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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CUSTOM APPEAL NO.72 OF 2016

DHL Express (India) Pvt.Ltd. ...Appellant
vs.
The Commissioner, Customs,
(General) Customs Brokerage Section ...Respondent

Mr.Prakash Shah a/w Mr.Jas Sanghavi i/b PDS Legal for the appellant
Mr.Pradeep S. Jetly for the respondent

CORAM : A.S.OKA, &
RIYAZ I. CHAGLA,JJ.
DATE : SEPTEMBER 11, 2017

P.C.:

1 By this Appeal, the appellant has taken an exception to the Judgment and order dated 25th January 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short `Appellate Tribunal'), West Zonal Bench at Mumbai. By the said order, the Appeal preferred by the appellant for challenging the order dated 25th March 2015 passed by the Commissioner of Customs (General), Customs Broker Section, Mumbai has been dismissed on the ground that the same was not maintainable under the provisions of section 129-A of the Customs Act,1962 (for short `the said Act').

2 By the order dated 25th March 2015, the Commissioner of Customs rejected the application made by the appellant for grant of new Customs Broker Licence under the Customs Broker Licensing

Regulation, 2013 (for short "said Regulation of 2013") by invoking clause (3) of Regulation 5 thereof.

3 The learned counsel for the appellant in support of his contention submitted that the appeal before the Appellate Tribunal was maintainable as under clause (a) of sub-section (1) of section 129A of the said Act, any person aggrieved by a decision or order passed by the Principal Commissioner of Customs or the Commissioner of Customs as an Adjudicating Authority may prefer an appeal to the Appellate Tribunal. He submitted that considering the definition of Adjudicating Authority under the said Act, in the present case, the Commissioner of Customs (General) acted as an Adjudicating Authority and while acting as such, he rejected the application for grant of Custom Broker Licence under the said Regulation of 2013. He submitted that the said Regulation of 2013 has been made in exercise of the power under sub-section 2 of section 146 of the said Act. Therefore, when the Commissioner of Customs exercised the power of rejecting the application for grant of licence, he acts as an Adjudicating Authority under the provisions of the said Act. He invited our attention to the Regulation 21 of the said Regulation of 2013. He submitted that though the said Regulation makes available a remedy to Customs Broker as defined under the said Regulation, nevertheless, a remedy of Appeal under clause (1) of Section 129A of the said Act is available to the person who has applied for grant of

Customs Broker Licence and whose application has been rejected. He also invited our attention to the Regulation in existence prior to the said Regulation of 2013. He pointed out the clause 8 of Regulation 22 of the Custom House Agents Licence Regulation, 2004. He invited our attention to the decision of a Division Bench of this Court in the case of Indowort (India) Limited vs. Union of India[1]. He also relied upon a decision of the Gujrat High Court in the case of Commissioner of Central Excise Vs. Girish B.Mishra[2]. He also invited our attention to a decision of a Division Bench of this Court in the case of S.R.Sales and Company vs. Commissioner of Customs (General)[3]. He would urge that the view taken by the Appellate Tribunal is erroneous and the appeal was maintainable. The learned counsel for the respondent supported the impugned order.

4 We have given careful consideration to the submissions. The law is well settled. An appeal is always a creation of a statute and unless there is a specific remedy provided in the statute by way of an appeal, a right of appeal is never available to a litigant.

5 The said Regulation of 2013 have been framed in exercise of the power under sub-section 2 of section 146. Section 146 of the said Act reads thus:

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1 2010 (254) E.L.T 62

2 2016 (339) E.L.T. 67 Gujrat

3 2013 (295) E.L.T. 653 Bombay

146. Licence for customs brokers -

(1) No person shall carry on business as a customs broker relating to the entry or departure of a conveyance or the import or export of goods at any customs station unless such person holds a licence granted in this behalf in accordance with the Regulation.

