

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 15.12.2016

Coram

The Honourable Mr.JUSTICE RAJIV SHAKDHER

Writ Petition No.29347 of 2015
and MP No.1 of 2015

A.Pavithra

.... Petitioner

Vs.

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

.... Respondents

Prayer : Writ Petition filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, calling for the records pertaining to the impugned letter dated 09.09.2015 passed by the second respondent in F.No.S.Misc.-8/2014 CBC Volume II and to quash the same and further direct the respondents to allow the petitioner to participate in the oral examination to be conducted by the respondents on 16th and 17th September 2015.

For Petitioner : Mr.G.Derrick Sam

For Respondents : Mr.G.M.Syed Nurullah Sheriff

O R D E R

1. The singular issue, which has been raised in this writ petition is, whether the respondents were required to give individual intimation to the petitioner with regard to oral examination held by them, for obtaining Customs House Agents License.

2. A perusal of the affidavit filed by the respondents, would clearly show, that there was no individual intimation given to the petitioner with regard to the oral examination.

2.1. Therefore, this Court is required to consider as to whether failure to issue individual or separate intimation to

the petitioner to present herself for the oral examination, was fatal to the stand taken by the respondents in defence of the relief sought for, in the writ petition.

3. By virtue of this writ petition, challenge is laid to the order dated 09.09.2015, passed by the second respondent.

4. In a sense, the entire stand of the respondents, and the facts necessary for dealing with the instant petition, in a nutshell, are encapsulated in the impugned order. The impugned order, being brief, is culled out hereunder, to the extent relevant, for the sake of convenience :

"Madam,

Sub : Request for appearance in CHALR
Rule 8 Oral Exam - Roll
No.044/2011 - reg.

xxxx

Please refer to your representation dated 26.08.2015 on the subject cited.

In this connection, please recall that the result of the written examination under Regulation 8 of CHALR, 2004, held on 23.09.2011, was declared on 17.02.2012, in which you qualified (Roll No.044/2011). Please also recall that Oral Examination was subsequently held on 29.03.2012 to 31.03.2012 and the result of which was declared on 30.04.2012, in which you did not qualify.

It is intimated that you were again called for the Oral Examination held on 05.04.2013 & 06.04.2013 by Circular dated 28.03.2013 (copy enclosed), in which you did not appear.

Further, as per Regulation 6(5) of CBLR, 2013, "An applicant who fails to clear the oral examination within two years from date of declaration of result of the related written examination, shall be treated as having failed in the examination". Therefore, you should have cleared the oral examination within 17.02.2014, as the result of the written examination was declared on 17.02.2012.

Hence, your request for including your name in the list of candidates to appear in the forthcoming Oral Examination cannot be considered.

This issues with the approval of the
Commissioner of Customs (Chennai-VIII).

Yours faithfully,

Sd/-

(S.Sambandan)

Assistant Commissioner of customs
Customs Broker Section

(emphasis is mine)

5. As it would be evident, the respondents concede that the petitioner applied and resultantly, sat for the written examination to obtain CHA Licence, on 23.09.2011. This examination was, admittedly, held when, Customs House Agents Licensing Regulation, 2004 (in short the 2004 Regulations) were in force.

5.1. Consequent thereto, on 17.02.2012, the petitioner was declared successful in the written examination.

5.2. Thereafter, in terms of the 2004 Regulations, as required, the petitioner, appeared for the oral examination, but failed to qualify; a fact, which was communicated to her on 30.04.2012.

5.3. A perusal of the impugned order would also show that the petitioner was eligible for taking the oral examination held by the respondents, immediately, thereafter, that is, on 05.04.2013 and 06.04.2013.

5.4. The respondents claim that the petitioner was called for oral examinations held on 05.04.2013 and 06.04.2013 via circulars issued in that behalf.

5.5. The common case of parties is that the petitioner did appear for oral examination either on 05.04.2013 or on 06.04.2013.

5.6. Resultantly, the respondents proceeded to reject the representation of the petitioner seeking another opportunity to sit for the oral examination on the ground that she had failed to clear the oral examination within a period of two (2) years, from the date of declaration of result of the related written examination. In this behalf, Regulation 6(5) of Customs Brokers Licensing Regulations, 2013 (in short the 2013 Regulations), was invoked.

6. Thus, the point of inflection between the parties is : whether an intimation with regard to oral examination could have been sent by the respondents by way of a circular, or, was the petitioner to be intimated individually, that is, via a separate notice.

