

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CUSTOMS APPEAL NO. 81 OF 2016

The Principal Commissioner of Customs	}	Appellant
versus		
Bombino Express Pvt. Ltd.	}	Respondent

Mr. Adwait Sethna with Mr. Jitendra Mishra for the appellant.

Mr. Prakash Shah with Mr. Jas Sanghvi and Ms. Neha Ahuja i/b. M/s. Prompt Legal for the respondent.

**CORAM :- S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

DATE :- FEBRUARY 8, 2018

P.C. :-

1. By this appeal, the revenue proposes the following three questions as substantial questions of law:-

"(i) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT erred in restoring the Registration of the Courier Licence of Respondent No. 1 despite there being no justification in law and or change of circumstances pursuant to the Hon'ble Bombay High Court's order dated 13th October, 2014 warranting the restoration of the respondent no. 1's courier licence lawfully revoked.?"

(ii) Whether in the facts and circumstances of the case and in law, the impugned order is sustainable in the teeth of the order of the Hon'ble Delhi High Court dated 14th October, 2014, which dismissed the writ petition filed by respondent no. 1 against the orders of the adjudicating authorities who had revoked the courier licence of respondent no. 1?"

(iii) Whether the CESTAT has erred in exercising its jurisdiction given that the appeal/representation made by respondent no. 1 was rejected by the Chief Commissioner of Customs as per Regulation 14 of the said Regulations?"

2. It is stated that M/s. Smashing Traders Private Limited had imported certain consignments. Those were detained on 13th September, 2014 for some misdeclaration and undervaluation. The goods were handed over to Air Intelligence Unit for further investigation. The bills of entry were filed by the first respondent herein. During the search of the office premises of the first respondent, certain incriminating documents were recovered under a panchanama. Those revealed that the first respondent was associated with clearance of the import consignments of one Mr. Kuo Leong, who was the proprietor of M/s. Smashing Traders and was selling goods through e-commerce portal. The investigations revealed that Mr. Kuo Leong had given access to his website to respondent no. 1 by the user-ID and password for updating the tracking system. Mr. Kuo had permitted multiple products to be bundled into one box before despatch from USA, as per the suggestion of the first respondent and such packet was declared for customs purpose. There was undervaluation and consequent evasion of customs duty. The import was admitted by Mr. Kuo Leong to be in the sum of Indian Rupees 70 lakhs, whereas, the declared value was Indian Rupees 22.53 lakhs. One

Shyam Kishore Mishra was found to be the holder of the import export code, which was obtained by him on behalf of M/s. Smashing Traders. His address was found to be bogus and there was no such office functioning in the name of M/s. Smashing Traders at the said address. The country head of the first respondent was questioned and his statement is relied upon by the Revenue. On these materials, eventually, a suspension order was passed on 25th September, 2014 suspending the registration of the licence granted to the first respondent under Regulation 10 of the Courier Import and Export (Clearance) Regulations, 1998 as amended. This was post issuance of a show cause notice to the first respondent. A writ petition was filed in this court against that suspension and that petition was dismissed. All that this court directed was to conclude the inquiry pursuant to the show cause notice as expeditiously as possible.

3. Thereafter, the inquiry was concluded, the inquiry report was forwarded and based on the findings therein, a further show cause notice was issued. The first respondent filed written response and also attended the oral hearing. On 12th December, 2014, an order was passed styled as order-in-original revoking the registration of the first respondent to operate as an authorised courier.

4. Against this order, an appeal/representation was preferred before the Chief Commissioner. On 13th July, 2015, he issued a show cause notice, after which, the representation came to be rejected. That was done by an order dated 21st January, 2016. It is in these circumstances and relying upon a further order of the High Court of Delhi as also the proceedings before the Settlement Commission, the Revenue was of the opinion that it can sustain the above concurrent orders. However, at the instance of the first respondent, the Tribunal interfered with the concurrent orders and was pleased to set aside the same. This appeal, therefore, challenges that order of the Tribunal.

5. The tribunal, in the detailed order, came to a conclusion that the lapses were minor, there is no justification to subject the first respondent to any further punishment. That is how the concurrent orders were set aside and by forfeiting the security deposit.

6. We have heard both sides and with their assistance, perused the appeal paper book. All that the Revenue would argue is that the Tribunal should not have interfered with the concurrent orders for they are passed on the materials produced on record. The orders were not perverse nor vitiated by any error of law apparent on the face of the record. The tribunal

erred in holding that the order-in-original was passed without causing and completing any inquiry. This is not correct for the order should have been perused by the tribunal in its entirety. The courier licence was revoked even before any show cause notice was issued to the importer. It is in these circumstances that even before this court, it was not seriously disputed that the inquiry against the first respondent can go on under the regulations, irrespective of the acts of the importers. It is in these circumstances, it is prayed that the present appeal be entertained and particularly because the tribunal interfered with pure finding of fact.

7. On the other hand, it was argued that the tribunal's order is well reasoned and should be sustained. There is nothing in the order of the tribunal, which would require interference by this court in its further appellate jurisdiction.

8. The tribunal had before it the appeal of the first respondent. The violations that were alleged as against the first respondent are that it did not obtain prior permission of the Customs to sublet/outsource any of the components in the door to door supply chain and that is why Regulation 13(j) was violated. That the import and export documents were not filed through a person who has passed the examination referred to in Regulation 8 or 19

of the Customs House Agents Licensing Regulations, 2004. That the first respondent has not followed the Know Your Customer (KYC) norms for significant percentage of the consignments checked and had failed to maintain proper records in electronic format while engaging third party courier for last mile delivery. They have no mechanism in place for procuring authorisation/KYC for such imports. The software system is not capable of storing KYC/authorisation record for export and authorisation/KYC/POD records for import in electronic form. That is why Regulation 13(a) and 13(j) read with circular dated 7th September, 2010 has been violated and as far as the acts of the importer are concerned, those were under investigation.