(2) The Board may make Regulation for the purpose of carrying out the provisions of this section and, in particular, such Regulation may provide for-

(a) the authority by which a licence may be granted under this section and the period of validity of such licence;

(b) the form of the licence and the fees payable therefor;

(c)the qualifications of persons who may apply for a licence and the qualifications of persons to be employed by a licensee to assist him in his work as a customs broker;

(d) the manner of conducting the examination;

(e) the restrictions and conditions (including the furnishing of security by the licensee) subject to which a licence may be granted;

(f) the circumstances in which a licence may be suspended or revoked; and

(g) the appeals, if any, against an order of suspension or revocation of a licence, and the period within which such appeal may be filed.]

6 Sub-section 1 of section 146 lays down that no person shall carry on business as a Custom Broker unless such person holds a licence in accordance with the Regulation. Sub-section 2 confers power on the Board to make Regulation for the purpose of carrying out the provisions of sub-section 1 of section 146. Sub-section 2 contemplates framing the Regulation providing for the Authority which is empowered to grant licence, qualifications for the person who may apply for licence, restrictions and conditions subject to which a licence may be granted. What is material is the fact that the power conferred by the Regulation framed under sub-section 2 of section 146 on the Authority named in the Regulation is basically a licencing power. The Authority which exercises such power to grant a licence is empowered to decide whether the applicant is entitled to a licence. At this stage, we may make a useful reference to the decision of a Division Bench of this Court in the case of S.R.Sales and Company (supra). In the case before the Division Bench, an order was passed under Regulation 21 of the Custom House Agents Licence Regulation, 2004 (for short `the said Regulation of 2004') by which the Custom House Agent was prohibited from working in certain sections. The Custom House Agent subjected the said order to a challenge before the Appellate Tribunal. The Appeal was dismissed as not maintainable by the Appellate Tribunal. The substantial questions of law which were formulated in the Appeal before this Court read thus:

> “(a) Whether the CESTAT was justified in holding that in view of the provisions of Regulation 22(8) of the CHALR, 2004, no appeal lies to the CESTAT against an order passed by the Commissioner of Customs under Regulation 21;
>
> (b) Whether Regulation 22(8) of the CHALR, 2004 is ultra vires the provisions of the Customs Act, 1962 inasmuch as the same takes away the substantive right of Appeal to the CESTAT as provided under Section 129A of the Customs Act,1962;
>
> (c)Whether Regulation 21 of the CHALR, 2004 is ultra vires the provisions of the Customs Act,1962.”

7 An argument was canvassed that in view of clause (a) of sub-section 1 of section 129 of the said Act, an Appeal lies before the Appellate Tribunal against the decision or order passed by the Commissioner of Customs as an Adjudicating Authority. An argument was canvassed that as order of prohibition has been passed by the Commissioner as an Adjudicating Authority, an Appeal would be maintainable under clause (a) of sub-section 1 of section 129. Under clause 8 of Regulation 22, an appeal by Custom House Agent was maintainable before the Appellate Tribunal, only against the order passed under Regulation 20 or sub Regulation 7 of Regulation 22. It was submitted that notwithstanding the Regulation 22 of the said Regulation of 2004, an

appeal would be maintainable under clause (a) of sub-section 1 of section 129A. Paragraph 15 of the said decision reads thus:

> “15 Section 129A provides an appeal to the Tribunal by a person aggrieved by orders of the nature provided in clauses (a) to(c). Clause (a) is a decision or order passed by the Commissioner of Customs as an adjudicating authority. The Appellant relied upon the definition of the expression “adjudicating authority” in Section 2 as meaning any authority competent to pass an order or decision under the Act. A decision taken by an authority under subordinate legislation is as a matter of statutory interpretation, regarded as a decision under the Act. This principle has been enunciated in the judgment of the Supreme Court in Indramani Pyarelal Gupta v. W.R. Natu [(1963) 1 SCR 721 at para 15]. This, however, would not be dispositive of the issue which arises in this case because essentially what the Court has to consider is whether the general appellate provisions that are contained in Section 129A would apply to action which is initiated against a CHA under the Regulation of 2004. Section 146 provides for the licensing of an agent for carrying on business within a customs station involving import or export of goods or entry or departure of a conveyance. The entire

