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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : 14th January, 2019

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CUSAA 45/2017

COMMISSIONER OF CUSTOMS

..... Appellant

Through : Mr. Harpreet Singh, Sr.
Standing Counsel along with
Ms. Suhani Mathur, Adv.

versus

SHIVA KHURANA

..... Respondent

Through : Ms. Shikha Sapra, Mr. Piyush
Kumar, Ms. Riya Chanana and
Mr. Shashwat Bhardwaj, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (ORAL)

1. The questions of law framed in this appeal are as follows:

"(i) Whether Customs, Excise and Service Tax Appellate Tribunal was right in deleting penalty of Rs.50 lakhs imposed on the respondent as customs house clearing agent and in holding that the respondent was not required to verify and ascertain the address and details of the importers?"

"(ii) Whether the order passed by the Customs, Excise and Service Tax Appellate Tribunal is perverse and contrary to the facts on record and mentioned in the order-in-original?"

2. The brief facts of this case are that the respondent assessee Customs House Agent (hereafter referred to as “CHA”) was issued a show cause notice on 15.03.2012, which alleged that the export of goods facilitated by it, was dubious and that the concerned parties, upon investigation and inquiry were found to be non-existent. The CHA has replied to the show cause notice and contested the proceedings arguing that it facilitated the consignments in question at the behest of one of its employees – Mr. Sanjay Panwar, who had in the past too, brought clients. It appears that in the course of investigations, the Revenue authorities found that the concerned exporters, were fictitious and that the consignments in truth were smuggled and also highly over-valued. In these circumstances, the penalty of ₹50,00,000/- was imposed on the CHA under Section 114 of the Customs Act, 1962.

3. The CESTAT by its impugned order allowed the CHA’s appeal; while doing so, it relied upon the judgment in *Falcon India v. Commissioner of Customs*, 2015 (326) ELT 728 (Del).

4. It is argued on behalf of the Revenue that the CHA in this case could not be absolved of responsibility inasmuch as Regulation 13 of the Customs House Agent Regulation, 2004 requires it to exercise due diligence and care. Therefore, a duty was cast upon it to ensure that the documents submitted by it on behalf of its clients were reflected as genuine export transactions and were not sham, meant to be conduit for smuggling over-valued goods. Learned counsel relied upon the judgment of the Andhra Pradesh High Court in *Commissioner of Customs & Central Excise v. H.B. Cargo Services*, 2011 (268) ELT

448 (A.P.) and submitted that the judgment in *Falcon* (supra) is not applicable.

5. In this case, the discussion with respect to the CHA's defence and the reasoning of the Commissioner of Customs is as follows :

“66.1. The noticee CHA in their defence have argued that the whole fiasco was the result of a fraud committed by one ex-employee Mr. Sanjay Panwar, who had provided them "export business" as he knew many people in exports business and after knowing about his ill doings, they terminated their association with him and Mr. Sanjay Panwar, no longer worked with them. They have also claimed that the same exporters had exported goods previously without any adverse notice, which was also the reason they did not suspect any foul play. They have only put an argument that they did not get to see or handle the goods for export as CHA and they work merely on the basis of the documents provided to them by the concerned party. They have also argued that in the present case the goods referred for examination were examined by the customs officers and cleared for export and that they had no expertise on in valuation of the goods nor they could physically count them prior to export and therefore they did not willfully cooperated with the exporters for the fraudulent exports. All these are alibis to cover up their failures once the offence being perpetuated by them was detected and their game plan exposed, they have resorted to such explanations in self defence.

67. The investigations into the matter have conclusively established and proved beyond any measure of doubt that the noticee export firms were found to be non-existing at the addresses declared in the shipping bills or in the IEC. Further Regulation 13 of the CHALR, LUU4 stipulates that a CHA shall verify antecedent, correctness of Importer Exporter Code (IEC) Number, identity of his client and functioning of his client at the declared address by using

reliable, independent, authentic documents, data or information. Further Regulation 19 also emphasizes that the CHA shall exercise such supervision as may be necessary to ensure the proper conduct of his employees in regard to their employment. The failures on part of the CHA to discharge its legal and statutory responsibilities have enabled and fully facilitated the fraudulent exports in the name of his non-existing clients, who are the noticees in the instant proceedings. The fraudulent exports to claim undue drawback benefits could not have taken place or at least come to light earlier, had the CHA fulfilled his obligations honestly. To get additional business, they reportedly shut their eyes on the activities of their employee and also failed to verify the antecedents or their clients. Even the items being exported by the five exporters show the same declared PMV, but they failed to notice the same. This obviously cannot be so without their active and clear complicity in the matter. If in the name of business the CHA overlooks his key legal responsibility and role, he is not only unworthy of a CHA but liable to not only equivalent but stricter punitive liabilities, more so on account of the fact of his being a CHA and licensed in term of CHALR Rules, 2004 under the Customs Act. He has deliberately failed to produce/unravel his co-conspirators and fraudsters in the matter.”

