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

CUSTOMS APPEAL NO. 103 OF 2007

The Commissioner of Customs (General) …**Appellant**
Mumbai Customs Zone – I, New Customs House, Ballard Estate, Mumbai – 400 001.
Versus
Alankar Shipping & Clearing P. Ltd. …**Respondents**
18, Tarotti Bhavan, 2nd Floor, 203, P.D'Mello Road, Mumbai – 400 001.

Mr. Pradeep S. Jetly, for the Appellant.
Dr. Sujay Kantawala, for the Respondent.

CORAM: M.S. SANKLECHA &
RIYAZ I. CHAGLA, JJ.

JUDGMENT RESERVED ON 16TH OCTOBER, 2018.

JUDGMENT PRONOUNCED ON 31ST OCTOBER, 2018.

O R A L J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. This Appeal under Section 130 of the Customs Act, 1962 challenges the order dated 9th May, 2007 passed by the Customs Excise and Service Tax Appellate Tribunal, Principal Bench at New Delhi ("the Tribunal"). This Appeal was admitted by an order dated 5th June, 2008 passed by this Court on the following substantial questions of law:-

(a) Whether the CESTAT is right in law in setting aside the order of cancellation of the CHA Licence after holding that there is a violation of Regulation 14(d) of the CHALR, 1984 by the CHA?

(b) Whether CESTAT, which is a creature of the Statute, is vested with the jurisdiction to grant relief by taking a lenient view, the power for which does not come out of the parent enactment?

(c) Whether the findings of the CESTAT that there are no violations of Regulation 14(a) and 14(l) of the CHALR 1984 by the CHA are based on no evidence or partly relevant or partly irrelevant evidence and are otherwise perverse and arbitrary?

(d) Whether CESTAT can ignore that a penalty of Rs.5,00,000/- under Section 112(b) of the Customs Act, 1962 was imposed on the CHA by Commissioner of Customs (Preventive), which was reduced to Rs.2,00,000/- by the CESTAT itself vide its order No.A/963-66/99-NB(DB) dated 29.10.1999, which was upheld by Hon'ble Apex Court, thereby confirming the involvement of the CHA in the case?

2. Before answering the substantial questions of law, a brief background of facts is necessary. The Respondent is a Customs House Agent governed by the Customs House Agency Licensing Regulations (the relevant regulations being the Regulations of 1984 and hereinafter referred to as “1984 Regulations”). The Respondent holds a Customs House Agent License (“CHA

Licence"). The Appellant has stated in the Appeal that three import firms in collusion with the Respondent had during the period 1992 – 1997 imported multiple consignments of assorted engineering cargo and declared it in the bills of entry for warehousing as "Ship Store". Thereafter these consignments were cleared from the warehouse under the cover of Pink Shipping Bills with Mumbai Customs without payment of import duty declaring the goods as "ship store" meant for Indian Navy. However, instead of delivering to the Indian Navy, the consignments were delivered to local markets en-route evading Customs Duty of several crores. These consignments were the subject matter of an investigation and the Respondent was searched on 10th September, 1997. This search / investigation resulted in recovery of incriminating documents and 16 imports were identified as 'diverted cargo' wherein the destinations declared in the Shipping Bills were not adhered to.

3. In the earlier round of proceedings, the Commissioner of Customs vide Order in Original dated 10th March, 1998 confirmed the involvement of Shri Krishnakumar Nair, Director of the Respondent and imposed penalty of Rupees One lakh. The Respondent in turn was held responsible for violation of Regulation 14(d) of Regulation, 1984 and imposed penalty of

Rupees Five lakhs. The Respondent being aggrieved by the order dated 10th March, 1998 preferred an Appeal before the Tribunal and the Tribunal vide order dated 29th October, 1999 reduced the penalty on the Respondent to Rupees Two lakhs. The Respondent thereafter preferred a Civil Appeal No. 2185 of 2001 against the Tribunal order dated 29th October, 1999 in the Supreme Court which was dismissed vide order dated 21st February, 2002.