subject matter of the licensing of CHAs which commences from invitation of applications and covers qualifications of eligibility, the holding of examinations, award of licences, obligations of CHAs and disciplinary control are governed by the Regulation. Section 146(2) contemplates that the Regulation is intended to fulfill the purpose of carrying out of the provisions of the section. That the Regulation may also govern the remedies which are available to a CHA against an order passed in the disciplinary jurisdiction is made abundantly clear by clause (f) of Section 146 (2). Section 146(2)(f) clarifies by way of illustration that the Regulation can govern the appeals, if any, against orders of suspension or revocation. If recourse to the general power of an appeal under section 129A was intended by Parliament to be available in disciplinary matters involving CHAs, there was no necessity of including a provision such as that which is contained in Section 146(2)(f). The provisions of Section 129A have to be harmoniously construed with those of Section 146. There is no question, in our view, of there being any inconsistency between the two statutory provisions. Similarly, there is no repugnancy between the provisions of Regulation 22(8) and section 129A. Section 146 operates in a field different from Section 129A. Section 146 governs the licensing of CHAs and contemplates the making of Regulation governing all aspects of the licensing of CHAs including disciplinary control. Remedies against orders passed in the disciplinary jurisdiction are to be provided in the Regulation. The Regulation constitute a self-contained code relating to the licensing of CHAs. The Regulation provide for disciplinary control over CHAs and have provided an appellate remedy against orders of revocation or suspension. An order of prohibition under Regulation 21, preventing a CHA from operating within one or more sections of a customs station is not subject to an appeal under the Regulation. The subordinate legislation has considered that such an order does not possess the consequences of either a revocation of a licence or for that matter, the suspension of a licence pending enquiry since such an order prohibits a CHA from operating in one or more sections of a customs station. The wisdom of the delegate of the legislature in not providing an appeal in such a case does not fall for re-evaluation by the Court. It is trite law that there is no inherent right of appeal. An appeal is a creation of a statute or, as in the present case, the creation of a statutory provision (Section 146) read together with the Regulation. A CHA is, however, not without remedy against an order of prohibition which is amenable to the jurisdiction of the High Court under Article 226 of the Constitution."

(underline supplied)

8 The Division Bench categorically observed that Section 146 operates in a field which is different from section 129A as section 146 governs licensing of Custom House Agents. It was observed that the remedies against the actions of the Licencing Authority have to be provided in the Regulation framed under sub-section 2 of section 146. It was held that such Regulations are a self contained Code for the Licensed Custom House Agents. It was observed that the delegate of the legislature in its wisdom has not provided for an Appeal in a case where there was prohibition imposed under Regulation 21 of the said Regulation of 2004. It was held that the Appeal being a creation of a statute, if the Regulations under sub-section 2 of section 146 do not provide for a remedy of appeal, an appeal under clause (a) of sub-section (1) of section 129A would not lie.

9 Thus, the said Regulation of 2013 framed under sub-section (1) of section 146 is a complete Code in itself which governs the powers of the Licencing Authority to grant or deny a licence under the Regulation which is contemplated by sub-section 1 of section 146. In the present case, the Commissioner of Customs acted in his capacity as the Licensing Authority under the said Regulation of 2013 and not as an Adjudicating Authority as contemplated by

clause (a) of sub-section 1 of section 129A of the said Act.

10 As far as the decision of this Court in the case of Indowort (India) Limited (supra) is concerned, the Division Bench was not dealing with an order made under such Regulation. As far as the decision of Gujrat High Court is concerned, the said High Court has not dealt with the issue of the remedy under the Regulation under sub-section 2 of section 146 of the said Act.

11 For the reasons recorded above, we agree with the view taken by the Appellate Tribunal that against the said order of the Commissioner (General), an appeal was not maintainable either under section 129A or under the provisions of the Regulation of 2013. The appeal under the said Regulation of 2013 is available only to a person who has been granted a licence.

12 Accordingly, we find no merit in the Appeal and the same is dismissed.

13 We however make it clear that we have made no adjudication on the merits of the order impugned in the Appeal before the Appellate Tribunal and the said contentions will be gone into in the companion writ petition.

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