9. The tribunal noted all the factual aspects and then came to the conclusion that firstly, there is no merit in the argument that the appeal was not maintainable. We find that such an argument was not raised before us. An attempt was made by the Revenue to question the jurisdiction of the tribunal and particularly as an appellate authority to scrutinise the legality and validity of the orders passed under the regulations. The argument was that these are essentially regulatory and disciplinary matters. The regulations ensure that the persons representing the importers as agents adhere to the norms prescribed and do not deviate or

depart therefrom. If there is a serious departure and which is found to be prejudicial to the interest of the Revenue, then, the authorisation/licence can be revoked. There is, therefore, a distinct adjudication mechanism and matters pertaining to duty or other liability qua the importers are not determined in such proceedings. It is, therefore, that the appeal was not maintainable.

10. We do not think that we should entertain such an argument by the Revenue and at this belated stage. The tribunal has found that throughout, the matter was contested on merits. Further, the issue of maintainability was also dealt with at an earlier stage. The argument was once the Chief Commissioner acted as an appellate authority, he would scrutinise the legality and validity of the order-in-original, then, all the more against this order, no appeal would lie.

11. We have found from a reading of the regulations that they are traceable to the power conferred in the authorities vide the Customs Act, 1962 and several notifications issued thereunder. The regulations apply for assessment and clearance of goods carried by the authorised courier on incoming or outgoing flights or any other mode of transport. Thus, these are the clearances through courier mode. For that purpose, the authorised courier

can be engaged and the term “authorised courier” is defined in Regulation 3 clause (a) of the regulations. Word “documents” is also defined in Regulation 3(b). Then, by Regulation 4, packing of goods to be imported or exported by courier is dealt with. Clearance of import goods is permissible if the procedure set out in Regulation 5 is followed. Similar is the position with regard to export goods and they can be cleared by Regulation 6. As far as registration of authorised courier is concerned, that aspect is dealt with by Regulation 8. There is scrutiny of applications by the Commissioner of Customs in terms of Regulation 9 and then, the registration is granted in exercise of powers of registration under Regulation 10. There are compliances to be made and particularly of execution of bond and furnishing of security. By Regulation 12, it is stated that a courier, who is registered under Regulation 10 or had intimated in form 'A' to the Commissioner of Customs having jurisdiction over the Customs Station from where he has to transact the business, shall furnish a bond and security as specified in Regulation 11 for each Customs Station. The obligation of authorised courier is set out in Regulation 13 and then, there is a power of de-registration. That power is conferred in the Commissioner of Customs. By sub-regulation (2) of Regulation 14, the aggrieved authorised courier and whose authorisation is revoked or he is de-registered, may, if aggrieved

by the order of the Commissioner, represent to the Chief Commissioner of Customs in writing against such order of the competent authority and thereafter it is permissible for the Chief Commissioner to dispose of the representation.

12. The tribunal found that even this mechanism is in place. Eventually, everything is traceable to the Customs Act, 1962 and once the said Act provides for an appeal and that appeal would lie to this tribunal against the order-in-original, then, merely because a representation or a remedy of making a representation is provided by the Regulations, that does not displace the appellate authority of the tribunal. We do not think that the tribunal, in the facts and circumstances of the case, has acted perversely in entertaining the appeal. More so, when the attempt of the Revenue was to question its jurisdiction on more than one occasion. Additionally, we have found that the tribunal, if approached and it is regularly done in the cases of the Customs House Authorisation Regulations by the aggrieved agent, then, against the orders of the tribunal restoring the licences or authorisation, the Revenue has brought appeals under the Customs Act, 1962 before this court. Therefore, one opportunity being provided in the scheme of the law to the aggrieved courier does not cause serious prejudice to the Revenue. More so, when it can always approach this court against the orders of the tribunal.

13. On facts, the tribunal found in this case that the courier's licence was revoked at a stage, namely, before issuance of the show cause notice to the importer. This court had directed completion of an inquiry, but even that order has not been properly adhered to. Apart therefrom, the tribunal found that in the backdrop of the regulations stated to have been violated or breached, the goods were already assessed and cleared from Customs and any arrangement by the first respondent post clearance from Customs for effecting domestic delivery to the door of the consignee mentioned in the courier parcel does not require any permission under the said regulations. The case of the Revenue is not that the courier agent sub-contracted to sublet/outsource any of the activity/function for the purpose of assessment and clearance of courier parcels. On further scrutiny, it was found that the charge of violation of Regulation 13(j) is not substantiated. Further, the first respondent had submitted in details as to how there was compliances with the KYC norms in the case of M/s. Smashing Traders and other past clearances. Information was also provided about the steps taken to revamp the website. The tribunal found that no infringement of KYC verification leading to any significant revenue loss was pointed out even in the show cause notice. Similarly, the tribunal found that the Revenue has not been consistent insofar as strict

adherence to KYC norms. In some cases the Revenue has not thought it fit and proper to pursue the matters beyond suspension. Then, the tribunal found that there was a proof of the appointment of the first respondent. The tribunal's findings and particularly from paras 12 to 15 are based on a re-appreciation and reappraisal of the factual materials. As a last fact finding authority, the tribunal could have performed that exercise. Once the matter is approached and looked at from this angle, we do not think that when such an exercise is undertaken by the tribunal, then, we should interfere in our appellate jurisdiction.

14. The appeal is, therefore, dismissed. There would be no order as to costs.

(SMT. BHARATI H. DANGRE, J.)

(S.C.DHARMADHIKARI, J.)