4. The Appellant has stated that the Respondent and its Director Shri Krishnakumar Nair had undertaken to clear the goods for import as agents of the importers. The Respondent were responsible for ensuring that the imported goods were delivered to the ship for which the shipping bills had been filed. However, they intentionally and wilfully withheld the relevant information with regard to use of imported cargo and the delivery destination for pecuniary gains for the importers and themselves. On the basis of an inquiry report, the CHA Licence No. 11/819 held by the Respondent was placed under suspension vide office order no.28/98 dated 4th December, 1998 passed by the Assistant Commissioner (LA). The Respondent being aggrieved by the suspension of its CHA Licence by order dated 10th December, 1998 preferred an appeal before the Tribunal. By an order dated 23rd August, 1999, the Tribunal directed restoration of the CHA

Licence vide order dated 23rd August, 1999. The Revenue filed reference application in the Tribunal and the Revenue was accordingly directed to restore the licence immediately by order dated 10th November, 1999. Accordingly, the CHA Licence was restored vide order dated 21st December, 1999 passed by the Commissioner of Customs (G), Mumbai.

5. Thereafter, an inquiry under the regulation 23 of the 1984 regulations was initiated against the Respondent for violation of Regulations 14(a), 14(d), 14(l), 14(o) and 14(j) of the 1984 Regulations. During the inquiry proceedings, the inquiring officer held that three Charges of violation of Regulations 14(a), 14(d) and 14(l) of the 1984 Regulations levelled against the Respondent were proved. The Adjudicating Authority accordingly after considering all aspects of the case ordered cancellation of the CHA Licence No. 11/819 held by the Respondent and forfeiture of the security deposit vide Order dated 19th October, 2004. The Respondent being aggrieved by the order dated 19th October, 2004 preferred an Appeal before the Tribunal and the Tribunal vide order dated 4th November, 2004 held that in the facts and circumstances of the case, the Customs Authorities are not justified in holding that the Respondent was involved in duty evasion. It was ordered that during the pendency of the Appeal

filed the impugned order be stayed and the Appellant be allowed by the Customs Authorities to carry out its works as Clearing Agent. In compliance of the Tribunal's stay order dated 4th November, 2004, the Commissioner of Customs (G) vide order dated 11th November, 2004 made the CHA Licence No.11/819 held by the Respondent operative till further orders. The Tribunal by its final order dated 9th May, 2007 allowed the appeal of the Respondent. The Tribunal set aside the order of cancellation by holding that the only charge viz. Violation of Regulation 14(d) of the 1984 Regulations has been made out and the other charges were not proved. The Respondent is accordingly not found guilty on the other charges. The Tribunal has held that the lapse on the part of the Respondent in complying with Regulation 14(d) of the 1984 Regulations does not warrant cancellation of the CHA Licence as ordered by the Commissioner and that in the facts and circumstances, the Tribunal would have gone for lesser punishment. However, the fact that the Respondent been paralysed from conducting their business for over eight months i.e. the CHA Licence having remained suspended by order dated 14th December, 1998, which came to be restored after one year, a lenient view has been taken by the Tribunal and accordingly the Tribunal did not consider it fit to impose any further reduced punishment. The said impugned order is the subject matter of challenge in this Appeal.

6. The relevant provisions of the 1984 Regulations are as under:-

> ***14. Obligations of Customs House Agent. – A Custom House Agent shall:-***
>
> ***(a) obtain an authorisation form 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 an Assistant Commissioner of Customs or Deputy Commissioner of Customs.***
>
> ***(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 Assistant Commissioner of Customs or Deputy Commissioner of Customs.***
>
> ***(l) ensure that all documents prepared or presented by him or on his behalf are strictly in accordance with orders relating thereto;***
>
> ***21. Suspension or revocation of licence. –***
>
> ***(1) The Commissioner may, subject to the provisions of Regulation 23, suspend or revoke the licence of a Custom House Agent so far as the jurisdiction of the Commissioner is concerned and also order for forfeiture of security on any of the following grounds:-***
>
> ***(a) failure of the Custom House Agent to comply with any of the conditions of the bond executed by him under Regulation 11;***
>
> ***(b) failure of the Custom House Agent to comply with any of the provisions of these regulations, whether within the jurisdiction of the said Commissioner or anywhere else;***

