

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

RESERVED ON: 12.04.2022

DELIVERED ON: 04.05.2022

CORAM:

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

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

CUSTA NO. 04 OF 2015

WELCOME AIR EXPRESS PRIVATE LIMITED

VERSUS

COMMISSIONER OF CUSTOMS (AIRPORT & ADMINISTRATION)

Appearance:-

Mr. Ananda Sen, Adv.

Mr. M.K. Poddar, Adv.

Mr. S.K. Poddar, Adv.

.....For the Appellant.

Mr. K.K. Maity, Adv.

.....For the Respondent.

JUDGMENT

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

1. This appeal filed under Section 130 of the Customs Act, 1962 (the Act) is directed against the order dated 25.05.2015 passed by the Customs Excise and Services Tax, Appellate Tribunal, East Regional Bench, Kolkata (Tribunal) in Customs Appeal No. 75205/2014 arising out of an order-in-original dated 19.12.2013 passed by the Commissioner of Customs (Administration & Airport), Calcutta. The appellant has raised the following substantial questions of law for consideration:-

- (I) *Whether on the facts and in the circumstances of the case the Tribunal was correct in coming to its findings that the petitioner had violated the provisions of Regulation 13 (b), 13 (d) and 19 (8) of Customs House Agents Licensing Regulation, 2004 resulting in revocation of the license of the petitioner, by solely relying upon statement given by the Managing Director of the petitioner without taking into consideration the other part of the evidence available on record, and whether the said finding is legal, proper and justified or whether the said finding is vitiated being perverse in law?*
- (II) *Whether on the facts and in the circumstances of the case the Tribunal grossly erred in law in coming to its conclusion that finding given in a collateral proceeding will not be taken into consideration for adjudicating a case when the background and genus of the offence committed is same in both the cases?*

2. The facts as stated by the appellant are that the appellant is a private limited company registered under the provisions of the Companies Act, 1956 and engaged in the business as the Customs House Agent (CHA). The appellant was granted a license to function as a CHA by order dated 27.01.2007 passed by the Commissioner of Customs (Administration) Kolkata in terms of Section 146 of the Act read with Regulation 9 (1) of the Customs House Agent Licensing Regulation, 2004 (CHALR), the period of license was for 10 years from 29.07.2006.

2.1 During November 2008, a forwarding agent *M/s. Draft Cargo India Private Limited, Kolkata* is said to have approached the appellant to export certain goods for one of its silent exporter, *M/s. Himalayan Tours and Travels*. The appellant would state that they earnestly believed that *Himalayan Tours* had a genuine export consignment as it was suggested by letter of authorization given by them dated 07.11.2008 certifying that *Himalayan Tours and Travels* appoints the appellant as their authorized CHA and the scope of their responsibility is confined to clearance of customs and dock based on pre-given documents. They also undertook that the container in which the goods were stuffed are 600 bags of iron sponge and there are no specified/contraband goods and/or any goods contrary to the Act has been stuffed in the said container. The appellant is stated to have prepared the shipping bill on the basis of the invoice and packing list prepared and forwarded by *Himalayan Tours* through *Draft Cargo India*, the freight forwarder. The shipping bill was assessed by the Customs authorities and the appellant paid the customs duty

of Rs. 57,637/- on behalf of the exporter. On 11.11.2008 the transporter of the said exporter brought the consignment stuffed in 20 feet container under lock and key and handed over the same to the *Jetty Sircar* of the appellant outside the gate of the *Netaji Subhas Chandra Dock, Kolkata* for the purpose of taking the same inside the port to comply with the shipping formalities with the customs authorities. The appellant would further state that the container was opened by the customs authorities for the purpose of examination and appraisal of the Cargo and thereafter it was sealed by the customs authorities and "Let Export Order" dated 11.11.2018 was issued.

