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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgement delivered on: 27.03.2017

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CUSAA 1/2016

KUNAL TRAVELS (CARGO)

..... Appellant

Versus

COMMISSIONER OF CUSTOMS (IMPORT & GENERAL)

NEW CUSTOMS HOUSE, IGI AIRPORT, NEW DELHI Respondent

AND

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CUSAA 12/2016

KUNAL TRAVELS (CARGO)

..... Appellant

Versus

COMMISSIONER OF CUSTOMS
(IMPORT & GENERAL)

..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr. Amarjeet Singh, Advocate.

For the Respondents: Mr. Sanjeev Narula, Sr. Standing Counsel with Mr. Abhishek Ghai,
Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.:-

1. These appeals are directed against the impugned order dated 08.06.2015 of the CESTAT, which upheld the order-in-original dated 01.05.2007 passed by the respondent – Commissioner of Customs revoking the appellant's Customs House Agent (CHA) license and forfeiting its security deposit of Rs.1 lakh.

2. The said license was granted under the Customs House Agents Licensing Regulations, (CHALR), 2004. The appellant had filed two shipping bills on 17.06.2003 in the name of one M/s H.M. Impex regarding the export of readymade garments entailing a duty drawback claim of about Rs.34 lacs. Upon inspection of the goods by the customs authorities it was found that against the declared weight of 10200 kg, the consignment weighed only 3820 kgs. in respect of one of the bills besides the goods/garments were of low quality and of irregular size. Hence the customs authorities concluded that there was a deliberate mis-declaration apropos the quality, quantity, value and weight of the consignments with the intention to defraud the government and illegitimately claim the benefit of duty-drawback.

3. The investigation apropos the exporter M/s H.M. Impex, at its given address WZ-156, Madipur, New Delhi – 63, of which one Mr. Rajiv Kumar was claimed to be its proprietor, but its Import Export Code (IE Code), revealed that no such entity existed at the said address. An employee of the appellant, Mr. Lalit Katoch, was said to be involved in the filing of the export documentation and inspection of the consignments. The appellant's proprietor, Mr. Sunil Bhatia had contended that the exporter was introduced to the CHA by Mr. Lalit Katoch who was the appellant's sales executive, and the latter in turn had been approached by one Mr. Vijay Gupta; the proprietor claimed ignorance of the nature or quantum of the goods in terms of the documents filed by Mr. Lalit Katoch, therefore, no allegation of mis-declaration or fraud could be fastened upon him or upon the appellant. Furthermore, he contended that the revocation of license for the submission of documents by his employee was too harsh an action and it ought to be recalled. He relied upon the judgment of the CESTAT in *M/s Pranil Shipping Vs . CC, Jamnagar* by Final Order No. A/11432 dated 24.7.2014.

4. The respondent, however, argued that the shipping bills were filed without verifying the identity of the exporter or ascertaining the veracity of the declarations made in the shipping bills for clearance of the goods through customs for export; this was a necessary precaution that the CHA ought to have taken before the documents were filed; this default shows a lack of due diligence and of serious misconduct, hence the respondent's action was justified. Especially, in view of the judgement of the Bombay High Court in *CC (General) Vs Worldwide Cargo Movers, 2010 (253) ELT 190 (Bom.)* and the Andhra Pradesh High Court in *CC Hyderabad-II Vs H.B. Cargo Services, 2011 (268) ELT 448 (A.P.)*.

5. In the impugned order the CESTAT had concluded that the shipping bills were filed in the name of a non-existent entity/exporter viz. M/s H.M. Impex, and there was nothing on record to show that anyone on behalf of the said exporter had ever approached the appellant for filing of the said shipping bills; the consignment was of a large value; the hand-written invoices were typed in the appellant's office; Mr. Lalit Katoch kept the proprietor involved/informed and the latter gave his consent for filing the documents; the high value of the consignments required due diligence compliance of Know Your Customer (KYC) norms under the CHALR, 2004 so as to ascertain the genuineness of the exporter and the exports. Since there was a gross mis-declaration in the description, value and weight of the consignment, there was non-compliance of the CHAs obligations mandated in Regulation 13 of CHALR, 2004. The CESTAT further opined that the CHA is treated with a certain degree of trust by the customs authorities, this trust has been completely violated in the present case; such breach of trust qualifies as grave misconduct on the part of the CHA i.e i) filing shipping bills of such high value in the name of a non-existing firm, ii) a serious dereliction of duty in not verifying the genuineness of the exporter

or of the consignment and iii) such conduct would have high financial and security consequences. The appellant's reliance on *M/s Pranil Shipping* (supra) was found to be inapplicable to the facts of the case, instead the CESTAT found favour with the judgments cited by the respondent i.e. *Worldwide Cargo Movers* (supra) and *H.B. Cargo Services* (supra). The latter judgment held that "*a single act of corruption is sufficient to award the maximum penalty which under the CHALR is of revocation of the license*", whereas the former held that the punishment for misconduct is best left to the disciplinary authority save in exceptional cases where it is shockingly disproportionate or malafide.