> ***(c) any misconduct on his part whether within the jurisdiction of the said Commissioner or anywhere else which in the opinion of the Commissioner renders him unfit to transact any business in the Customs Station.***
>
> ***(2) Notwithstanding anything contained in sub-regulation (1), the Commissioner may, in appropriate cases, where immediate action is necessary, suspend the licence of a Custom House Agent where an enquiry against such agent is pending or contemplated.***

7. We shall now consider the submissions and answer the substantial questions of law in seriation as under:-

<u>Re</u>. <u>Question (a):-</u>

8. Mr. Jetly, the learned counsel for the Appellant – Revenue has submitted that the Tribunal has found the Respondent to have violated Regulation 14(d) of Regulation, 1984. Upon so finding, the Tribunal was obligated to uphold the revocation of the CHA Licence held by the Respondent under Section 21 of the 1984 Regulations. He has submitted that the Tribunal in the facts and circumstances of the present case erroneously exercised its discretion in taking a lenient view by setting aside the order of cancellation issued by the Commissioner and in not considering any further punishment. He has submitted that the Tribunal despite holding that the Respondent had failed to exercise adequate caution in dealing with the procedural requirement of

producing the purchase order of the Indian Navy, had simply gone on the version of the Director of the Importer Company, Shri Bhavesh Gandhi, who has stated that he had assured the Respondent's Director Shri Nair that he would go to the Customs House Air Cargo and reply to the queries raised by the Customs Authorities. This had led to the diversion of the consignments which were meant for delivery to the Indian Navy, to local markets and resulting in the evasion of customs duty. He has submitted that a serious view should have taken by the Tribunal and has relied upon the judgment of the Supreme Court in the case of ***Commissioner of Customs Vs. K.M. Ganatra & Co.***[1]***.*** He has submitted that the Supreme Court in the facts and circumstances of that case held that the misconduct on the part of the Customs House Agent reflected a chain of acts and that in such a situation the discretion exercised by the Tribunal by restricting the period of revocation was inappropriate. He has submitted that the judgment of the Supreme Court in ***K.M. Ganatra (Supra)*** would apply in the facts and circumstances of the present case and that the Tribunal in the present case by exercising its discretion and setting aside the cancellation of the CHA Licence had exercised its discretion in an inappropriate manner.

1 2016(332) E.L.T. 15 (S.C.)

9. Dr. Sujay Kantawala, the learned counsel for the Respondent has submitted that the Tribunal has only upheld the violation of Regulation 14(d) of the 1984 Regulations, whilst dropping the other charges. The Tribunal accordingly found that this violation of Regulation 14(d) did not warrant cancellation of the CHA Licence as ordered by the Commissioner and that accordingly a lenient view has been taken considering that the Respondent had been paralysed from conducting its business for over eight months, on account of the CHA Licence having been suspended and which came to be restored nearly after one year. He has relied upon the inquiry report to show that two of the charges of violation of the 1984 Regulations levelled against the Respondent were also not proved. He has distinguished the judgment of the Supreme Court in ***K.M. Ganatra (Supra)*** by submitting that the Supreme Court had found in the factual matrix of that case there was a serious violation of the Regulations and on many occasions by the transferring of the licence in contravention of the Regulations and the Customs House Agent was held to be involved in fraudulent activity, causing immense financial loss to the Revenue. It was in this context that the Supreme Court held that the discretion exercised by the Tribunal in restricting the period of revocation of the CHA Licence was