2.2 On 30.11.2008 the Managing Director of the appellant was called over phone by the officers of the Directorate of Revenue Intelligence, Calcutta, Zonal House, (DRI) to be present in the dock complex for the purpose of re-examination of the Cargo. The container was opened and the Cargo was re-examined and stated to contain red sander-woods in logs. Thereafter the Managing Director received summons under Section 108 of the Act and the statement was recorded from the Managing Director which according to the appellant was obtained under threat, undue influence and coercion. It is thereafter by order dated 11.05.2009 the CHA license granted to the appellant was suspended in exercise of the powers conferred under Regulation 20(2) of the CHALR. It was alleged that the appellant has contravened the provisions of the CHALR and the conditions of license warranting immediate action so as to prevent further exercise of his CHA license. The order further stated that proceedings for revoking the license under Regulation 22 of CHALR will be

initiated separately. The appellant filed WP NO. 454 of 2009 challenging the order of suspension and by order dated 22.05.2009 an interim order was granted till 26.06.2009 subject to the condition that the appellant shall not allow the CHA license to be used by any other person other than the appellant and the employees of the appellant. Simultaneously, the department issued notice dated 05.05.2009 under proviso to Section 110 (2) of the Act calling upon the appellant to show cause as to why the time limit for issuance of show-cause notice under Section 110 (2) should not be extended for a further period of 6 months that is up to 12.11.2009 under the proviso to Sub-section (2) of Section 110 of the Act. Opportunity of personal hearing was granted and fixed on 08.05.2009, by the Commissioner of Customs (Port), Kolkata. The appellant who was the 6th noticee appeared and submitted reply to the show cause notice. The contentions raised by the appellant did not find favour with the Commissioner who by order dated 08.05.2009 extended the period for issuance of the show cause notice up to 12.11.2009. It is thereafter the show cause notice dated 14.08.2009 was issued to the appellant under Section 22 (1) of the CHALR calling upon them to show cause as to why the CHA license held by them should not be revoked and their security deposit ordered to be fortified under Regulation 20 (1) of the CHALR. In the said show cause notice, the authority was of the prima facie view that the conduct of the appellant is unbecoming as CHA on the following grounds:-

(a) As per Regulation 13 (a) of CHALR2004, the CHA should obtain an authorization from the company/firm/individuals by whom he is for the time

being employed as Customs House Agent and produce such authorization whenever required by the Deputy or Assistant Commissioner of Customs but the CHA failed to do so.

(b) As per Regulation 13 (b) of CHALR2004, the CHA should transact business in the Customs Station wither personally or through an employee duly approved by the Deputy/ Assistant Commissioner of Customs but the CHA failed to do so.

(c) As per Regulation 13 (d) of CHALR2004 the CHA should 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/Assistant Commissioner of Customs, but the CHA failed to do so.

(d) As per Regulation 19(8) of CHALR2004, the CHA should exercise such supervision as may be necessary to ensure the proper conduct of their employees in the transaction of business as agents, but the CHA failed to do so.

2.3 The appellant submitted their reply dated 17.09.2009 denying and disputing the allegations made against them in the show cause notice. In the said reply the appellant retracted the statement recorded by the authorities from the Managing Director of the appellant, on the ground that it was a statement prepared as per the dictation of the authority and the Managing Director was under duress and coercion and no reliance could be placed on the statement. The sum and substance of the reply given by the appellant was that there is no allegation that the appellant was involved in mis-declaration and/or export of red sanders and there is no provision under the Act or under CHALR

that there should be a written agreement between the forwarding agent and the clearing agent to undertake the export. Further it was stated that it is absolutely false to state that the *Jetty Sircar, Mithun Ghosh* was not an employee of the appellant and the copy of a *Jetty Sircar* license issued by the Kolkata Port Trust was relied upon to state that *Mithun Ghosh* was an employee of the appellant. Further it was stated that the appellant was duly authorized to carry on the export formalities and copy of the authorization letter was appended to the reply. Further with regard to the allegations that the appellant failed to verify the genuineness of the export Cargo, it was stated that the Cargo was in a sealed container and question of verifying the same by the appellant, a clearing agent, does not arise and they have no authority to break open the lock of the container but they are required to be proved based upon the declaration of the exporter as per invoice, packing list and the authorized letter which stated that the cargo has 600 bags of iron sponge and there is no specified/contraband goods. Further the appellant placed reliance on the "Let Export Order" issued by the customs authorities who had examined the cargo by opening the container after which it was re-sealed. Further the appellant contended that it is practically impossible for a clearing agent to verify the genuineness of each and every client and it is a usual business practice that clients will be introduced by the forwarding agent and the clearing agent would undertake the job reposing faith on the forwarding agent. The other allegations which were made against the appellant were also denied. It is further submitted that though the reply was submitted by the appellant and received