7. Quite clearly, the petitioner was given intimation by a circular dated 28.03.2013. In this circumstance, one would,

therefore, be required to examine the relevant regulations, which were in force, at the time, when, the written examination was taken by the petitioner and how, if at all, they were impacted by the new regulations, which were brought into play by the respondents.

8. At the time, when, the petitioner took the written examination, the regulations, which were in force, were, concededly, the 2004 Regulations. The 2004 Regulations were superseded by the 2013 Regulations. The 2013 Regulations were notified on 21.06.2013.

9. Therefore, before, I proceed further, it may be relevant to note, what is stated in the preface of the '2013 Regulations'. A quick perusal of the preface set out in the 2013 Regulations would demonstrate that while the said Regulations supersede the 2004 Regulations, it saves things which are done or, omitted to be done before such supersession :

"In exercise of the powers conferred by sub-section (2) of Section 146 of the Customs Act, 1962 (52 of 1962), and in supersession of the Customs House Agents Licensing Regulations, 2004, except as respect things done or omitted to be done before such supersession, the Central Board of Excise and Customs hereby makes the following regulations, namely :-"

(emphasis is mine)

10. As per the 2004 Regulations, as is the case under the 2013 Regulations, the petitioner, was required to appear for the written examination, and thereafter, take the oral examination, to obtain a CHA License.

10.1. The relevant Regulation of the 2004 Regulations, to which, I would make a reference hereafter, permitted an applicant/examinee (in this case the petitioner), who cleared the written examination, but failed in the oral examination linked to it, to make attempts at clearing the oral examination, by sitting for oral examination held within a period of two years of the related written examination irrespective of the number of chances of availed earlier.

11. It is the common case of parties before me, that the relevant Regulation, which is required to be adverted to, in this behalf would be Regulation 8 of 2004 Regulations. Thus, for the sake of convenience, an extract of Regulation 8 is culled out hereunder :

"REGULATION 8. Examination of the applicant - (1)
Any applicant whose applications is received
within the last date specified in the notice or

publication, as the case may be, referred to in regulation 4 and who satisfies the requirements of regulations 5 and 6, shall be required to appear for the written as well as oral examination conducted by the Director General of Inspection at specified centres and specified dates, [once every year - substituted by Notification No.30/2010-Cus. (N.T.), dated 08.05.2010], for which intimation shall be sent individually in advance before the date of examination.

Provided that an applicant who has already passed the examination referred to in regulation 8 will not be required to appear for any further examination.

(2) The applicants declared successful in written examination shall be called for oral examination.

(3) It shall be necessary for the applicant to clear written as well as oral examinations separately. An applicant who clears the written examination but fails in the oral examination linked to it, shall have to clear the oral examination within two years of the related written examination irrespective of the number of chances, and if he fails to do, he shall be treated as having failed in the examination.

(4) An applicant shall be allowed a maximum period of seven years within which he shall pass both the written and oral examinations. No further extension of time shall be granted.

(5) Notwithstanding anything contained in sub-regulation (4), any person who holds a temporary license granted under regulation 8 of the Customs House Agents Licensing Regulations, 1984, shall be allowed to pass the examination within a period of two years from the date of commencement of these regulations."

(emphasis is mine)

12. As it would be evident, upon a bare reading of clause (1) of Regulation 8, that an applicant/examinee, (i.e., the petitioner in this case), was required to appear for the written as well as the oral examination conducted by the Director General of Inspection at specified centres and on specified dates, for which, intimation had to be sent "individually", in advance, prior to the date of the examination.

12.1. Furthermore, clause (2) of Regulation 8, required the respondents to call the applicant/examinee, (i.e., the petitioner herein) for an oral examination, if declared successful in the written examination.

12.2. Clause (3) of Regulation 8 mandated that if, an applicant/examinee, had cleared the written examination, but had failed the oral examination, the applicant/examinee would have to clear the oral examination, within two years of the related written examination irrespective of the number of chances; and if, he/she failed to do so, he/she would be treated as having failed in the examination.

12.3. Clause (4) of Regulation 8 provided that the applicant would be allowed a maximum period of seven (7) years within which, he/she would have to pass both the written and oral examinations, and that, no further extension of time would be granted thereafter.

13. As it would be seen on a perusal of the impugned order, the respondents, as a matter of fact, invoked Regulation 6 of the 2013 Regulations. For the sake of convenience, the relevant extract of Regulation 6 is also extracted hereunder :

"REGULATION 6. Examination of the applicant.

