

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (CUSTOMS)
ORIGINAL SIDE**

RESERVED ON: 13.09.2022

DELIVERED ON: 26.09.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE SUPRATIM BHATTACHARYA

CUSTA NO. 62 OF 2018

COMMISSIONER OF CUSTOMS (AIRPORT & ADMINISTRATION), KOLKATA

VERSUS

M/S. S. PANDEY & COMPANY

Appearance:-

Mr. K.K. Maiti, Learned Senior Standing Counsel.

.....For the Appellant.

Mr. Arijit Chakraborty, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal filed by the Revenue under Section 130 of the Customs Act, 1962 (the Act), is directed against the order dated March 29, 2017 passed by the Customs Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata (Tribunal) in order No. F/075901/2017 in Appeal No. C/194/2012-DB, arising out of order-in-original dated April 13, 2012, passed by the Commissioner of Customs (Airport & Admin.), Kolkata under Regulation 22(7) of the Customs House Agents Licensing Regulations, 2004 (CHALR).

The appeal was admitted on November 26, 2018 on the following questions of law:

- (i) *Whether the impugned order of the Tribunal can be called perverse for the reason that on the ground the respondent was exonerated from penalty in the proceeding under Section 124 of the Customs Act, 1962, the Tribunal set aside the order revoking their license?*
- (ii) *Whether the Tribunal ought to have done so when the charge against the agent was serious i.e. not advising the customs properly under the regulations with regard to the mis-declaration of the description of the goods by the exporter?*

2. The respondent was granted Customs House Agents License during 1997 under the erstwhile Customs House Agents Licensing Regulations, 1984 to transact customs clearance work within the jurisdiction of Kolkata Customs Commissionerate. The respondent came to adverse notice of the Department pursuant to an investigation done by the Directorate of Revenue Intelligence,

Kolkata Zonal Unit (DRI), who had received information that Red Sanders wood which is a prohibited item, is attempted to be illegally exported under the guise of ductile iron casting from an exporter of Burdwan through Haldia Port. This investigation culminated in issuance of show-cause notice under Section 124 of the Act dated 25.02.2010. The respondent was the 5th noticee in the said notice. The respondent was called upon to show cause as to why penalty should not be imposed on them under Section 114(i) of the Act on the alleged ground that the respondent for material gain assisted in the attempt of illicit export of Red Sanders and thus, had failed to discharge their responsibilities properly/ legally in dealing with the subject goods. Further, they had handled the consignments without getting any authorization letter from the declared exporters and they had failed to advise their clients to comply with the provisions of the Act and did not bring the matter to the notice of the Customs Authorities and all these tantamounts to not exhibiting their proper role as CHA. The competent authority under CHALR was requested to take suitable action in terms of the Regulations for not complying with the obligations laid down in Regulation 13 of the CHALR. Further, it appears that the respondent has rendered themselves liable for penal action under Section 114(i) of the Act for the aforesaid omission and commission. The appellant submitted their explanation on March 16, 2010 stating that they received the job order from *M/s. Suman International* and they were aware that *M/s. Suman International* had secured the job order from *M/s. Liner Shipping Agency (P.) Ltd.* and *M/s. Suman International* is also a CHA and since their license has been temporarily

suspended, they approached the respondent for carrying out the said job order. Further, the respondent referred to the statement recorded from the proprietor under Section 108 of the Act wherein they had stated that they entrusted the job order to their employee Mr. Samrat Basu who got the documents from *M/s. Suman International* and on the basis of such documents, he prepared the shipping bills and other documents necessary for export of the goods. Further, it was stated that Mr. Samrat Basu was not aware of the contents of the containers. It was further stated that CHA did not know about the contents of the containers in as much as the containers were not packed in their presence and the containers have been brought by the export personnel and they handed over the containers after those entered the docks. Thus, the respondent denied the allegation that they knew or were in association with the exporter to export a prohibited cargo, as such the allegation is false and there is no evidence to the said fact. Further, the respondent contended that the Department has not produced any evidence that the respondent had knowledge that the containers contained Red Sanders wood. Further, it was contended that in order to invoke penalty proceedings against the respondent, the onus is on the Department to prove that the CHA had knowledge about the contents of the containers or they have associated with the exporter to export prohibited goods out of the country. Thus, all the allegations are mere surmises and conjectures on the part of the investigation agency and no penalty can be imposed on assumptions, presumptions and suspicion. Reliance was placed on the decision of the Hon'ble Supreme Court in ***Hindustan Steel Ltd. Versus***

