* IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE T. RAJANI

+ C.E.A.No.64 of 2016

% Date: -09-2017

Between:

M/s.M.G.K.Associates
1-10-1 to 8, Air Cargo Complex, Hyderabad,
Rep. by its Proprietor Mr. M.G. Khan.

…Appellant

Vs.

The Commissioner of Customs & Central Excise,
Hyderabad II Commissionerate, L.B. Stadium,
Hyderabad.

…Respondent

! Counsel for the Appellant : Mr. G. Mohan Rao

^ Counsel For the Respondent : Mr. B. Narasimha Sarma

< GIST:

> HEAD NOTE:

? Cases referred

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT. JUSTICE T. RAJANI

C.E.A.No.64 of 2016

JUDGMENT: (per VRS, J.)

A Customs House Agent has come up with the above appeal under Section 130 of the Customs Act, 1962, questioning the correctness of the order passed by the CESTAT, including the very jurisdiction of the CESTAT to entertain the appeal of the Revenue.

2. Heard Mr. G. Mohan Rao, learned counsel for the appellant and Mr. B. Narasimha Sarma, learned Senior Standing Counsel for the Department.

3. The appellant was granted Customs House Agent Licence way back in the year 1989, under the Licensing Regulations prevailing at that time. A new set of Regulations were issued in the year 2004. When the appellant applied for renewal on 22.02.2005, he was issued with a show cause notice, dated 27.06.2005, alleging violation of certain Regulations. The appellant submitted a detailed reply on 14.07.2005.

4. By an Order in Original dated 14.02.2006, the Commissioner dropped further proceedings and the application of the appellant for renewal was directed to be taken up for further processing. Accordingly renewal was granted till 27.04.2008.

5. The Order in Original was taken up by a Committee of Principal Chief Commissioners of Customs and Central Excise, under Section 129-D of the Customs Act, 1962 and the Committee directed the respondent to file an appeal before the CESTAT as against the Order in Original dated 14.02.2006.

6. Accordingly, the respondent filed an appeal under Section 129-D (4) of the Customs Act, 1962. The said appeal was allowed by the Tribunal and the matter was remanded back to the adjudicating authority for a fresh disposal. Questioning the correctness of the order of the Tribunal, the Customs House Agent has come up with the above appeal raising the following substantial questions of law:

1. Whether an appeal would lie to CESTAT under Section 129D(4) from the Order in Original dated 14.02.2006 of the Commissioner of Customs and Excise, under the Customs House Agent Licensing Regulations 2004?
2. Whether the impugned order passed by the Tribunal contrary to its findings in paragraphs 11, 12 and 13 of the order is valid and legal?

Substantial Question of Law – 1:

7. Admittedly the Order in Original dated 14.02.2006 was passed in terms of CHA Licensing Regulations 2004. The CHA Licensing Regulations, 2004 do not provide for an appeal as against the order dropping further proceedings and directing the processing of the application for renewal of the licence.

8. Therefore in the absence of any provision for an appeal under the CHA Licensing Regulations, 2004, the Department thought fit to take the route under Section 129-D of the Customs Act, 1962. Sub-section (1) of Section 129-D of the Customs Act reads as follows:

> "129D: Power of Committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs or Principal Commissioner of Customs or Commissioner of Customs to pass certain orders: --
> (1) The Committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs may, of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner or Customs or Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points

> arising out of the decision or order as may be specified by the committee of Principal Chief Commissioners of Customs or Chief Commissioners of Customs in its order."

9. A careful look at Section 129-D (1) would show that the same confers power upon a Committee of Principal Chief Commissioners, to call for and examine the record of any proceeding in which a Principal Commissioner of Customs or Commissioner of Customs has passed any decision or order under the Act, as an adjudicating authority. Therefore for the invocation of the *suo motu* power of revision conferred by Section 129-D (1), the following pre-requisites are to be satisfied:

1. A Principal Commissioner or Commissioner should have passed any decision or order under the Act; and
2. Such an order should have been passed by him as an adjudicating authority.

