IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO. 98 OF 2015

Karamshi J. Nakhua ..Appellant
versus
The Commissioner of Customs
(General) ..Respondents

Mr. Prakash Shah with Mr. Prasad Paranjape and Mr. Jas Sanghavi i/b PDS Legal for the Appellant.
Mr. Pradeep Jetley for the Respondent.

CORAM: S. C. DHARMADHIKARI &
SMT. BHARATI HARISH DANGRE, JJ.

DATE : 11TH JANUARY, 2018.

P. C. :

1] Leave to amend to correct the cause title is granted and re-verification is dispensed with. Amendment to be carried out within one week from today.

2] The appellant is carrying on business in the name and style of M/s.S.K. Shipping Agency. He is the sole proprietor rendering customs house agency services relating to clearance of import and export customs house.

3] He is aggrieved and dissatisfied by an order passed on 11th December 2014 by the Customs, Excise & Service Tax Appellant Tribunal West Zonal Bench (CESTAT for short). That order is dated 3rd/11th December 2014, by which the appellant's appeal is dismissed. The Tribunal confirms the order dated 28th February 2013 of the

Commissioner revoking the Customs House Agent License, i.e., CHA No.11/865 and forfeiting the entire security deposit.

4] From the record, it appears that the appellant was carrying on business for about 23 years. Needless to state that the grant, issuance and regulation of this license is governed by Customs House Agents Licensing Regulations, 1984 now amended by 2004 Regulations. The license was renewed from time to time.

5] The appellant was operating at Mumbai Airport and Nhava Sheva port. His track record is otherwise clear. In the year 2009-2010, he handled the customs clearance of various consignments. It is his case that he obtained letters of authority from the exporters and on the basis of which he acted as an agent. In this case, one Rajesh Khichda was a liaisoning person and he liaisoned with the exporter Mansukh Kataria. That was regarding dispatch of the export goods from Surat and its arrival at the Nhava Sheva port, its unloading etc. and the rest of the customs clearance work will be handled by the appellant's paid staff. It is stated that one Deepak Mange, the Docks Clerk of the appellant, who is having a valid pass, attended the customs related work in connection with the consignments exported by the exporters. The agent of the exporter was allowed to supervise clearance work by the appellant. That gentlemen Rajesh was not the appellant's paid employee nor the custom pass holder. There was no likelihood of his having been allowed to enter the customs premises or handled the export clearance work. Thus the department could not have permitted him, but based on purported information from the Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai, started investigation into the alleged case of large scale fraudulent exports of various types of fabrics and involving several exporters. The allegation then was that the appellant, for monetary gains, allowed use of its licence by the said Rajesh. After recording the statements of several persons, including Rajesh, a suspension notice was issued on 21st December 2009. The appellant preferred an appeal against this order of suspension to the Tribunal and the Tribunal held that once the department desires to initiate inquiry under Regulation 22 of the 2004 Regulations, that should be within 90 days from the Tribunal's order dated 20th January 2012.

6] The argument is that the Tribunal's order was flouted by the Department, which took its own time to appoint an officer, allowed him to submit his report and thereafter imposed penalty. It is apparent that though the suspension was revoked, according to the appellant, enquiry was not concluded until 9th November 2012. That is the date on which the inquiry report was submitted. But the Commissioner disagreed with the findings recorded in the inquiry report and issued a disagreement memo, which was also served on the appellant. Thus the Commissioner indicated that he was not inclined to agree with the findings recorded by the Inquiry Officer and the appellant must face an inquiry at his end. Therefore, a personal hearing was granted and pursuant to this disagreement memo, on 28th February 2013, the order-in-original was passed which cancelled the license.

7] Aggrieved by the same, the appeal before the CESAT was filed, which has been dismissed by the impugned order.

8] The assessee has proposed several questions as substantial questions of law involved in this appeal. He has particularly highlighted the fact that the revocation of license as Customs House Agent is invalid because of failure on the part of the Revenue to conclude the inquiry within the period of 90 days. That is, according to the appellant, a statutory period and in this case, it commenced from 4th December 2010. That having not been adhered to, the inquiry is vitiated completely. If that is vitiated the penalty does not survive.