State of Orissa¹. Further, it was stated that in the show-cause notice a request has been made to the competent authority under the CHALR to take action against the respondent and this direction is arbitrary exhibiting bias against the respondent. Further, it was submitted that first and foremost what is required to be seen is whether there was any intentional contravention of the provisions of the CHALR and even before adjudicating the case, such recommendation to the competent authority under the CHALR to take action against the respondent is not proper and justified. Accordingly, the respondent prayed for dropping further proceedings pursuant to the show-cause notice dated 25.02.2010.

3. Thereafter, show-cause notice dated July 26, 2010 was issued to the respondent under Regulation 22(1) of the CHALR calling upon the respondent to show cause as to why the Customs House Agent License held by them should not be revoked and their security deposit ordered to be forfeited under the provisions of Regulation 20(1) of CHALR, 2004. In the meantime, the license granted to the respondent was suspended under Regulation 20(2) of the CHALR by order dated 18.03.2010. The respondent had challenged the said order by filing an appeal before the learned Tribunal which was pending at relevant time and also stated to be pending as on date. The respondent had submitted in their reply dated 27.03.2012 to the enquiry report and a written synopsis dated 28.03.2012 setting out their defense. The adjudicating authority who had issued the show-cause notice under Section 124 of the

¹ 1978 (2) ELT 159 (SC)

Customs Act passed order dated January 4, 2012 dropping the proposal to impose penalty on the respondent on the ground that the Department has failed to establish knowledge of involvement of the respondent for gain in the alleged conspiracy to abet smuggling. Thereafter, the competent authority under the CHALR adjudicated the show-cause notice dated July 26, 2010 and passed order dated 16.04.2012 revoking the license granted to the respondent and also order forfeiture of the full amount of security deposit. Aggrieved by such order, the respondent filed appeal before the learned Tribunal which was allowed by the impugned order. Aggrieved by such order, the revenue is on appeal before us.

4. We have heard Mr. K.K. Maiti, learned Senior Standing Counsel for the appellant revenue and Mr. Arijit Chakraborty, learned Advocate for the respondent.
5. The allegation against the respondent is that they have violated Regulations 13(a) and 13(d) of the Customs House Agents Licensing Regulation, 2004. Regulation 13 deals with obligations of Customs House Agent. Sub-Regulation (a) of Regulation 13 states that a Customs House Agent shall obtain an authorization from each of the companies, firms or individuals by whom he is for the time being employed as Customs House Agent and produce such authorization whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs. Sub-Regulation (d) states that a Customs House Agent shall 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. The admitted fact is that the export order was not received by the respondent from the exporter but they had secured the order through another CHA and it is that agency which had entrusted the documents for the purpose of preparation of shipping bills and other export documents after the goods were loaded in the containers, sealed and brought to the docks. The consistent case of the respondent is that they had no knowledge of the cargo which was stuffed in the containers and the containers had the seal affixed by the Central Excise Department intact and having received the documents from *M/s. Linker India*, export documents were prepared by the respondent. In the light of the said factual position, the respondent while responding to the show-cause notice dated 25.02.2010 issued by the DRI, specifically contended that unless there is evidence to show that the respondent/ CHA had knowledge of the prohibited goods being stuffed into the containers, they cannot be held liable for payment of penalty as penalty cannot be imposed on assumptions and presumptions without evidence. This stand taken by the respondent in the response to the show-cause notice dated February 25, 2010 was accepted by the adjudicating authority in its order dated 04.01.2012, wherein the authority specifically recorded that the Department has failed to establish knowledge of any involvement of the respondent for gain in the alleged conspiracy to abet smuggling of Red Sanders. The learned Tribunal taking note of the said order dated January 04, 2012 and also taking note of the conduct of the respondent in having cooperated with the investigating agency and taking into account the

overall facts and circumstances of the case which were referred, opined that revocation of license and forfeiture of the security deposit is excessive. The revenue is before us contending that the respondent having violated Regulations 13(a) and (d) of the Regulation, the competent authority under the CHALR was well justified in revoking the license and ordering forfeiture of the security deposit. In support of their contention, Mr. Maiti placed reliance on the decisions in the case of **Welcome Air Express Pvt. Ltd. Versus Commissioner of Customs (Airport & Administration)** ² dated 04.05.2022 and **Commissioner of Customs (Airport & Administration) Versus M/s. Marico Logistics Pvt. Ltd.**³ dated July 21, 2022.