by the department, no further action was taken within a reasonable time. The writ petition filed by the appellant in WP No. 454 of 2009 was taken up for hearing and by order dated 23.12.2009, the same was disposed of by directing the Commissioner of Customs to complete the proceedings and pass an adjudicating order within 6 months from the date of communication of the order in the writ petition. The appellant would state that it is only thereafter the department conducted an inquiry under Regulation 22 (2) of CHALR and submitted inquiry report dated 30.01.2010, a copy of which was forwarded to the appellant along with the letter dated 04.03.2010. The appellant submitted a representation dated 30.04.2010 on the contents of the inquiry report denying and disputing the findings of the inquiring authority and stating that the inquiry was completed in a hurried manner and the inquiry officer has failed to adhere to Regulation 22 (6) of the CHALR which stipulates a time limit for furnishing the copy of the inquiry report. The appellant also reiterated their earlier submission denying and disputing the allegations made against them.

- 2.4 An opportunity of personal hearing was granted to the appellant in which the appellant was represented by his Counsel. The appellant placed reliance on several decisions of the Hon'ble Supreme Court to substantiate their case. The Commissioner of Customs by order-in-original dated 5th August, 2011 revoked the CHA license granted to the appellant and forfeited the security deposit. Earlier, the Commissioner of Customs (Preventive), Kolkata adjudicated a show-cause notice dated 11th November, 2009 issued by the DRI to nine noticees and the appellant and its Managing Director were the 6th and 7th

noticees in the said show-cause notice. An order-in-original dated 5th January, 2012 was passed confiscating the red sanders under Sections 113(d) and 119 of the Act. Insofar as the penalty which was proposed against the appellant and its Managing Director, the Commissioner dropped the penalty proceedings. Penalty was imposed on the exporter and its Managing Director to the tune of Rs. 5,00,000/- each and penalty of Rs. 10,00,000/- was imposed on one *Ashok Thakur* who was the third noticee.

2.5 The appellant filed an appeal before the Tribunal, challenging the order dated 5th August, 2011 revoking that CHA license and forfeiting the security deposit. Before the learned Tribunal, the appellant relied upon the order-in-original dated 5th January, 2012 passed by the Commissioner of Customs (Preventive) dropping the penalty proceeding against the appellant and its Managing Director. It was contended that based on identical allegations which were the basis for revoking the license, were considered by the Commissioner and penalty proceedings were dropped against the appellant and its Managing Director and this order should be considered while testing the correctness of the order revoking the CHA license. The learned Tribunal noting that the findings in the order passed by the Commissioner of Customs (Preventive), was not available before the Commissioner of Customs (Administration and Airport) while revoking the license, remanded the matter back to the Commissioner (Administration and Airport) to decide the case afresh. Pursuant thereto, fresh adjudication was commenced which culminated in an order dated 19th December, 2013. Thereunder, the Commissioner of Customs (Administration &

Airport) revoked the CHA license granted to the appellant and forfeited the security deposit. This order was challenged by the appellant before the learned Tribunal. The learned Tribunal by order dated 25th May, 2015 dismissed the appeal which is impugned before us.

3. Mr. Ananda Sen, learned Advocate appearing for the appellant contended that the learned Tribunal did not properly consider the detailed reply filed by the appellant for the show-cause notice and the inquiry report though the learned Tribunal has referred to the contents of the show-cause notice and the inquiry report. Further, the learned Tribunal did not record any findings as to the effect of the order dated 5th January, 2012 by which the penalty proceedings under Section 114 was dropped against the appellant and its Managing Director and the basic facts and the evidence being the same, the findings recorded in the order dated 5th January, 2012 should have an effect while deciding the correctness of the revocation of the CHA license. Further, the learned Tribunal brushed aside the *Jetty Sircar* license issued to *Mithun Ghosh* which proved that Ghosh was the employee of the appellant. Further, the learned Tribunal ought to have appreciated the limited work assigned to the appellant who bonafidely worked on the basis of letter of authorization issued by the exporter. Further, the learned Tribunal ought to have taken note of the fact that the Customs Department had examined the cargo and having been satisfied had issued "Let Export Order" and solely based upon the statement recorded under Section 108 of the Act from the Managing Director of the appellant which was duly retracted, the order revoking the license ought to