- (1) An applicant, who satisfies the requirements of regulation 5, shall be required to appear for a written as well as oral examination conducted by the DGICCE :

Provided that an applicant who has already passed the examination referred to in regulation 9 of the Custom House Agents Licensing Regulation, 1984 (corrected by M.F. (D.R.) Corrigendum F.No.502/07/2013-Cus.VI, dated 19.7.2013) [or] regulation 8 of the Custom House Agents Licensing Regulation, 2004 shall not be required to appear for any further examination.

(2) The written examination shall be conducted on specified dates in month of January of each year for which intimation shall be sent individually to applicants in advance before the date of examination and the result of the said examination shall be declared by end May each year.

(3) The applicant who is declared successful in the written examination shall be called for an oral examination on specified dates in month of June of each year, the result of which shall be declared in the month of July of each year.

(4) The applicant shall be required to clear written examination as well as oral examination.

(5) An applicant who fails to clear the oral examination within two years from date of declaration of result of the related written examination, shall be treated as having failed in the examination.

(6) An applicant shall be allowed a maximum

period of seven years from the date of original application within which he shall pass both written and oral examinations and no further extension shall be granted."

(emphasis is mine)

14. A perusal of Regulation 6 of the 2013 Regulations, would show that in substance, the two Regulations are similar.

14.1. The difference, if any, to my mind, is cosmetic. The 2013 Regulations provide that written examination will be held in the month of January each year and the result would be declared in May of that year.

14.2. The applicant/examinee, who clears the written examination is to be called for an oral examination in the month of June each year, and result, is to be declared in the month of July each year. [See Regulation 6(2) and 6(3).]

14.3. Regulation 6(5) gives a window of two (2) years to the applicant/examinee to clear the oral examination. In this sense, Regulation 6(5) of the 2013 Regulations is, in effect, similar to Regulation 8(3) of the 2004 Regulations.

15. The only difference in the stands taken by the parties, before me, is that, while the petitioner says individual intimation had to be given qua oral examination, the respondents take the stand that a circular would suffice.

15.1. In this connection, a submission is made on behalf of the respondents, which is, that the usage of the expression "called for" an oral examination, in Regulation 6(3) of the 2013 Regulations, sets the tone, that the intent, was to move away from the requirement of 'individual intimation', as adverted to in Regulation 8(1) of the 2004 Regulations, to giving notice of oral examination by whichever means available.

15.2. The other submission advanced by the respondents to resist the writ petition, was that, the issue raised before this Court could be agitated before an appellate authority. In other words, the argument of availability of an alternate remedy was propounded by the respondents for rejection of the writ petition.

16. Thus, in so far as, the first submission is concerned, in order to appreciate its validity, one would have to look at the terms used in the two Regulations in their contextual framework and then, come to a conclusion, whether they convey disparate or, the same meaning, though, put differently.

16.1. The plain language of Clause (1) of Regulation 8 of the 2004 Regulations requires the respondents to "individually" intimate, in advance, the applicants/examinees, with regard to, holding of examinations. This clause takes, within its sway, both written and oral examination.

16.2. On the other hand, under Clause (2) of Regulation 6

of the 2013 Regulations, individual intimation is required to be given in advance, qua the date of the written examination, which is slated for January of each year. However, in so far as oral examination is concerned, Clause (3) of Regulation 6 of the 2013 Regulations states that an applicant/examinee, who is declared successful in the written examination shall be "called for" an oral examination on specified dates in the month of June of each year.

16.3. To my mind, the expression "individual intimation", which finds a mention both in Regulation 8(1) of the 2004 Regulations and in Regulation 6(2) of the 2013 Regulations, as also the expression "called for" used in Regulation 6(3) of the 2013 Regulations convey one and the same meaning, having regard to the context, in which the 2004 and the 2013 Regulations have been framed.

16.4. The only difference being that while there was a reference to both written and oral examination in clause (1) of Regulation 8 of 2004 Regulations, under the 2013 Regulations, the said clause has been split into two clauses, i.e., Clause (2) and (3) of Regulation 6.

17. In order to understand the purport and the meaning of the expressions used in the 2004 and 2013 Regulations, one has to look at the contextual framework, in which, they are placed. Often, a draftman uses synonymous terms and/or expressions without intending to change their purpose or meaning. Both, 2004 and 2013 Regulations provide for a written examination, followed by an oral examination for applicants/examinees to obtain CHA Licenses. While clearing of a written examination at one sitting is made mandatory, a little leeway is given for the oral examination. Thus, the purpose is achieved by giving additional chances to take the oral examination. Therefore, this object, which is, sought to be achieved by those who framed the Regulations, cannot be allowed to be defeated by permitting notice, being given via a circular, which may or may not be seen by an applicant/examinee.