9] Then the breach of principles of natural justice is highlighted.

10] Reliance is placed upon several orders of this Court admitting the appeals on this point and equally a view taken by the High Courts in India that the above duration or period is mandatory.

11] We have heard both sides on this limited point.

12] From the record, it is apparent that the license was suspended with effect from 21st December 2009, but restored on 5th March 2012. Thereafter the departmental inquiry commenced and the charge was that the appellant has allegedly allowed Mr.Rajesh to use their licence for monetary consideration which violates the provisions of Regulation 12 of the 2004 Regulations. The second charge is that there is no proper authorization obtained from the exporters. The third charge is that the business has not been transacted in the Customs Station personally or through an approved employee, but in violation of sub-clause (b) of Regulation 13 of the Regulations 2004. There are two more charges but which are connected entirely to the acts of the said Rajesh. Finally, due and proper vigilance and care has not been taken in ensuring compliance with the law.

13] It is common ground that the inquiry proceedings concluded and the report was submitted on 9th November 2012. The Inquiry Officer has submitted a very detailed report and he held that charge No.2 is proved. However, he held that the vital and crucial charge No.1 and related charges pertaining to the acts of Mr. Rajesh Khichda are not proved.

14] Thereafter, disagreement memo was served and in which disagreement was expressed as far as inquiry report exonerating the appellant from primary or vital charge. In that regard, the observation that the monetary consideration has flown between the appellant and the said Rajesh shows un-authorised and impermissible use of the license.

15] The appellant pointed out that now there is a specific finding in the inquiry report and merely because another view is possible, the disagreement memo should not be sustained.

16] The order-in-original proceeds on the footing that the appellant before us has involved himself in the case of supporting those parties who indulged in fraudulent exports. Thus the conduct and role of the Customs House Agent in the context of his responsibilities would reveal that there are certain statements and which have been given by the crucial witnesses. The Commissioner purports to record his finding on one important contention with regard to the conclusion of inquiry within a period of 90 days and whether non-adherence thereto would vitiate it from inception. He rejects that contention and assigns certain reasons. On merits, he relies upon the statements which have been recorded during the course of investigation and holds that the said Rajesh, who is admittedly not an employee had prepared certain documents with the help of the appellant and also taken Shipping Bills so generated to Nhava

Sheva for effecting clearance and he used to also do carting of goods. Thus, an authorised person was allowed to transact business. At the same time, the Commissioner holds that the said Rajesh may not have done complete acts which are to be done and contemplated to be performed by the Customs House Agent, but the appellant allowed him and thus was not vigilant in fulfilling his obligations and discharging his duties as Customs House Agent. The fraudulent acts attributable to Rajesh and the exporters do not in any manner concern the Customs House Agent before us. In the peculiar circumstances the charge of negligence and non-adherence to the Regulation, in the sense of failing to discharge his duties and responsibilities, has been held to be proved.

17] From 28th February 2013 and even after the Tribunal had dismissed the appeal, the license has been revoked. The appeal was dismissed on 11th February 2014. Thus the appellant has been out of business from 28th February 2013.

18] Upon an overall consideration of the materials, we are of the view that the extreme penalty of revocation of Customs House Agent License along with forfeiture of security deposit was not justified. In the facts and circumstances of the case and since the charge of negligence and non-adherence to the Regulations insofar as failure to fulfill and discharge the responsibilities has been proved, the penalty of revocation of license for a period of five years from 28th February 2013 is justified. The security deposit is also rightly forfeited.

19] Thus, by substituting the penalty of permanent revocation of Customs House Agent License with that of revocation for a period of five years and forfeiture of penalty, we dispose of the appeal. We maintain the conclusion of both the Tribunal as also the Commissioner's order-in-original insofar as the above. The appeal stands disposed of accordingly and the substantial question of law also stand answered in the above terms. We hasten to clarify that this order shall not be treated as precedent in future cases. No order as to costs.

(SMT. BHARATI H. DANGRE, J.) (S. C. DHARMADHIKARI, J.)

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