6. *Worldwide Cargo Movers* (supra) had in turn relied upon a judgment of Madras High Court in *Arvind C. Bhagat Vs. CC, Chennai, 2000 (122) ELT 678 (Mad)*, in which the CHA had failed to discharge its obligation to exercise proper supervision, as in the case of *Shri Kamakshi Agency Vs. Commissioner of Customs, Madras 2001 (129) ELT 29 (Mad)*, also referred to in the same judgment. The CHA was held responsible for fraudulent activity of the third parties to whom it had delegated its functions. However, it is to be noted that in *Shri Kamakshi Agency* (supra) the CHA had "*brazenly defended his Regulation 8 employee who gave a fake name of his brother as an importer for undervaluing the imported car...*".

7. In the present case, however, the appellant has not defended the action of Mr Lalit Katoch, on the contrary it is the appellant's case that Mr. Lalit Katoch was merely a marketing executive and not a 'G' or 'H' Card Holder under the CHALR, 2004, therefore, the latter and Mr Dheeraj Khurana had no business entering the customs house or having the goods examined and their presence at the ICD, Tughlakabad was unauthorized. Nor were they authorized to sign any documents on behalf of the CHA. Furthermore, Mr Roshan Sharma - the appellants G card holder had denied having signed any

documents of M/s HM Impex. The appellant had denied the allegations in the show cause notice dated 16.06.2004. It had contended that since the actions of Mr. Lalit Katoch were without any authority the appellant ought not to be penalized for it.

8. The appellant's license was suspended w.e.f. 20.09.2004. In the challenge before the CESTAT, this suspension was set aside on 12.10.2004 and the Commissioner of Customs was directed to re-appreciate the appellant's case since the Commissioner had not satisfied himself about the urgency which was required in a case of immediate suspension under Regulation 20(2) of the CHALR. The Commissioner was further directed to state the grounds on which he proposes to suspend the license and to provide an opportunity to the CHA to submit its response within a specified time. However, in the subsequent *de novo* proceedings on 28.02.2005 an order-in-original was passed reiterating the suspension of the appellant's license by reproducing the facts in the show cause notice dated 16.06.2004. Challenge to this suspension order before the CESTAT was unsuccessful on the ground that the Commissioner was within his powers to pass such suspension order apropos the facts at that stage of the case.

9. Aggrieved by the above the petitioner approached this court through a writ petition: WP(C) No. 11628-29/2005 which was disposed-off on 23.08.2005 with the direction that the order of the Commissioner shall be treated as a show cause notice and upon the appellant responding to it within two weeks therefrom, a reasoned order would be passed. On 06.10.2005 an inquiry report was prepared by the Assistant Commissioner of Customs under Regulation 22 of CHALR, 2004. It concluded that i) the appellant had not contravened Regulation 13(n) as there was nothing to prove that it caused unavoidable delay or did not attend to its duties with utmost speed ii) since the exporter was a non-existent entity and the documents were

prepared in the office of the CHA and were filed by its employees, and the goods were incorrectly declared with an inflated value so as to fraudulently obtain the duty drawback, there was a lack of due diligence by the CHA in terms of the said regulations. The appellant's submissions against the report and the procedure did not find favour with the Commissioner of Customs, who vide order dated 01.05.2007 imposed a penalty of ₹1 lakh under Section 114 of the Customs Act, 1962 on the appellant and revoked its CHA license. This was an appeal against the said revocation, penalty and forfeiture before the CESTAT, which resulted in the impugned order.