have been set aside. Further, the *Jetty Sircar* license issued to *Mithun Ghosh* is by the Kolkata Port Trust and not by a private concern or an individual and due weightage ought to have been given to the said document. Further, the learned Tribunal ought to have given due consideration to the retraction made by the Managing Director to the statement which was recorded from him under Section 108 of the Act and due weightage ought to have been given to the evidential value of such a statement which was subsequently retracted. Further, it was contended that the learned Tribunal did not analyze the case in the context of doctrine of proportionality which should have been given due consideration. The learned Advocate referred to Regulation 30 of the CHALR and submitted that no case has been made out to revoke the license issued to the appellant. Further, it is contended that the appellant had bonafidely carried out that assignment as CHA license in accordance with the license issued and in accordance with the CHALR and it does not warrant regulation of the CHA license.

4. In support of his contention, the learned Advocate referred to the decision of the High Court of Delhi in ***Vijender Singh Versus Commissioner of Customs (Import & General) (Del) (HC)***¹ for the proposition that when two proceedings are initiated pertaining to the very same transaction, and in one such proceeding the appellant and its Managing Director were exonerated, based on the same allegations, the CHA license could not have been revoked. For the same proposition, reliance was placed on the decision of the High Court

¹ (2018) SCC Online- Del 13051

of Judicature at Bombay in ***Commissioner of Central Excise, Nagpur Versus Ramratan Shrivallabh Chandak (Dead)*** ² and also the decision in ***Union of India Versus M/s. East & West Shipping Agency (Bom) (HC), Customs Appeal No. 78 of 2018*** dated 23.02,2010. To explain the duties of the CHA license, reliance was placed on the decision of the High Court of Delhi in ***Commissioner of Customs versus Shiva Khurana, Customs Appeal No. 45 of 2017*** dated 14th January, 2019 and it is submitted that the duty of a CHA is as a mere agent and not as a revenue officer who has power to investigate and go into the veracity of the statement made orally or in a document.

5. With regard to proportionality of penalty, heavy reliance was placed on the decision of the High Court of Delhi in ***M/s. Ashiana Cargo Services Versus Commissioner of Customs (I & G) (Del)*** ³. With the above submissions the learned Advocate for the appellant prayed for setting aside the order passed by the learned Tribunal and consequently set aside the order passed by the Commissioner revoking the appellant's license and to restore the same so as to enable the appellant to carry on their duties as a CHA.

6. Mr. K.K. Maity learned Standing Counsel appearing for the Department submitted that what is required to be considered is the effect of the order passed under the Customs Act dropping the penalty proceedings against the appellant and such order was passed under the provisions of the Customs Act and the order revoking the CHA license has been passed under the CHALR which specifies the duties and responsibilities of a CHA and, therefore, the

² (2014) 310 ELT 438 (Bom.)

³ (2014) SCC Online Del 1161

order dropping penalty proceedings can have no effect on the action taken under CHALR. In this regard, the learned Standing Counsel has drawn our attention to the findings recorded by the Commissioner of Customs (Preventive) in his order dated 5th January, 2012 wherein it has been observed that though action under the Customs Act may not be required to be taken, the appellant can be proceeded under the relevant regulations (CHALR). Therefore, it is submitted that the learned Tribunal after considering the effect of the order, dropping the penalty proceedings and taking note of the fact that the appellant failed to discharge their responsibilities properly in dealing with the goods handling without verifying the antecedents of the exporter and allowed the forwarding agent, *Draft Cargoways* to use that CHA license for financial considerations and the *Jetty Sircar, Mithun Ghosh* who actually did the clearance work at the dock, was not the employee of the CHA and they even authorized three employees to *Draft Cargoways* for obtaining *Jetty Sircar* license and all clearly exhibits that the appellant did not discharge their duties, enjoyed upon them as a CHA. The learned standing Counsel further submitted the appellant having allowed the freight forwarder, *Draft Cargoways* to use their CHA license for the purpose of Customs clearance for monetary considerations, that too, without any written agreement warrants revocation of their license. The *Jetty Sircar, Mithun Ghosh* who handled the clearance work at the dock was not the employee of the CHA but an employee of the *M/s. Draft Cargoways* which is in clear violation of the license conditions read with CHALR. The appellant does not dispute the fact that the authorization letter