17.1. The use of the expression "called for" in the 2013 Regulations, when, looked at contextually and in a holistic manner, can only mean giving of an individual intimation. The reason being that the expression "called for" is the genus, whereas the expression individual intimation is the specie. It cannot but be conceded that the expression "called for" would take within its fold individual notice. To my mind, a purposive interpretation would assist in fulfilling the object, which is sought to be achieved by these Regulations, which is to give additional chances to the applicants/examinees to clear the oral examination within a defined period. Furthermore, individual intimation has practical significance as well. Ordinarily, the applicants/examinees, who are required to be called for an oral examination, would be large in number and therefore, setting out

different dates may help, both the examiner and examinees; an exercise which can be conveniently undertaken by issuing individual notices. This is, apart from the difficulty that administrators may face as to how circular intimations giving dates of oral examination are to be published. Putting up circulars on notice boards of customs office may not serve the purpose. The applicant/examinee may not visit the office during the relevant period for a variety of personal reasons. The record, in the instant case, shows that it is the petitioner's stand that she was unaware of the circular fixing dates of oral examination, as she was pregnant during the relevant period.

17.2. The nearest example by which one can drive home the point concerning the similarity of meaning qua the expressions used in the 2004 and the 2013 Regulations, is by citing the oft repeated illustration of a glass, which is half-full with water. As is said, one could either say it is half-full or, half-empty. Therefore, in my opinion, the expression individual intimation and "called for" oral examination convey the same meaning.

17.3. More importantly, according to me, the petitioner would be governed by the 2004 Regulations, wherein, under Clause (1) of Regulation 8, the respondents were required to give her an individual, albeit, advance intimation. The reason why the petitioner would be governed by the 2004 Regulations is that, she sat for the written examination, when 2004 Regulations were in vogue. Therefore, the actions taken under the said Regulations would stand saved under the 2013 Regulations. This is evident, apart from anything else, upon a bare perusal of the preface to the 2013 Regulations.

17.4. As a matter of fact, giving intimation to the petitioner for oral examinations held on 05.04.2013 and 06.04.2013 via circular dated 28.03.2013 was not in order, as 2013 Regulations were notified only on 21.06.2013.

18. Thus, the stand taken by the respondents that the petitioner was intimated with regard to the oral examination held on 05.04.2013 and 06.04.2013 via the Circular dated 28.03.2013, cannot be sustained. The respondents were required to send an intimation "individually" to the applicants/examinees and in this case, the petitioner herein, with regard to the oral examinations, which were supposedly held on 05.04.2013 and 06.04.2013. The fact that the said procedure was not followed, persuades me to hold the impugned order is flawed in law.

19. Before, I conclude, I must deal with the other objection raised by the respondents, which is, that, qua the aforesaid impugned order, an alternate remedy is available to the petitioner by way of an appeal to the Central Excise Services Tax Appellate Tribunal (CESTAT). In my view, merely because an alternate remedy is available, it does not emasculate this Court of its jurisdiction under Article 226 of the Constitution. It is a rule of self-limitation. The matter has

been pending adjudication before this Court, since 2015. If, I were to, now, relegate the petitioner to an alternate remedy, it would only delay the matter. The petitioner needs to know where she stands; as ultimately, each days' delay impacts her livelihood. Therefore, this submission advanced on behalf of the respondents, cannot, also, be sustained.

20. Having regard to the aforesaid discussion, as indicated above, the impugned order is set aside. The respondents will call the petitioner, in the immediately succeeding oral examination, that is, likely to be held in June 2017. Due written intimation, via, recorded delivery will be sent to the petitioner with regard to the date, time and venue fixed for the oral examination.

21. The writ petition is, accordingly, disposed of in the aforementioned terms. Resultantly, connected miscellaneous petition is closed. There shall, however, be no order as to costs.

s/d-
Assistant Registrar (CCC)

//True Copy//

Sub-Assistant Registrar

To

1. The Commissioner of Customs,
Chennai VIII Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.
 2. The Assistant Commissioner of Customs,
Customs Broker Section,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.
- +1 CC to M/s. Hari Radhakrishnan, Advocate sr 73518

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