6. Mr. Chakraborty contended that the Tribunal taking note of the order dated January 4, 2012 exonerating the respondent from the penalty proceedings proposed under Section 124 of the Act as well as the conduct of the respondent in having cooperated with DRI in the investigation and considering the totality of the facts and circumstances of the case opined that the revocation of the license was excessive. Thus, in the absence of any perversity in the order passed by the Tribunal, this Court will not interfere with the said order, more particularly when no substantial question of law arises for consideration in this appeal. Mr. Chakraborty placed reliance on the decision of the High Court of Bombay in **Commissioner of Customs (General) Versus Sainath Clearing Agency** ⁴ ; the decision of the Hon'ble Supreme Court in

² CUSTA No. 4 of 2015

³ CUSTA No. 16 of 2020

⁴ 2015 (326) ELT 548 (Bom.)

Commissioner of Customs (General) Versus K.M. Ganatra and Company ⁵ ;
Transport Logistics Versus CESTAT, Chennai ⁶, ***Commissioner of Customs (General) Versus Alankar Shipping & Clearing P. Ltd.***⁷ and ***Exim Cargo Services Versus Commissioner of Customs (General)*** ⁸.

7. In ***Welcome Air Express Pvt. Ltd.*** the appeal filed by the Customs House Agent was dismissed affirming the order passed by the learned Tribunal upholding the revocation of license. In ***M/s. Marico Logistics Pvt. Ltd.*** the order passed by the learned Tribunal setting aside the revocation of license was reversed and the order passed by the competent authority revoking the license was restored. These decisions have been pressed into service by Mr. Maiti to support his argument that the doctrine of proportionality was considered in those cases and the Court had upheld the stand taken by the Department and confirmed the order of revocation. It is no doubt true that in both the decisions, the Court considered the doctrine of proportionality, however such consideration was made after taking note the facts and circumstances of those cases. In ***Welcome Air Express Pvt. Ltd.*** the Court held that no lenient approach can be adopted in favour of the Customs House Agent as in the proceedings initiated under Section 124 of the Act, the Commissioner of Customs did not exonerate the CHA. In ***Marico Logistics Pvt. Ltd.*** there was an admission made by the Customs House Agent before the Commissioner which clearly shows the connection of the CHA with the attempt to export the

⁵ 2016 (332) ELT 15 (SC)

⁶ 2016 (338) ELT 380 (Mad.)

⁷ 2019 (367) ELT 553 (Bom.)

⁸ 2019 (368) ELT 1024 (Del.)

prohibited item, Red Sanders and the Court held that the learned Tribunal has picked holes in the evidence brought on record by the Licensing Authority which not only probalilises but also establishes the violation committed by the CHA giving no room for interference. Both the aforementioned decisions may not be applicable to the case on hand as in the proceedings initiated under Section 124 of the Act proposing to levy the penalty on the respondent was dropped by adjudication order dated January 04, 2012 holding that the Department had failed to establish knowledge of the respondent and involvement for gain in the alleged conspiracy to abet smuggling. Thus, the respondent stood completely exonerated from the proceedings initiated under Section 124 of the Act.

8. It is true that the proceedings initiated under the CHALR are independent proceedings but the fact remains that proceedings under the CHALR was commenced by issuance of show-cause notice dated July 26, 2010 under Regulation 22(1) of the CHALR, 2004 pursuant to the direction issued by the DRI while issuing show-cause notice dated February 25, 2010. Therefore, while accepting the submission of Mr. Maiti that proceedings under the CHALR are independent proceedings but if the factual matrix which led to the action being initiated under CHALR has been found to be not established and nothing adverse turns out against the CHA, such proceedings would undoubtedly have a bearing on the proceedings proposing revocation of the license granted to the respondent. Precisely this was done by the Tribunal and not only that the learned Tribunal also notes the conduct of the respondent in cooperating with

DRI in the investigation. That apart, the learned Tribunal has taken into consideration the totality of the facts and circumstances and then held that the order of revocation of license was excessive, in the given facts and circumstances more particularly, when the respondent stood completely exonerated in the proceedings initiated under Section 124 of the Act.