10. The appellant contends that the impugned order erred in concluding that M/s H.M. Impex had never approached it for filing the shipping bills or that no authorization had been obtained from it since this is contrary to the facts available on record; that it had filed the due authorization in this regard and had declared so in the shipping bills; indeed this was prominently mentioned on top of the shipping bills; that there was no delay in the discharge of duty towards the CHA; it had properly maintained its books and had not refused access to any material which was sought by the respondent; it had submitted copies of its attendance register as and when required by the customs authorities; it had not sought to influence any government officials apropos the shipping bills; it had paid the requisite government dues; it had exercised due diligence apropos the correctness of the information as provided by its clients regarding the clearance of the cargo – consignment. In the present case it had not represented M/s H.M. Impex before the custom authorities in any manner since the entire action had been taken by an employee i.e. Mr. Lalit Katoch without the CHAs authorization; and finally that the show cause notice does not specify as to which clause of Regulation 13(e) of the CHALR, 2004 had been violated by it. The appellant submitted that Mr. Lalit Katoch was never authorized by it to act apropos clearance of

export consignment and his duties were limited to that of a sales and marketing executive; hence for the action of its employee was beyond the scope of his duties the appellant and its proprietor cannot be punished.

11. The obligations of the CHA are stipulated in Regulation 13 of the CHALR-04:

“... Obligations of Customs House Agent. 13. - A Customs House Agent shall -

(a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as Customs House Agent and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs;

(b) 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;

(c) not represent a client before an officer of Customs in any matter to which he, as an officer of the Department of Customs gave personal consideration, or as to the facts of which he gained knowledge, while in Government service;

(d) advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs;

(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;

(f) not withhold information contained in any order, instruction or public notice relating to clearance of cargo or baggage issued by the Commissioner of Customs, from a client who is entitled to such information;

(g) promptly pay over to the Government, when due, sums received for payment of any duty, tax or other debt or

obligations owing to the Government and promptly account to his client for funds received for him from the Government or received from him in excess of Governmental or other charges payable in respect of the clearance of cargo or baggage on behalf of the client;

(h) not procure or attempt to procure directly or indirectly, information from the Government records or other Government sources of any kind to which access is not granted by the proper officer;

(i) not attempt to influence the conduct of any official of the Customs Station in any matter pending before such official or his subordinates by the use of threat, false accusation, duress or the offer of any special inducement or promise of advantage or by the bestowing of any gift or favour or other thing of value; m not refuse access to, conceal, remove or destroy the whole or any part of any book, paper or other record, relating to his transactions as a Customs House Agent which is sought or may be sought by the Commissioner of Customs;

(k) maintain records and accounts in such form and manner as may be directed from time to time by a Deputy Commissioner of Customs or Assistant Commissioner of Customs and submit them for inspection to the said Deputy Commissioner of Customs or Assistant Commissioner of Customs or an officer authorised by him whenever required;

(l) ensure that all documents, such as bills of entry and shipping bills delivered in the Customs Station by him show the name of the importer or exporter, as the case may be, and the name of the Customs House Agent, prominently at the top of such documents;

(m) in the event of the licence granted to him being lost, immediately report the fact to the Commissioner of Customs;

(n) ensure that he discharges his duties as Customs House Agent with utmost speed and efficiency and without avoidable delay....”

12. Clause (e) of the aforesaid Regulation requires exercise of due diligence by the CHA regarding such information which he may give to his

client with reference to any work related to clearance of cargo. Clause (1) requires that all documents submitted, such as bills of entry and shipping bills delivered etc. reflect the name of the importer/ exporter and the name of the CHA prominently at the top of such documents. The aforesaid clauses do not obligate the CHA to look into such information which may be made available to it from the exporter/ importer. The CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect to clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area. What is noteworthy is that the IE Code of the exporter M/s H.M. Impex was mentioned in the shipping bills, this itself reflects that before the grant of said IE Code, the background check of the said importer/ exporter had been undertaken by the customs authorities, therefore, there was no doubt about the identity of the said exporter. It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE Code given to it by a client for each import/ export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e. KYC etc. would have been done by the customs authorities. There is nothing on record to show that the appellant had knowledge that the goods mentioned in the shipping bills did not reflect the truth of the consignment sought to be exported. In the absence of such knowledge, there cannot be any *mens rea* attributed to the appellant or its proprietor. Whatever may be the value of the goods, in the present case, simply because upon inspection of the goods they did not corroborate with what was declared in the shipping bills, cannot be deemed as mis-declaration by the CHA because the said document was filed on the basis of information provided to it by M/s H.M. Impex, which had already been granted an IE Code by the DGFT. The grant of the IE Code presupposes a verification of