inappropriate. He has relied upon the judgment of this Court in the case of ***Principal Commissioner of Cus. (General) Vs. Interport Impex P. Ltd.***[2] which distinguished ***K.M. Ganatra (Supra)*** as having been decided in the facts and circumstances of that case and upheld the liberal view taken by the Tribunal. This Court held that the Tribunal was justified in holding in the facts and circumstances of the case that revocation of the licence already suffered by the Customs House Agent till the Tribunal passed the impugned order was adequate punishment and that the Respondent could not be penalised any further. Similar view had been taken by this Court in ***Ajay Clearing Enterprises Vs. Commissioner of Customs (General)***[3]**,** where this Court on the facts and circumstances of the case viz. The CHA was held to have only violated Regulation 13 (a) of the 2004 Regulations which is equivalent to Regulation 14 (a) of the 1984 Regulations held that the penalty already suffered of loss of licence as customs house agent till the passing of the impugned order by the Tribunal was sufficient and that no revocation of the licence was called for as the other charges were not proved. He has submitted that in present case also the Respondent is held to have only violated Regulation 14(d) of the 1984 Regulations and hence a

2 2017 (346) E.L.T. 223 (Bom.)

3 2016 (336) E.L.T. 33 (Bom.)

similar liberal view was taken by the Tribunal and calls for no interference.

10. Having considered the submissions, we find that the Tribunal after considering the charges which had been levelled against the Respondent of violation of the 1984 Regulations set aside two of the three charges and upheld one charge viz. violation of Regulation 14(d) of the 1984 Regulations. We find that the Tribunal has considered the material on record and found that the serious charges levelled against Respondent had not been proved and that in the inquiry report itself two of the serious charges of violation of the 1984 Regulations were held to be not proved. The Tribunal has considered the violation of Regulation 14(d) of the 1984 Regulations to be a violation of a procedural requirement by not having produced the purchase order of the Indian Navy to whom the imported consignments were ultimately meant to be delivered. Such violation according to the Tribunal did not warrant cancellation of the licence as ordered by the Commissioner and that a lenient view had been taken by considering the suspension of the CHA Licence which had already been suffered by the Respondent prior to the passing of the impugned order to be sufficient. The judgment of the Supreme Court in ***K.M. Ganatra (Supra)*** was passed in the facts and

circumstances of that case considering that the transfer of licence by the customs house agent was in contravention of the Regulations on many occasions and that immense financial loss has been suffered to the Revenue. The Supreme Court accordingly held that in the factual matrix of that case, it was a serious violation on the part of the customs house agent involving fraudulent activity affecting the Revenue and hence the discretion exercised by the Tribunal in restricting the period of revocation of the customs house agent licence was found to be inappropriate. The judgment of the Supreme Court in ***K.M. Ganatra (Supra)*** has been distinguished in ***Interport Impex P. Ltd. (Supra)*** and in paragraph 8, this Court held thus:-

> ***Though, Mr. Jetly would submit that this is a complete arbitrary exercise on the part of the Tribunal and it should not have interfered with that part of the order of the disciplinary authority, what we find is that this case is some-what distinct from K.M. Ganatra (Supra). There, the Tribunal on the basis of all the materials placed before it came to the conclusion that the exporters were not bona fide. It found that the licence was misused to such an extent by the CHA that it was also established that he was involved in a fraudulent activity affecting the Revenue. The licence was misused. It was also found that it was not the first instance in which K.M. Ganatra (Supra) misused the CHA licence. It is in these circumstances that the discretion exercised by the Tribunal was interfered with.***

11. Accordingly, in the case of ***Interport Impex P. Ltd. (Supra)*** and ***Ajay Clearing (Supra),*** this Court has held that the Tribunal in taking a liberal view had not exercised its discretion arbitrarily or capriciously and its order could not be termed as perverse or vitiated by any error of law apparent on the face of the record. This Court like in the present case held that the loss already suffered from the date of revocation till the date of the impugned order of the Tribunal was sufficient and no further revocation of licence was warranted. Hence, we do not find the impugned order has in the facts and circumstances of the present case taken a view which is in any manner perverse and / or arbitrary.

