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

CUSTOMS APPEAL NO. 13 OF 2016

WITH
NOTICE OF MOTION NO. 244 OF 2016
AND
NOTICE OF MOTION NO. 2818 OF 2016

The Principal Commissioner of Customs (General)	}	Appellant
versus		
S. K. D. Shipping Agency	}	Respondent

Mr. Pradeep S. Jetly for the appellant.

Mr. Sujay Kantawala with Mr. Brijesh Pathak and Mr. Hemant Dave for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- DECEMBER 5, 2016

P.C. :-

1. This appeal of the Revenue challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) dated 21st April, 2015.

2. Mr. Jetly appearing for the appellant would submit that the question of law formulated in para 4 at page 62 of the memo of appeal is a substantial question of law.

3. He would submit that the tribunal should have found and from the record that this is a very serious case where the charge is of transfer of licence unauthorisedly. That is contrary to Regulation 12. The conclusion in the order passed by the Commissioner is relied upon to submit that the said Regulation is violated. The respondent has not denied that it has allowed one Mr. Manish Sangani to use its licence. He was not an employee of the firm holding the licence. In such circumstances that the violation was proved.

4. The Regulation 13(a) making it mandatory for the Custom House Agent (CHA) to obtain proper authorisation is also violated. The stipulation that the CHA shall transact business in the Customs Station either personally or through an employee duly approved by the Deputy Commissioner of Customs or Assistant Commissioner of Customs is also breached. The charge in that regard also stands proved in the light of illegal transferability being upheld. It is held by the CESTAT that Regulation 13(d) was also violated. Once it is held that the CHA did not exercise due diligence, did not comply with Regulation 9.5, then, all the more, according to Mr. Jetly, the tribunal erred in restoring the licence by observing that what the CHA has already undergone is an adequate or enough punishment. This is

not an approach which the tribunal could adopt in the facts and circumstances of the present case. For all these reasons, he would submit that the appeal be entertained.

5. Reliance is placed on the judgment of the Hon'ble Supreme Court of India in the case of *Commissioner of Customs vs. K. M. Ganatra and Co.*[1].

6. On the other hand, it is submitted by Mr. Kantawala that the tribunal's order does not raise any substantial question of law. The tribunal found that though the said Manish Sangani was allowed by the CHA to use the licence because Manish Sangani's licence as a CHA was suspended, the Customs also was found to be at fault. Then, the tribunal concluded that the transfer of licence did not take place physically. The prohibition is against transfer of licence. The tribunal, though concluded that even the handing over of the licence and allowing its usage would amount to transfer for the purpose of Regulation 12, what has been then concluded is that the other violation, as held to be proved, has not been committed. There is an authorisation though belatedly produced. Secondly, though Regulation 13(a) is held to be not adhered to, that is not something which has weighed with the tribunal. Mr. Kantawala submits that though the findings of the

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Commissioner on other charges are also held to be sustainable, still, what the tribunal has held is that the CHA cannot be disabled permanently for the violation as that would deprive him and his employees of their source of livelihood. The licence has remained inoperative since 29th May, 2012. The three years period, uptill the order of the tribunal, during which the CHA was not able to use the licence, is a sufficient punishment. Mr. Kantawala would submit that in the given facts and circumstances and this being the only violation proved against the CHA, the penalty or punishment was reduced. Such a finding of fact cannot be termed as perverse and should not be interfered with in the present case. The appeal be dismissed.

7. After having perused the memo of appeal and all the findings in the tribunal's order, we are of the opinion that the essential factual position is that the CHA licence was granted under the Regulations of 1984. Thereafter, the 2004 Regulations and later on the 2013 Regulations came into force. The information was received on 6th March, 2012 and based on which the proceedings were initiated. The statement of Mr. Manish Amlani, Director of the respondent was recorded. Thereafter, based on his admission that one Manish Sangani presented the bills of entry for examination and assessment and on the basis of

the interrogation of Manish Sangani and his employee, the CHA, namely, the respondent before us was proceeded against. However, in the memo of appeal, it is alleged that it was found that Manish Sangani and his employee were operating under a distinct licence in the name and style as M/s. National Shipping Agency. Their licence was placed under suspension on 21st October, 2011. Yet, they had their temporary passes renewed in their name after the suspension. This was a case where the CHA licence was used by Manish Sangani and this is a case of violation of Regulation 12. That is how the Commissioner of Customs (General) proceeded against the respondent and passed order on 30th July, 2012.

8. Aggrieved and dissatisfied with that order, the tribunal was approached by the said respondent/CHA holder.

9. The tribunal entertained his appeal of the year 2013 and decided it on 21st April, 2015. Thus, from 29th March, 2012 till the tribunal's order dated 21st April, 2015 was communicated and even today, this CHA licence is non-operative.

10. We have found from a perusal of the tribunal's order and the findings therein that this is not a case similar to that of *K. M. Ganatra and Co.* (supra) relied upon by Mr. Jetly. There, the

licence was misused. That was to facilitate the fraudulent activities. The active involvement of the CHA holder was found to be established. The finding in the inquiry report revealed that this is a systematic fraud affecting the Revenue. The Hon'ble Supreme Court of India also concluded that the tribunal was in complete error in condoning the serious lapses. This was a case of number of violations by the said Ganatra and Co. There was a chain of acts and what one finds is that the repetitive violations were the subject matter of the penalty proceedings. It is in these circumstances that the discretion was interfered with. The discretionary order was termed as arbitrary and capricious. There, the CHA holder was a habitual offender. Unmindful of all this and its active involvement in a case of patent fraud that the Hon'ble Supreme Court of India found that the tribunal should not have set aside the penalty and restored the licence. In these circumstances, the appeal of the revenue was allowed.

11. This case is not identical on facts. In the present case, though the said Manish Sangani was found to have utilised the licence, the said Manish Sangani himself was a CHA. His licence was suspended. Though the licence was suspended, the Customs did not forfeit the authorisation in his favour and seize the documents in that regard. Therefore, the involvement of the

Customs Officers was also directed to be probed by the tribunal. In the facts and circumstances of the present case, though upholding the charges and the findings of the inquiry officer in that regard, the quantum of punishment was interfered with. Once we have found that the licence was not in use from 29th March, 2012 and till date, then, the tribunal's order does not require any interference. It cannot be termed as perverse or vitiated by error of law apparent on the face of the record. We, therefore, dismiss this appeal, but without any order as to costs.

12. Mr. Jetly assures the court that after receipt of a copy of this order, the CHA licence of the respondent would be restored within a period of one week thereafter. Statement accepted.

13. In the light of the dismissal of the appeal, the notices of motion do not survive and stand disposed of as such.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**