9. The power of the learned Tribunal to vary, confirm or modify the order passed by the competent authority is beyond doubt. In **K.M. Ganatra & Co.** the Hon'ble Supreme Court pointed out that the Tribunal has jurisdiction to confirm, modify or annul the decision and while exercising its jurisdiction, has to exercise it in accordance with law having regard to the factual matrix of the case. The Tribunal having been conferred the power to modify the order restricting the period of revocation will definitely come within the sweep of the said power. In **Sainath Clearing Agency** it was held that the authority issuing the license had certain amount of discretion in the matters of revocation of licenses and while imposing penalty. It was pointed out that the orders should not be lightly interfered with, however, that does not mean that once the orders of the authorities like Commissioner are capable of being challenged in further, then the Appellate Tribunal's powers are in any way restricted or circumscribed. Further, it was held that in order to render substantial justice and if the Tribunal feels that there is a certain period which has gone by during which the agent has been out of business, then that is sufficient penalty but such a view cannot be taken in all cases as a matter of rule. In **Transport Logistics** it was held that the CHA was out of work for more than 3 years and

that itself is sufficient punishment for the appellant therein. Following the decision of this Court in **Commissioner of Customs (Preventive) Versus Over Land Agency** ⁹, the period of suspension of license was restricted and the CHA therein was directed to make fresh security deposit and on such deposit being made, the license was directed to be restored. In **Alankar Shipping & Clearing Pvt. Ltd.** the Court taking into consideration the decision in **K.M. Ganatra & Co.** held that the Tribunal has power under the CHALR, 1984 to take a lenient view to modify the revocation period. In **Exim Cargo Services** the Court took into consideration the factual position and held that there is nothing to show that appellant therein or any of its employees could be attributed to any conscious or deliberate mis-statement on behalf of the importer more particularly, when there was no corroborative evidence or statement of anybody that the CHA had information, knowledge or has connived in the alleged forgery of invoices, mis-declaration and under-valuation. Further it was held that an element of mens rea, or any direct or indirect involvement attributable to the CHA through active knowledge or connivance is required to be proved in a proceeding for revocation of license of a Customs House Agent.

10. The legal position which emerges from the above decisions is that, considering the facts and circumstances of each case, the Tribunal has jurisdiction to confirm, modify or annul the decision of the authority. Further, the Tribunal exercises jurisdiction; such exercise should be in accordance with

⁹ 2006 (204) ELT 554 (Cal.)

law. In the instant case, the Tribunal took note of the undisputed fact whereby the respondent was completely exonerated from the proceedings initiated under Section 124 of the Act where there was allegation of abetment to smuggling. Thus, the factual matrix based on which the proceedings were initiated under CHALR, 2004 appears to have been effaced. However, we have to tread a cautious approach since the respondent is under obligation to act in accordance with law, in terms of the license granted to him under the CHALR, 2004. The respondent has bound himself by executing a bond and furnishing security to scrupulously abide by the terms and conditions of the license. Therefore, even if the respondent has been fully exonerated in the proceedings initiated under Section 124 of the Act, yet the competent authority under CHALR is entitled to examine the case of the respondent qua the requirement under the regulations. It is an admitted fact that the respondent did not obtain the authorization from the exporter but they are stated to have received the job order from another CHA whose license had been suspended. If such is the case, it tantamounts to a clear violation of Regulation 13(a) of the Act. In ***Noble Agency Versus Commissioner of Customs***¹⁰, the learned Tribunal had explained the important position played by a Customs House Agent in the Customs House in the following terms:

“The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz. carriers, custodians like BPT as well as the Customs. The

¹⁰ 2002 (142) ELT 84 (Tri-Mumbai)

importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests of both the importers and the Customs. A lot of trust is kept in CHA by the importers/ exporters as well as by the Government Agencies. To ensure appropriate discharge of such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations lists out obligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations....”