facts etc. made in such application with respect to the concern or entity. If the grant of such IE Code to a non-existent entity at the address WZ-156, Madipur, New Delhi – 63 is in doubt, then for such erroneous grant of the IE Code, the appellant cannot be faulted. The IE Code is the proof of locus standi of the exporter. The CHA is not expected to do a background check of the exporter/client who approaches it for facilitation services in export and imports. Regulation 13(e) of the CHALR 2004 requires the CHA to: *“exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage”* (emphasis supplied). The CHA's due diligence is for information that he may give to its client and not necessarily to do a background check of either the client or of the consignment. Documents prepared or filed by a CHA are on the basis of instructions/documents received from its client/importer/exporter. Furnishing of wrong or incorrect information cannot be attributed to the CHA if it was innocently filed in the belief and faith that its client has furnished correct information and veritable documents. The mis-declaration would be attributable to the client if wrong information were deliberately supplied to the CHA. Hence there could be no guilt, wrong, fault or penalty on the appellant apropos the contents of the shipping bills. Apropos any doubt about the issuance of the IE Code to M/s H.S. Impex, it was for the respondents to take appropriate action. Furthermore, the inquiry report revealed that there was no delay in processing the documents by the appellant under Regulation 13(n).

13. This Court in *Ashiana Cargo Services vs Commissioner of Customs (I & G) 2014 (302) E.L.T. 161 (Del)* has inter alia held:

“..... 10. Beginning with the facts, there is virtually no dispute. There is a concurrent finding of fact by the Commissioner and the CESTAT that the appellant did not have knowledge that the illegal exports were effected

using the G cards given to VK's employees. There was no active or passive facilitation by the appellant in that sense. Undoubtedly, the provision of the G cards to non-employees itself violated the CHA Regulations. This is an admitted fact, but it is not the Revenue's argument (nor is it the reasoning adopted by the Commissioner or the CESTAT) that this violation in itself is sufficiently grave so as to justify the extreme measure of revocation. Not any and every infraction of the CHA Regulations, either under Regulation 13 ("Obligations of CHA") or elsewhere, leads to the revocation of license; rather, in line with a proportionality analysis, only grave and serious violations justify revocation. In other cases, suspension for an adequate period of time (resulting in loss of business and income) suffices, both as a punishment for the infraction and as a deterrent to future violations. For the punishment to be proportional to the violation, revocation of the license under Rule 20(1) can only be justified in the presence of aggravating factors that allow the infraction to be labeled grave. It would be inadvisable, even if possible, to provide an exhaustive list of such aggravating factors, but a review of case law throws some light on this aspect. In cases where revocation of license has been upheld (i.e. the cases relied upon by the Revenue), there has been an element of active facilitation of the infraction, i.e. a finding of mens rea, or a gross and flagrant violation of the CHA Regulations. In Sri Kamakshi Agency (supra), the licensee stopped working the license, but rather, for remuneration, permitted his Power of Attorney to work the license, thus in effect transferring the license for money. As the CESTAT noted, "9.....[a]pplicant instead of discharging his functions as a Custom House Agent in accordance with the Regulations, in flagrant violation of those Regulations went to the extent of encashing the facilities made available to him as a CHA by selling it for a price". Moreover, the Power of Attorney was - as a matter of fact - "actively involved in the fraudulent act in connivance with the importers and others and that as per the Power of Attorney Bond executed by Sri K. Natarajan, all acts, deeds and things done by Sri D. Sukumaran were to be construed as if they were done by himself. Therefore

virtually all the fraudulent activities carried out by the Power of Attorney of Thiru Natarajan were to be treated as having been carried out by Thiru K. Natarajan himself", i.e. the licensee. In OTA Kandla, too, mens rea (i.e. knowledge) of the licensee was established. By a statement of the petitioner under Section 108, Customs Act, followed by the inquiry, it was clear that the licensee was aware that the consignment contained gypseous alabaster, a prohibited substance, but nonetheless, participated in its release from the Kandla Port. In CUS.A.A.24/2012 Page 10 Santon Shipping (supra), the adjudicating authority came "to the conclusion that the fraud in this case has been committed in so many consignments over a long period of time and the same could not have happened without the connivance of the CHA". The revocation of the license was again informed by the fact of connivance (i.e. mens rea as to the infraction) of the CHA. In Eagle Transport (supra), the CHA transferred the license altogether. As the CESTAT noted, "... the activities of the appellant firm were controlled day to day, not by Shrimankar but by employees of Amol Shipping Agency. We do not see how this does not amount to transfer of the licence in all but name. Hence, we must hold that the first and second articles of charge have been rightly held as proved." Moreover, more than 100 blank shipping bill forms were sent to a third-party. Following these aggravating factors, the penalty of revocation was justified by the CESTAT. Similarly, in HB Cargo (supra), relied upon by the majority of the CESTAT, the case did not concern any ordinary infraction of the CHA Regulations, but "an act of corruption", where blank shipping bills were issued by the partner and authorized representative of the CHA for a consideration of `150 per shipping bill.

