashiana Cargo Services Vs. Commissioner of Customs)

2. 2011 186 ECR 0314 AP (The Commissioner of Customs and Central Excise Vs. H.B.Cargo Services)

10. The following decisions have been relied on the side of the Respondents:-

1. AIR 2010 SC 2239 (Raj Kumar Shivhare Vs. Assistant Director of Enforcements),

2. 2010 253 ELT 190 Bom (Commissioner of Customs (General) Vs. Wordwide Cargo Movers),

3. 2015 316 ELT 651 Kar (DHL Express India Private Limited Vs. Union of India)

4. 2012 286 ELY 730 Del (Global Marine Agencies Vs. Commissioner of Customs, Jaipur)

The decisions relied on by the learned counsel on either side need not be gone into, as the disputed questions of facts cannot be decided by this Court.

11. In the decision of this Court reported in CDJ 2014 MHC 5840 (Socomec UPS India Pvt. Limited Vs Commissioner of Customs (Appeals), Chennai and another), which was rendered after following the decision of the Honourable Supreme Court reported in 1995 (75) ELT 13 (SC) Liberty Oil Mills Pvt. Ltd., v. Collector of Central Excise, it has been held as under:-

> " 13. Before this Court ventures into the factual and legal submissions made on either side, it has to be pointed out that the impugned order passed by the first respondent is an appealable order, in terms of Section 129A of the Customs Act, 1962, and the appeal shall lie to the Appellate Tribunal, namely, CESTAT. The petitioner has failed to avail the said alternate remedy, available to them, under the Statute and straight away approached this Court, by way of this writ petition. In the affidavit filed in support of the writ petition, no justifiable grounds have been raised by the petitioner to justify their action in by-passing the appellate remedy. Learned counsel for the petitioner also did not venture to make any submissions as to why the petitioner should not be directed to avail the alternate remedy. His contention was that the exemption notification is clear in its terms and the respondents cannot insist upon the end-use certificate, which is not contemplated in the notification, therefore, the petitioner has approached this Court.
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> 19. The Hon'ble Supreme court, in the case of Liberty Oil Mills Pvt. Ltd., v. Collector of Central Excise, reported in 1995 (75) ELT 13 (SC) held that in a case of an ambiguity or doubt regarding an exemption provision in a fiscal statute, the ambiguity or doubt will be resolved in favour of the Revenue and not in favour of the Assessee. In any event, these contentions could very well be raised before the Appellate Authority and the petitioner has not placed any material before this Court to justify its action in bypassing the appellate remedy available under the Act.
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> 20. In the light of the above findings, this Court is not inclined to go into the merits of the contentions raised by the petitioner and the writ petition is dismissed, as not maintainable.

However, it is open to the petitioner to file an appeal before the CESTAT, if so advised. No costs."

12. In the case on hand, the contentions of the Petitioner cannot be a basis to circumvent the appeal remedy available for the petitioner as per Section 129(A) of the Customs Act, 1962, since the said Section provides an efficacious alternative remedy before the Appellate Tribunal against the impugned order. There is also no justifiable grounds to bypass this appeal remedy. Further the issues pointed out by the Petitioner as well as the Respondents are questions of fact and the allegations that the Petitioner had earlier involved around 85 times and illegally cleared such goods against the Regulations, which have to be established by the Parties by producing records and could be examined by the appellate authority. That apart, in the impugned order itself, it has been clearly stated that any person aggrieved by the order can prefer an appeal to the CESTAT under Section 129A of the Customs Act.

13. In view of the above, since the disputed questions cannot be gone into by this Court, leaving it open to the Petitioner to avail the statutory appeal remedy provided under the Act, this Writ Petition is dismissed. No costs. Consequently, the connected MP is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

Srcm

To:

1.The Chief Commissioner of Customs,
Chennai Customs Zone,
Customs House, No.60,
Rajaji Salai, Chennai-1

2.The Commissioner of Customs (Airports & Air Cargo)
New Custom House, Meenambakkam, Chennai-27.

+ 1 cc to M/s. Sathish Parasaran, Advocate SR.66434
+ 1 cc to M/s. S. Xavier Felix, Advocate SR.65779

WP.No.29987 of 2014

KKG(CO)
EU 23.12.15