pmw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO.37 OF 2016
WITH
NOTICE OF MOTION NO.1184 OF 2016

Commissioner of Customs, Pune
Ice House, Sassoon Road,
Pune. … Appellant

Versus

M/s. Pratima Clearing Agency
situated at K building, 2nd Floor,
24, Walchand Hirachand Marg,
Mumbai 400 038. … Respondent

Mr. Swapnil Bangur a/w Mr. Sham V. Walve for the Appellant/ Applicant.
Mr. Anil Balani for the Respondent.

CORAM : A.S. OKA &
RIYAZ I. CHAGLA, JJ.

DATE : 9th AUGUST, 2017

ORAL JUDGMENT (Per A.S. Oka, J.)

1 By consent of the parties the Appeal is taken up for final disposal as a substantial question of law arises which we have indicated in this judgment. With a view to appreciate the controversy, a brief reference to the facts of the case will be necessary. The Respondent was granted a license to operate as Custom House Agent (for short "CHS") on 5th November, 2002 which was renewed from time to time.

2 A show cause notice was issued by the Commissioner of Customs, Pune to the Respondent on 10th January, 2012.

3 The order of revocation of license was earlier passed by the Commissioner of Customs (General), Mumbai which was set aside by the Appellate Tribunal on 18th June, 2012 on the ground that the Commissioner of Customs, Mumbai lacks jurisdiction as the license was issued by the Commissioner of Customs, Pune.

4 On 10th January, 2012 a show cause notice was already issued, as stated above by the Commissioner of Customs, Pune alleging contravention of clauses (a), (d) and (e) of Regulation 13 of the Customs House Agents Licensing Regulations, 2004.

5 Thereafter, a show cause notice dated 19th October, 2012 was issued to the petitioner by the Commissioner of Customs, Pune. The said show cause notice refers to report of the Enquiry Officer (Assistant Commissioner of Customs, Division - VI Thane Service Tax – II, Mumbai). Three charges were framed against the Respondent. As far as the charge regarding violation of clauses (a) and (d) of Regulation 13 are concerned, the same were held as "not proved". However, charge of violation of clause (e) of Regulation 13 was held as "proved". In the

show cause notice, the Commissioner of Customs, Pune called upon the Respondent to show cause as to why the Enquiry Report submitted by the Assistant Commissioner should not be relied upon in deciding earlier show cause notice dated 10th January, 2012 by which the Respondent was called upon to show cause as to why CHA license should not be revoked.

6 On the basis of the show cause notice dated 19th October, 2012, the Commissioner, Pune passed an order dated 28th March, 2013 by which the license granted to the Respondent under the provisions of the Custom House Agents Licensing Regulations, 2004 was revoked with immediate effect. He held that even the allegations under clauses (a) and (d) of Regulation 13 were proved.

7 Being aggrieved by the said order, the Respondent preferred an Appeal before the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai. By the impugned order, the said Appeal was allowed by the Appellate Tribunal. The Appellate Tribunal held that though the Commissioner of Customs was entitled to disagree with the findings recorded in the Enquiry Report, before doing that, the Respondent ought to have been put to notice as to why a different view should not be taken by the Commissioner. As no

such notice was issued to the Respondent, the Appellate Tribunal proceeded to set aside the order passed by the Commissioner of Customs.

8 The learned counsel appearing for the Appellant has relied upon the substantial questions of law framed in paragraph 4 of the Memorandum of Appeal. His first submission is that it cannot be said that the Commissioner of Customs had not put the Respondent to the notice that he intended to disagree with certain conclusions drawn in the Enquiry Report especially as regards the charge of violation of clauses (a) and (d) of Regulation 13 of the said Regulations. He submitted that the Respondent was made aware that even the allegation of violation of clauses (a) and (d) of Regulation 13 would be taken up for consideration by the Commissioner while exercising powers under clause 7 of the Regulation 22 of the Regulations. Lastly, he submitted that even assuming that the findings recorded by the Appellate Tribunal is correct, an opportunity ought to have been granted to the Appellant to issue a fresh or supplementary show cause notice.

9 The learned counsel appearing for the Respondent supported the impugned judgment and order. He pointed out that a gross breach of principles of natural justice was established. He

submitted that though the Appellate Tribunal may not have recorded specific reasons, the Tribunal was of the view that now it is too late in the day to give an opportunity to the Appellant to serve a fresh show cause notice. He pointed out several aspects on merits of the case and submitted that after lapse of so many years, now permission should not be granted to the Appellant to issue a fresh show cause notice.