11. Viewing these cases, in the background of the proportionality doctrine, it becomes clear that the presence of an aggravating factor is important to justify the penalty of revocation. While matters of discipline lie with the Commissioner, whose best judgment should not second-guessed, any administrative order must demonstrate an CUS.A.A.24/2012 Page 11 ordering of priorities, or an appreciation of the aggravating (or

mitigating) circumstances. In this case, the Commissioner and the CESTAT (majority) hold that "there is no finding nor any allegation to the effect that the appellant was aware of the misuse of the said G cards", but do not give adequate, if any weight, to this crucial factor. There is no finding of any mala fide on the part of the appellant, such that the trust operating between a CHA and the Customs Authorities (as a matter of law, and of fact) can be said to have been violated, or be irretrievably lost for the future operation of the license. In effect, thus, the proportionality doctrine has escaped the analysis.

12. Learned Senior Standing Counsel for the Customs has stressed that the infraction in this case is not a routine matter, but rather, illegal smuggling of narcotics by the G card users. However, given the factual finding that the CHA was not aware of the misuse of the G cards (and thus, also unaware of the contents being smuggled), no additional blame can be heaped upon the CHA on that count alone. Rather, the only proved infraction on record is of the issuance of G cards to non-employees, as opposed to the active facilitation of any infraction, or any other violation of the CHA Regulations, whether gross or otherwise. Neither have any such allegations been raised as to the past conduct of the appellant, from the time the license was granted in January, 1996. Equally, it is important to note that the appellant has - as of today - been unable to work the license for 8 years, and thus been penalized in this manner. This is not to say that CUS.A.A.24/2012 Page 12 the trust operating between the Customs Authorities and the CHA is to be taken lightly, or that violations of the CHA Regulations should not be dealt with sternly. A penalty must be imposed. At the same time, the penalty must - as in any ordered system - be proportional to the violation. Just as the law abhors impunity for infractions, it cautions against a disproportionate penalty. Neither extreme is to be encouraged. In this case, in view of the absence of any mens rea, the violation concerns the provision of G cards to two individuals and that alone. A penalty of revocation of license for this contravention of the CHA Regulations unjustly restricts the appellant's ability to engage in the business of the CHA for his entire lifetime. As

importantly, it skews the proportionality doctrine, substantially lowering the bar for revocation as a permissible penalty, especially given the dire civil consequences that follow. On the other hand, the minority Opinion of the CESTAT, delivered by the Judicial Member, correctly appreciates the balance of relevant factors, i.e. knowledge/mens rea, gravity of the infraction, the stringency of the penalty of revocation, the fact that the appellant has already been unable to work his license for a period of 6 years (now 8 years), and accordingly sets aside the order of the Commissioner dated 24.01.2005...”

14. Any act to defraud presupposes the intention to obtain something fraudulently. In the present case, the appellant (through its proprietor) has all along contended that the documents were filed unauthorizedly by a person incompetent to do so; it has not defended the action of Mr Lalit Katoch; it claims ignorance and innocence of the contents of the consignment; it objects to the very filing of the two shipping bills by either Mr Katoch or any person authorised on its behalf, hence there cannot be a presumption of its deliberate act/intention to defraud. There is no evidence of active facilitation of clearance of the consignment through customs by the appellant, hence, no *mens rea* can be inferred to defraud the government for obtaining duty drawback through a fraudulent transaction. Consequently, the appellant cannot be faulted or punished in the manner it has been.

15. In these circumstances, the revocation of the appellant's CHA license is unjustified and is accordingly, set aside. The revocation of license which is in operation since 2005 i.e. almost 12 years, is itself a severe punishment and could also serve as a reprimand to the CHA to conduct its affairs with more alacrity. In these circumstances, the forfeiture of the security amount and the imposed penalty of ₹ 1 lakh also is set aside. The said amount shall be credited to the appellant's account. If the tenure of the license has expired

but is otherwise extendable, then upon the appellant's application such extension would be granted as per rules. However, if an application is to be made for grant of a new license, then such an application if made, would be considered under the extant Regulations. The appeals are disposed off with the above directions.

NAJMI WAZIRI, J.

S. RAVINDRA BHAT, J.

MARCH 27, 2017

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