was not received directly by them from the exporter but from the freight forwarder, *Draft Cargoways*. The appellant failed to verify the genuineness of the exporter or the cargo which was sought to be exported. The assignment of clearing received by the appellant was not sourced from the exporter directly but from *Draft Cargoways* without verifying the genuineness of the exporter. The appellant, in violation of Regulation 19 of CHALR authorized three employees of *Draft Cargoways* and used them to process the documents on behalf of the CHA. Further, the Commissioner in its order dated 19th December, 2013 rightly pointed out that the order-in-original dated 5th January, 2012 passed under the provision of the Customs Act has no bearing on the action initiated under the CHALR which is initiated separately without prejudice to the action already taken under the provisions of the Customs Act. Further, the Managing Director of the appellant had clearly stated in the statement recorded under Section 108 that *Jetty Sircar Mithun Ghosh* who actually did the clearance work at the dock was not the employee of the CHA but the employee of the freight forwarder *Draft Cargoways*. Thus, this statement is binding on the Managing Director and the subsequent retraction while submitting a reply dated 17th September, 2009 to the show-cause notice was rightly disbelieved by the adjudicating authority. Further, the facts, clearly show that the appellant had violated Regulation 13(b) of the CHALR as none of their employees have been approved by the Customs Authorities, which is required to be done under the regulations. Thus, the Commissioner rightly held that the appellant was not aware about the exporter, did not take any steps to

know the exporter, failed to advise them to follow and comply with the provision of the Act and the CHALR which is a duty cast upon the appellant. Further, it is contended that merely verifying the IEC number of any exporter or importer does not mean that the actual identity of the exporter or importer is verified and that the exporter or importer has been advised by the appellant in terms of the provisions of Regulation 30(d) of the CHALR. Thus, the appellant ignored the mandatory obligation under the statutory regulations and thereby, encouraged the unscrupulous exporter to smuggle red sanders. Further, the Tribunal examined the facts and found that there is nothing to indicate that the inquiry officer had overlooked a provision of Regulation 22(3) of the CHALR, nor the appellant was able to find out that the inquiry officer had overlooked the said provision or that documents were not supplied to them. Further, it is submitted that the statement recorded under Section 108 of the Act is admissible in evidence and can form the sole basis for suspending the CHA license subject to it being voluntary and truthful and retracted statements can be relied upon only if, on examination of evidence it is concluded that statement was true and voluntary. Bearing this legal principle in mind, the Commissioner after analyzing the facts has recorded the finding that the appellant could not produce any documentary evidence to prove that the statement of the managing Director were duly retracted, nor produced any evidence that the statement recorded under Section 108 of the Act was under coercion and compulsion. Therefore, it is submitted that the learned Tribunal after re-examining the facts and noting the statutory provisions as well as the

relevant regulations found that the Act provides for two types of actions namely, for imposition of penalty for aiding and abetting the importer/ exporter in smuggling of goods and the other being action contemplated under CHALR. Therefore, the learned Tribunal rightly held that merely on the ground that penalty proceedings were dropped, is not a ground for quashing the order revoking the CHA license as it has been confirmed that the appellant had indulged in gross misconduct and contravened the provisions of the CHALR. The learned Standing Counsel referred to Section 146 of the Act which deals with the license for customs broker and the embargo placed under Sub-Section (1) of Section 146 which prohibits any person to carry on the business as a customs broker at any customs station unless and until he holds a license granted in this behalf in accordance with the regulations. In support of his contentions the learned Counsel placed reliance on the decision of the High Court of Judicature at Madras in **Commissioner of Customs (Export), Chennai Versus I. Sahaya Edin Prabhu** ⁴ and submitted though the facts of the case were different it was also a case relating to attempt to smuggle red sanders and in that case on facts there was nothing to indicate that the CHA has not discharged his duty in the clear appearance various services further in the case on hand it has clearly established that the appellant has failed to discharge his statutory obligation. Reliance was placed on the decision of the High Court of Judicature at Patna in **Bhaskar Logistic Services Pvt. Ltd.**

⁴ 2015 (320) ELT 264 (Mad.)