10. The expression "adjudicating authority" is defined in Section 2(1) to mean any authority competent to pass any order or decision under this Act, but does not include the Board, Commissioner (Appeals) or Appellate Tribunal. There are different types of orders or decisions that could be made by an adjudicating authority under the Act. They are –

1. Provisional assessment of duty;
2. Abatement of duty;
3. Revision of duty;
4. Order for refund of duty;
5. Recovery of duties not levied or not paid or short levied or short paid or erroneously refunded;
6. Order of attachment;
7. Licensing of public warehouses, private warehouses and special warehouses;
8. Order for provisional release of goods;
9. Confiscation;
10. Adjudication of confiscation and penalties; etc.,

11. The grant of licence to operate as a Customs House Agent is not included as one of the matters of adjudication that could be made under the Customs Act, 1962. It is important to note that the licensing of public warehouses, private warehouses, special warehouses etc., are included as one of the matters for adjudication under the Act.

12. The only provision of the Act, which talks about Customs House Agents, is Section 146. Interestingly, Section 146 uses the expression “Customs Broker”. Sub-section (2) of Section 146 empowers the Board to make Regulations for the purpose of carrying out the provisions of Section 146 (1), viz., the licensing of customs brokers. Matters that could be covered by the Regulations framed by the Board under Section 146(2) include – (1) the authority by which a licence may be granted; (2) the period of validity of such licence; (3) form of the licence and fee payable therefor; (4) the qualifications of persons, who apply for a licence and the qualifications of the persons to be employed by such licensees; (5) the manner of conducting examination; (6) the restrictions and conditions subject to which licence can be granted; (7) the circumstances in which a licence may be suspended or revoked; and (8) appeals, if any, against an order of suspension or revocation of licence and the period within which such appeal may be filed.

12. Clause (g) of sub-section (2) of Section 146 specifically speaks only about appeals against an order of suspension or revocation of licence. It does not talk about an appeal against the grant of a licence or renewal of a licence.

13. In view of the restriction contained in Section 146 (2) (g), the Customs House Agent Licensing Regulations, 2004 do not provide for any appeal against the grant of a license or renewal of licence. Since the grant

of a licence or renewal of a licence is an administrative act within the power and control of the Commissioner of Customs, no one can be said to be aggrieved by the grant or renewal of a licence.

13. A careful look at the Customs House Agent Licensing Regulations, 2004 would show that they deal with – (1) the invitation of applications to be made by the Commissioner of Customs every year; (2) the Form in which the application for licence is to be made; (3) the conditions to be fulfilled by an applicant; (4) inquiries to be made by the Commissioners on the applications; (5) examinations to be conducted for determining the eligibility of the candidates; (6) grant of licence in Form-B; (7) execution of bond and furnishing of security; (8) period of validity of licence; (9) non-transferability of the licence; (10) obligations of the Customs House Agent; (11) contingencies where the constitution of the firm or company that holds the licence, undergoes a change; (12) employment of persons by the licensees; (13) suspension or revocation of licence; (14) order prohibiting a Customs House Agent from working in any one or more sections; (15) suspension or revocation of licence; and (16) membership of association of agents.

14. A careful look at the Regulations 1 to 24 of the Customs House Agents Licensing Regulations, 2004 would show that insofar as the grant of a licence, suspension of a licence, revocation of a licence and renewal of a licence are concerned, these Regulations constitute a complete code in themselves. These regulations do not leave anything uncovered insofar as these aspects are concerned.

15. There are few provisions in the CHA Regulations themselves, which deal with the right of appeal. For instance, Regulation 9(4) enables an applicant to file an appeal to the Chief Commissioner of Customs, as

against an order of the Commissioner of Customs rejecting his application for the grant of licence. Similarly, Regulation 22(8) enables a Customs House Agent, whose licence has been suspended or revoked either under Regulation 20 or under Regulation 22(7) to file an appeal to the CESTAT under Section 129-A.

16. It is seen from the scheme of the Regulations that the Commissioner of Customs acts as the authority empowered to grant, suspend or revoke a licence. He is the licensor and the agent becomes the licensee. While a licensee may become aggrieved when his application for renewal of licence is rejected or when his licence is suspended or revoked, the licensor himself cannot be said to be aggrieved by the grant of licence.