12. We accordingly, answer question (a) in the affirmative i.e. in favour of the assessee and against the Revenue.

Re.: Question (b):-

13. This question has already been answered by the Supreme Court in ***K.M. Ganatra (Supra),*** where the Supreme Court has held that the Tribunal has power under the Customs House Agents Licensing Regulations to modify the order of the Commissioner by taking a lenient view and restricting the period of revocation. The Revenue does not dispute this position and hence

this question stands answered in the affirmative in favour of the Assessee.

<u>Re.: Question (c)</u>:-

14. Mr. Jetly has relied on the earlier round of proceedings, including the inquiry report which had on the material before it found the Respondent guilty of violation of Regulations 14(a) and 14 (l) apart from Regulation 14(d) of the 1984 Regulations. He has submitted that these findings and material on record have been overlooked by the Tribunal in holding that the Respondent had not violated Regulations 14(a) and 14(l) of the 1984 Regulations. He has submitted that the findings of the Tribunal that these charges have not been proved are based on no evidence or partly relevant or partly irrelevant evidence and are otherwise perverse and arbitrary. Dr. Sujay Kantawala on the other hand has submitted that the Tribunal only after considering the evidence on record including the findings in the inquiry report has taken a reasoned decision in setting aside the other charges of violation of the 1984 Regulations. He has taken us through the impugned order and submits that this being findings of fact which are not in any manner perverse, calls for no interference from this Court.

15. Having considered the submissions, we find that the Tribunal has in considering whether the Respondent had committed violation of Regulation 14(a) of the Regulation, 1984 noticed that there was a discrepancy in the show cause notice itself. The Tribunal has considered the statement recorded under Section 108 of the Customs Act of Shri Krishnakumar Nair, Director of the Respondent that the three importers are companies working under the name of Metropolitan Group of Companies and it is the Metropolitan Group of Companies which had issued letter in favour of the Respondent to deal with the clearance of the exports and imports. This was never disowned by the importers as having not been authorised by them. The two statements on behalf of the importers i.e. the statements of Shri Bhavesh Gandhi had endorsed the authorisation of the Respondent as Customs House Agent. Hence, this finding of the Tribunal on the evidence and material on record viz. that the Respondent has established its authorisation as Customs House Agent on behalf of the importers and therefore no violation of Regulation 14(a) cannot in any manner be held to be perverse and / or arbitrary. In so far as the other charge of violation of Regulation 14(l) of the 1984 Regulations viz. the preparation and presentation of the documents (Shipping bills) is concerned, the Tribunal held that the

Appellant was not able to prove that the documents prepared / presented by Respondent – Custom House Agent was not in accordance with the orders, if any, relating thereto. Further no such orders were in existence. The Tribunal has taken a view that the Customs Officer would in any event have scrutinized the compliance or otherwise of the documents filed before them before the consignments were cleared. The Tribunal accordingly found that the alleged violation on the part of the Respondent in not preparing or presenting documents to the Customs Authorities strictly in accordance with the Rules and orders relating thereto to have not been proved. We find that this view taken by the Tribunal that the Respondent is not guilty of the charge of having violated Regulation 14(l) of the 1984 Regulations is a possible view taken by the Tribunal on the evidence and material on record which cannot be held to be in any manner perverse and / or arbitrary. Accordingly, we answer question (c) in the negative i.e. in favour of the Assessee and against the Revenue.

Re.: Question (d):-

16. Mr. Jetly, the learned counsel for the Appellant - Revenue and Dr. Sujay Kantawala, learned counsel for the Respondent - Assessee both submit that this substantial question of law does

not arise from the impugned order of the Tribunal. Accordingly, the Revenue does not press this question of law.

17. In the above view, questions (a), (b) and (c) are answered in favour of the Respondent – Assessee and against the Appellant – Revenue. Question (d) is dismissed as not pressed by the Appellant.

18. Accordingly, the Appeal is dismissed.

(RIYAZ I. CHAGLA J.) **(M.S. SANKLECHA, J)**