Versus Union of India ⁵ wherein, the Court declined to interfere with the factual findings recorded by the authorities. Reliance was placed on the decision of the High Court of Judicature at Madras in ***K. V. Prabhakaran Versus Commissioner of Customs, Chennai*** ⁶, wherein under similar circumstances the order revoking the CHA license was upheld. Reliance was placed on the decision of High Court of Madras in ***Shri Rama Thenna Thayalan & Anr. Versus CESTAT, C.M.A. (MD) Nos. 916 and 917 of 2014*** dated 30.11.2021 wherein, the Court refused to interfere with the order passed by the authorities. Reliance was placed on the decision in ***Commissioner of Customs Versus K.M. Ganatra & Co.*** ⁷ to explain the important position of a CHA in the customs house. Reliance was placed on the decision of the High Court of Andhra Pradesh in ***Commissioner of Customs & CX., Hyderabad-II Versus H.B. Cargo Services*** ⁸ which affirmed the imposition of maximum punishment of revocation of license granted to a CHA.

7. On the doctrine of proportionality the learned standing Counsel referred to the decision of the High Court of Gujarat at Ahmadabad in ***Ota Kandla Pvt. Ltd. Versus Union of India*** ⁹ wherein the Court affirmed that punishment of revocation of license was neither harsh nor disproportionate. Reliance was placed on the decision of the High Court of Judicature at Madras in ***Shri***

⁵ 2016 (340) ELT 17 (Patna)

⁶ 2019 (365) ELT 877 (Mad.)

⁷ AIR (online) 2016 (SC) 536

⁸ 2011 (268) ELT 448 (A.P.)

⁹ 2011 (269) ELT 457 (Guj.)

Kamakshi Agency Versus Commissioner of Customs (Mad.)¹⁰, wherein the Court affirmed the order of revocation of license that blank documents were signed by the proprietor of the CHA without knowing the importers/ exporters and nature of goods imported/ exported. Reliance was placed on the decision of the High Court of Delhi in **Premier Shipping Agency Versus Commissioner of Customs**¹¹, wherein the vires and scope of Regulation 21 of Customs Broker Licensing Regulation (2013) (CBLR) was upheld. With the above submissions the learned Senior Standing Counsel contended that this Court will not interfere with the concurrent findings of the fact recorded by the adjudicating authority and affirmed by the learned Tribunal and in the absence of any procedural violation committed by the department, this Court exercising power under Section 130 of the Act will not interfere with the factual findings and accordingly, prayed for dismissal of the appeal.

8. Mr. Ananda Sen, learned Advocate appearing for the appellant by way of reply, while briefly reiterating the contentions advanced by him submitted the decision in *H.B. Cargo Services* was considered and dealt with by the High Court at Delhi in the case of **Shiva Khurana (supra)** and the decision in **Shri Kamakshi Agency** was also considered in **Ashiana Cargo Services** and after taking note of all the decisions the High Court of Delhi dealing with the punishment of revocation of the CHA license held the same to be disproportionate.

¹⁰ 2001 (129) ELT 29 (Mad.)

¹¹ 2015 (315) ELT 27 (Del.)

9. We have heard the learned Advocates appearing for the parties and carefully perused the materials placed on record. In the preamble portion of this judgment we have referred to the two substantial questions of law suggested by the revenue and since, the appellant has raised the issue regarding proportionality of the punishment before the Tribunal as well as before this Court, apart from considering the two substantial questions of law which have been suggested we shall also deal with the aspect regarding proportionality of the punishment imposed on the appellant while dealing with the matter.
10. The appellant was granted a license under Regulation 9(1) of the CHALR, 2004 to carry on the activity as a Customs House Agent. The license was for a period of 10 years from 29.07.2006. The CHALR was notified in exercise of powers conferred by Sub-Section (2) of Section 146 of the Act and in supersession of the Customs House Agents' License Regulation, 1984.
11. Regulation 2(c) defines "Customs House Agent" to mean a person licensed under the Regulations (CHALR) to act as an agent in the transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any Customs station. Regulation 3 places an embargo stating that no person shall carry on business as a CHA relating to the entry or departure of a conveyance or the import or export of goods of any Customs station unless such person holds a license granted under the Regulations (CHALR). The proviso exempts three categories where no license is required, of which we are not concerned in this appeal. The application for being appointed