10 The following question arises in this Appeal :-

> "Whether the Appellate Tribunal ought to have given an opportunity to the Appellant to issue a fresh show cause notice to the Respondent? "

11 We have carefully considered the submissions. We have perused the impugned order of the Appellate Tribunal as well as the order dated 28th March, 2013 passed by the Commissioner of Customs. As narrated earlier, the first show cause notice was issued on 10th January, 2012 by the Commissioner of Customs, Pune calling upon the Respondent to show cause as to why his license should not be revoked on the basis of the allegation of violation of clauses (a), (d) and (e) of Regulation 13 by exercising power under Regulation 22. As pointed out earlier, the Commissioner of Customs, Mumbai had revoked the license which order was set aside on the ground that the Commissioner of Customs at Pune had jurisdiction under Regulation 22. The second

show cause notice dated 19th October, 2012 was issued by the Commissioner of Customs, Pune in which in paragraph 5, there is a reference to the report submitted by the Enquiry Officer and the conclusion of the Enquiry Officer that charge based on violation of clause (e) of Regulation 13 was established and the charges based on violation of clauses (a) and (d) of Regulation 13 were not established. What is material is paragraph 7 of the show cause notice which reads thus :-

> "7. In view of above, M/s. Pratima Clearing Agency situated at K building, 2nd Floor, 24, Walchand Hirachand Marg, Mumbai 400 038 are hereby called upon to show cause to the Commissioner of Customs, Pune having his office situated at 4th Floor, E Wing, ICE House, 41/A, Sassoon Road, Pune – 411 001, within 45 days from receipt of this notice, as to why the above referred enquiry report, submitted by the Asst. Commissioner, Div. VI, Thane, service tax – II, Mumbai should not also be relied while deciding the earlier show cause notice issued to them, under F.No.VIII/Cus/13-31/TC/2002 on 10/01/2012, proposing revocation of its CHA licence bearing no.PNR/MIRAJ/013/2005, under the provisions of Regulation 22 of CHALR, 2004 for the acts and omissions committed by them as detailed in this show cause notice as well as earlier show cause notice dated 10/01/2012."

12 As held by the Full Bench of this Court in the case of *Delta Logistics Vs. Union of India*[1], while exercising power under the provisions of Regulation 22 of the said Regulations, a power is vested in the Commissioner of Customs to disagree with the report of the Enquiry Officer submitted in accordance with clause 5 of Regulation 22. However, elementary principles of natural justice require the Commissioner of Customs to put the licensee to the notice that he intends to disagree with the report of the Enquiry Officer or disagree with certain findings recorded by the Enquiry Officer. In the present case, in paragraph 7 of the show cause notice dated 19th October, 2012, the Respondent was called upon to show cause why the Enquiry report should not be relied upon while deciding earlier show cause notice dated 10th January, 2012. The second show cause notice itself reflects the findings recorded by the Enquiry Officer. It is true that in the first show cause notice, violation of clauses (a), (d) and (e) of Regulation 13 was alleged. But when the said show cause notice was issued, the Enquiry Report was not available which is referred to in the second show cause notice which holds that the allegation of breach of clauses (a) and (d) of Regulation 13 has not been proved. Therefore, by no stretch of imagination, it can be held that the Appellant was put to notice that the Commissioner intended to disagree with the findings on the allegations recorded by the Enquiry Officer as far as clauses (a) and

1 2012(286) E.L.T. 517 (Bom.)

(d) of the Regulation 13 are concerned.

13 We have therefore no hesitation in holding that the part of the impugned order which proceeds to set aside the order of revocation is legal and valid and no interference is called for.

14 However, we are of the view that the Appellate Tribunal ought to have granted an opportunity to the Commissioner of Customs to issue a fresh or supplementary show cause notice putting the Respondent to the notice that while deciding the first show cause notice, the Commissioner intends to disagree with the findings recorded by the Enquiry Officer. The learned counsel appearing for the Respondent tried to canvass that the Appellate Tribunal for good reasons has not granted such opportunity. However, we find that no such reasons have been recorded in the impugned judgment and order. He submitted that the agony of the Respondent should not be continued by granting the said opportunity inasmuch as the subsequent events do not warrant revocation of license and first show cause notice of the year 2012.

15 Even if a fresh show cause notice is issued or supplementary show cause notice is issued, the issue of the delay

always remains open which can be agitated by the Respondent while giving a reply to the show cause notice and at the time of personal hearing. There is no finding recorded by the Appellate Tribunal that on merits, the action of revocation of the license was bad in law. The order of revocation has been set aside only on the ground of breach of principles of natural justice. As we are not disturbing that part of the order by which the order of revocation of the license is set aside, if the said license continues to be valid as of today, this judgment and order will not affect the validity of the said license.

16 Accordingly, the Appeal must succeed in part. Hence, we pass the following order :-

ORDER

(i) The impugned judgment and order of the Appellate Tribunal dated 17th September, 2014 to the extent to which the order of the Commissioner of Customs, Pune dated 28th March, 2013 is set aside is confirmed;

(ii) However, it will be open for the Commissioner of Customs, Pune to issue a fresh show cause notice or a supplementary show cause notice for putting the Respondent to the notice that the Commissioner intends to disagree with the findings recorded by the Enquiry Officer on charges 1 and 2;

(iii) If such show cause notice or supplementary show cause notice is issued, the Respondent can contest the same on all permissible grounds including the ground of delay;

(iv) The Appeal is accordingly partly allowed on above terms with no order as to costs;

(v) Notice of Motion does not survive in view of disposal of the Appeal;

(RIYAZ I. CHAGLA, J) **(A.S. OKA, J)**