17. While acting as the licensing authority under the Regulations, the Commissioner of Customs does not act as an adjudicating authority. Whenever an adjudicating authority passes an order under the Customs Act, 1962, favouring an assessee, the revenue (or the department) becomes aggrieved, since the collection of revenue to that extent is hampered. This is why *suo motu* powers are conferred upon superior authorities for revision of assessments, whenever the original order of adjudication goes in favour of the assessee. But the grant of a licence cannot be said to prejudice the department, in the same sense as an order of adjudication under the Act may prejudice the department.

18. Therefore, the argument of the learned Senior Standing Counsel for revenue that the order of the Commissioner of Customs granting or renewing a licence is an order passed under the Customs Act, 1962, cannot be accepted. An order granting a licence or renewing a licence is not an order of adjudication under the Act. While an order granting a

licence to a public warehouse or a private warehouse or a special warehouse may be an order of adjudication in view of the provisions of Chapter-IX, an order granting a licence under the CHA Regulations cannot be termed as an order of adjudication. Hence the question of invocation of *suo motu* power of review under Section 129-D (1) by the Committee of Principal Commissioners does not arise.

19. It appears that the CESTAT has consistently held that no appeal would lie as against the orders of the nature dated 14.02.2006. In P. Cawasji & Co. v. Commissioner[1], G.P. Jaiswal v. Commissioner of Customs[2] and A.S. Vasan & Sons v. Commissioner of Customs[3], the CESTAT had taken such a view. The decision in *A.S. Vasan & Sons v. Commissioner of Customs* was confirmed by the High Court of Bombay in the decision reported in 2009 (238) ELT 217.

20. Subsequently, the Tribunal reiterated the same view in Tass Clearing Services (P) Ltd., v. Commissioner of Customs[4].

21. Apart from the consistent stand taken by the Tribunal, which also received the approval of the Bombay High Court, there is also a decision of the Calcutta High Court, in M. Dutta Agency v. Commissioner of Customs[5], where the Calcutta High Court was concerned with a question that would probably be collateral to the question on hand. In the case before the Calcutta High Court, the question was as to whether an appeal would lie under the Customs Act, 1962 when an application for renewal was rejected. In the absence of a provision for an appeal under the Regulations (as they existed at that

[1] 2000 (119) ELT 606
[2] 2008 (226) ELT 707
[3] 2008 (230) ELT 374
[4] 2009 (238) ELT 671
[5] 1998 (101) ELT 581

time), the Calcutta High Court took the view that no appeal would lie under the Regulations and that therefore, the only remedy available to the licensee in such a case, was to invoke the jurisdiction of the High Court under Article 226.

22. In a recent decision in Commissioner of Central Excise v. Aren Shipping Agents Pvt. Ltd.,[6], the Madras High Court took clue from the decision of the Calcutta High Court and upheld an order of the CESTAT holding that no appeal would lie as against the orders directing the grant of renewal or the processing of applications for renewal. Therefore, when the Tribunal has consistently been holding the view that no appeal would lie as against the orders directing the grant or renewal of license or directing the processing of the applications for renewal, we do not think that the Department can fall back upon the provisions of Section 129-D(1) of the Customs Act, 1962.

23. As we have pointed earlier, the Order in Original dated 14.02.2006 was not an order of adjudication passed under the Customs Act, 1962, to enable the Committee of Principal Chief Commissioners to invoke the *suo motu* power of revision under Section 129-D(1). More over, CHA Licensing Regulations constitute a complete code in themselves, insofar as the grant, renewal, suspension or revocation of licences are concerned. Therefore, except insofar as the matters regarding which a provision for appeal is made in the Regulations, no appeal would lie, outside the Regulations.

24. Hence the 1st question of law is answered in favour of the appellant. As a consequence, there is no necessity to answer the 2nd question of law.

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6 2016 (341) ELT 586

25. In view of our answer to the 1st question of law, the order of the Tribunal impugned in this appeal is set aside and the Central Excise Appeal is allowed. As a sequel, miscellaneous petitions pending in this appeal, if any, shall stand closed.

V. RAMASUBRAMANIAN, J

T. RAJANI, J

____September, 2017
Js.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE SMT. JUSTICE T. RAJANI

C.E.A.No.64 of 2016
(Per VRSJ)

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