6. The Regulation in question reads as follows :

“13. Obligations of Customs House Agent.-

A Customs House Agent shall -

xxx

xxx

xxx

(o) verify antecedent, correctness of Importer Exporter Code (IEC) Number, identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information.”

7. This court is of the opinion that the impugned order is justified in the facts and circumstances of the case. The reference to the verification of “antecedents and correctness of Importer Exporter Code (IEC) Number” and the identity of the concerned exporter/importer, in the opinion of this Court is to be read in the context of the CHA’s duty as a mere agent rather than as a Revenue official who is empowered to investigate and enquire into the veracity of the statement made orally or in a document. If one interprets Regulation 13(o) reasonably in the light of what the CHA is expected to do, in the normal course, the duty cast is merely to satisfy itself as to whether the importer or exporter in fact is reflected in the list of the authorized exporters or importers and possesses the Importer Exporter Code (IEC) Number. As to whether in reality, such exporters in the given case exist or have shifted or are irregular in their dealings in any manner (in relation to the particular transaction of export), can hardly be the subject matter of “due diligence” expected of such agent unless there are any factors which ought to have alerted it to make further inquiry. There is nothing in the Regulations nor in the Customs Act which can cast such a higher responsibility as are sought to be urged by the Revenue. In other words, in the absence of any indication that the CHA concerned was complicit in the facts of a particular case, it cannot ordinarily be held liable.

8. As far as the decision in *H.B. Cargo Services* (supra) is concerned, the facts reflected in paras 5 and 9 facially show that the CHA played an active role. It is in these circumstances that in para 15 (which was relied upon by the Revenue), the Court made the

following observations :

“15. While the punishment imposed on the CHA has to be commensurate with the gravity of the proved acts of misconduct as, on revocation of his license, the CHA would suffer, it must not be lost sight of that, though it is the right of a citizen to carry on his business or profession, it is subject to reasonable restrictions and conditions which, in the present case, are stipulated under the CHALR [Worldwide Cargo Movers – 2010 (253) E.L.T. 190]. As noted hereinabove, blank shipping bills were issued by the partner and authorized representative of the respondent – CHA for a consideration of Rs.150/- per shipping bill. In cases involving corruption there cannot be any punishment lesser than the maximum i.e., revocation of the license. No other lesser punishment can be contemplated in such cases [State of T.N. v. K. Guruswamy – (1996) 7 SCC 114]. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The consideration received for the act of misconduct may be small or large. It is the act of corruption that is relevant, and not the quantum involved in such acts. [Ruston & Hornsby (I) Ltd. v. T.B. Kadam – (1976) 3 SCC 71; U.P. SRTC v. Basudeo Chaudhary – (1997) 11 SCC 370; Janatha Bazar (South Kanara Central Coop. Wholesale Stores Ltd.) v. Sahakari Noukarara Sangha – (2000) 7 SCC 517; Karnataka SRTC v. B.S. Hullikatti – (2001) 2 SCC 574; Rajasthan SRTC v. Ghanshyam Sharma – (2002) 10 SCC 330; Municipal Committee, Bahadurgarh v. Krishnan Behari – (1996) 2 SCC 714; U.P. SRTC v. Suresh Chand Sharma – (2010) 6 SCC 555; J.A. Naiksatam v. Prothonotary & Senior Master, High Court of Bombay – (2004) 8 SCC 653; Union of India v. Gyan Chand Chattar (2009) 12 SCC 78; NEKRTC v. H. Amaresh – (2006) 6 SCC 187; U.P. SRTC v. Vinod Kumar – (2008) 1 SCC 115].”

9. In the given circumstances, this Court is of the opinion that the decision in *H.B. Cargo Services* (supra) does not apply in the present

case.

10. Having regard to the above discussions, this Court is of the opinion that there is no merit in the appeal; the CESTAT's impugned order is accordingly affirmed. The appeal is dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

JANUARY 14, 2019

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