as a CHA can be made only upon the same being invited by the Commissioner of Customs in terms of Regulation 4. Regulation 5 deals with the applications for license, Regulation 6 deals with the conditions to be fulfilled by the applicant, Regulation 7 deals with scrutiny of applications for license and Regulation 8 deals with the examination which the applicant has to undertake for being considered for grant of license. Regulation 9 deals with grant of license. Sub-Regulation (1) of Regulation 9 states that the Commissioner of Customs shall on payment of a fee grant a license to an applicant who has passed the examination referred to in Regulation 8. Sub-Regulations (2) to (6A) of Regulation 9 deal with the various powers of the Customs authorities including the power to reject an application for grant of license. Regulation 10 deals with execution of bond and furnishing of security which is required to be complied with by the applicant before grant of license under Regulation 9. Regulation 11 deals with the validity of the license and Regulation 12 prohibits transfer of the license in favour of any other person. Regulation 13 deals with obligations of the CHA. In the case on hand, we are to examine as to whether the appellant has discharged his obligations in accordance with Regulation 13 read with the license conditions. The relevant clauses of Regulation 13 as quoted below:

Regulation 13:-

- a) 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;

- b) Transact business in the Customs Station either personally or through an employee duly approved by the Deputy Commissioner of Customs or Assistant commissioner of Customs;*
- c)*
- 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 Deputy Commissioner of Customs or Assistant Commissioner of Customs'*
- e) Exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of Cargo or baggage;*
- f) Not withhold information contained in any order, instruction or public notice relating to clearance of cargo or baggage issued by the Commissioner of Customs, from a client who is entitled to such information;*
- g)*
- h)*
- i)*
- j)*
- k) Maintain records and accounts in such form and manner as may be directed from time to time by a Deputy Commissioner of Customs or Assistant Commissioner of Customs and submit them for inspection to the said Deputy Commissioner of Customs or Assistant Commissioner of Customs or an Officer authorized by him whenever required;*
- l)*
- m)*

- n) Ensure that he discharges his duties as Custom House Agent with utmost speed and efficiency and without avoidable delay;*
- o) Verify antecedent, correctness of Importer Exporter Code (IEC) No., identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information.*

12. Regulation 19 deals with the employment of persons. The CHA may having regard to the volume of work as transacted by him employing any number of persons to assist and the minimum educational qualification required to be possessed by such person shall be 10+2 or equivalent. Appointment of such a person shall be made only after obtaining the approval of the Deputy Commissioner of Customs or Assistant Commissioner of Customs or by a Committee by Officers of Customs. Sub-Regulation 8 of Regulation 19 states that the CHA shall exercise such supervision as may be necessary to ensure the proper conduct of any such employees in the transaction of business as agents and be held responsible for acts or omissions of his employees in regard to that employment. Regulation 20 deals with suspension or revocation of license, Regulation 22, deals with the procedure for suspending or revoking the license granted under Regulation 20. Thus, a combined reading of these relevant regulations of the CHALR shows the importance of the role of a CHA while handling Cargo for export or for import. The conditions stipulated in the regulation clearly show that there is no vested right in the CHA to claim that he is entitled to be granted license or that he can carry on his business activities as done by a normal businessman. In

other words, the activities of a CHA are clearly circumscribed under the Regulations and equally the obligations which a CHA has to discharge have also been clearly delineated in the Regulations. Thus, the conditions contained in the Regulations as well as in the license issued to a CHA are irrevocably binding on the CHA or in other words there cannot be any relaxation of the rigour of the effect of the Regulation on the activities of a CHA. As pointed out above the CHA is not free to employ any person of his choice but only with the approval of the Customs Authorities, that apart the person to be employed is required to possess a minimum educational qualification prescribed under Regulation 19(1). Thus, if a CHA permits a person to represent or handle any cargo for export or import without such person being specifically authorized by the Customs to be an employee of the CHA, it would amount to a clear violation of the Regulation warranting action against the CHA. That apart, the CHA even prior to the issuance of license has irrevocably bound himself by executing a bond and furnishing security. This is to emphasize the role of a CHA while carrying on their activities.