11. The above decision of the learned Tribunal was approved by the Hon’ble Supreme Court in **K.M. Ganatra & Co.** Thus, any contravention of the obligations cast on the CHA even without intent would be sufficient to invite action against the CHA. In **Shri Kamakshi Agency Versus Commissioner of Customs** ¹¹ the role of the CHA was explained in the following terms:

“The very purpose of granting a license to a person to act as Customs House Agent is for transacting any business relating to the entry or departure of conveyance or the import or export of goods at any customs station. For that purpose, under Regulation 9 necessary examination is conducted to test the capability of the person in the matter of preparation of various documents, determination of value procedures for assessment and payment of duty, the extent to which he is conversant with the provisions of certain enactments etc. Therefore, the grant of license to act as a Custom House Agent has got a definite purpose and intent. On a reading of the Regulations relating to the grant of license to act as Custom House Agent, it is seen that while Custom House Agent should be in a position to act as agent for the transaction of any business relating to the entry or departure of conveyance or the import or export of goods at any customs station, he

¹¹ 2001 (129) ELT 29 (Mad.)

should also ensure that he does not act as an Agent for carrying on certain illegal activities of any of the persons who avail his services as Custom House Agent. In such circumstances, the person playing the role of Custom House Agent has got greater responsibility. The very prescription that one should be conversant with the various procedures including the offences under the Customs Act to act as a Custom House Agent would should that while acting as Custom House Agent, he should not be a cause for violation of those provisions. A CHA cannot be permitted to misuse his position as a CHA by taking advantage of his access to the Department. The grant of license to a person to act as Custom House Agent is to some extent to assist the Department with the various procedures such as scrutinizing the various documents to be presented in the course of transaction of business for entry and exit conveyance or the import of export of the goods. In such circumstances, great confidence is reposed in a Custom House Agent. Any misuse of such position by the Custom House Agent will have far reaching consequences in the transaction of business by the Custom House officials.”

12. Thus, if the conduct of the respondent is viewed bearing in mind the above legal principles, it no doubt shows that the respondent had violated the conditions of license. The respondent having received the export order from a third party is also to be held guilty for not being able to advise his client to comply with the provisions of the Act as the respondent did not know who his client was and it is through a third party they had received the job order. Therefore, the respondent cannot be fully exonerated from the proceedings. Thus, taking into consideration the reasoning of the learned Tribunal which was arrived at taking note of the fact that the respondent was completely exonerated in the proceedings initiated under Section 124 of the Act and

proposal to levy penalty was dropped and also the fact, that the respondent cooperated with the investigating agency, we are of the view that the discretion exercised by the learned Tribunal cannot be termed to be either arbitrary or perverse. The period during which the license stood revoked, i.e., commencing from the date of suspension till the date of revocation vide order dated April 13, 2012 and till date would be a deterrent to the respondent to carry on his functions in future as a Customs House Agent strictly in accordance with the terms of the license and faithfully and diligently undertake the activities bearing in mind the important role played by a CHA in the Customs House. However, the order passed by the learned Tribunal setting aside the forfeiture of the security deposit appears to be granting over indulgence to the respondent. Therefore, to that extent, the order passed by the learned Tribunal has to be interfered and the respondent has to be directed to make a fresh security deposit to be entitled for renewal of his license.

13. In the result, the substantial questions of law are answered in the following terms:

- (i) The order passed by the learned Tribunal setting aside the revocation of license cannot be held to be wholly perverse considering the facts and circumstances of the case, however, setting aside the order forfeiting the security deposit is not tenable.
- (ii) The respondent having failed to adhere to Regulation 13(a) of the CHALR, 2004 cannot be exonerated completely and, therefore, the period during which the license stood revoked till it is restored shall

be treated as a penalty and the order of confiscation of security deposit passed by the competent authority stands restored with a direction to the respondent to furnish fresh security deposit to the satisfaction of the Department.

14. In the result, the appeal is allowed in part and the substantial questions of law are answered in the above terms.

15. The Customs House Agents License granted to the respondent, shall be renewed upon the respondent furnishing fresh security to the satisfaction of the authorities and the order of revocation of license till it is restored and renewed, shall be taken as a punishment imposed on the respondent in lieu of the punishment of permanent revocation of the license as ordered in the order dated April 13, 2012. This direction shall be complied with within eight weeks from the date of receipt of the server copy of this order. No costs.

(T.S. SIVAGNANAM, J.)

I agree

(SUPRATIM BHATTACHARYA, J.)

(P.A.- PRAMITA)