13. Regulation 13 stipulates the obligations of a CHA. Clause (a) of Regulation 13 mandates that a CHA shall obtain an authorization from each of the companies, firms or individuals by whom he is for the time being employed as a CHA and produce such authorization whenever required by the Customs Authorities. The CHA cannot transact business in the Customs station either personally or through an employee duly approved by the department. The CHA is required to 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 Customs Authorities. The words “his client” occurring in Regulation 13(d) would mean the company or the firm or the individual by whom the CHA has been employed. Thus, a CHA is required to obtain an authorization from the person who has employed him as a CHA and produce such authorization as and when required by the Customs Authorities. Therefore, the appellant cannot be heard to say that he received the authorization from a freight forwarder, *Cargoways* and he bonafidely believed the said freight forwarder. This candid admission of the appellant would clearly show that the appellant has disregarded and violated Regulation 13(a). Furthermore, there was no document produced by the appellant to show that the person/ persons who handled the cargo were the employee/ employees of the appellant duly approved by the Customs Authorities. The appellant had placed strong reliance on the *Jetty Sircar License* issued by the Kolkata Port Trust, a temporary license, authorizing *Mithun Kumar Ghosh* to deliver cargo and take delivery of cargo from Kolkata Port Trust on behalf of the appellant. The case of the respondent department is based upon a statement recorded from the Managing Director of the appellant under Section 108 of the Act. Statement recorded under Section 108 of the Act is admissible in evidence and can be a sole basis for taking appropriate action based on such statement. The appellant would contend that the statement recorded from the Managing Director was not voluntary but taken under threat and coercion and therefore, the statement cannot be relied upon. The statement was recorded from the Managing Director of the appellant on two

dates, namely, 18.11.2008 and 27.4.2009. Neither the Managing Director nor the appellant took any steps to retract statement so recorded at the earliest point of time. It is only after the show-cause notice dated 14.08.2009 was issued while submitting their reply dated 17.09.2009 in paragraphs (viii) and (ix) therein, the appellant would contend that the authority pressurized the Managing Director to write a statement as per their dictation and sign the same which he had done under duress and coercion and as such, no reliance should be placed on the same. On a reading of the said contention, we have no hesitation to hold that the said contention is absolutely vague. It is no doubt true that when a statement is recorded and the authority proposes to rely upon the original statement, he is required to deal with the retraction and record satisfaction that the retraction was an afterthought, not admissible and does not impinge on the evidential value of the first statement. As mentioned, the so called retraction is absolutely vague. There is no material or any other reference made to support the stand that the Managing Director was forced to give a statement. As noted above, statements were recorded on two dates, 18.11.2008 and 27.04.2009. If the stand taken by the appellant were to be true, any prudent person would retract the statement at the earliest point of time. The appellant/ Managing Director did nothing after 18.11.2009 but chose to cooperate in the investigation by responding to another summons and also recording another statement on 27.04.2009. Even, thereafter there is no valid retraction or a whisper about the veracity of the statement. For the first time, after the show-cause notice dated 14.08.2009 was issued, while submitting the

reply a faint attempt has been made by the appellant to retract the so called statement. Therefore, we hold that the authority rightly rejected the so called retraction and proceeded to adjudicate the matter taking note of the statement recorded under Section 108 of the Act. The learned Tribunal on its part also examined this aspect and rightly affirmed the view of the Commissioner.

14. The next aspect to be considered is with regard to the effect of the order passed by the Commissioner dated 05.01.2012 dropping the penalty proceedings initiated under Section 114 of the Act. In the said proceedings there were totally 9 noticees and the appellant was the 6th noticee and its Managing Director the 7th noticee. On a perusal of the order-in-original date 05.01.2012 we find that the Commissioner has elaborately discussed the factual matrix and found that a racket of unscrupulous persons involved themselves in a conspiracy to organize smuggling of red sanders out of the country in violation of the Exim Policy, 2004-2009. Further, it was observed that the main offenders had engaged some personal agents to handle the official formalities relating to the export of the consignment on their behalf. Three persons have been named to be the main culprits who have master-minded the conspiracy in the attempt of smuggling the red sanders and they mis-declared the description of the export goods to cover the attempt of smuggling. Further, it was noted that a similar consignment declared as sponge iron, had been exported by the same group of persons in the month of October, 2008 and it can be reasonably be presumed that the same might have contained red sanders which have been smuggled out of India under the guise

of export of sponge iron and therefore, those three perpetrators were held liable for penal action under Section 114(i) of the Act. The three culprits who are said to be the master-mind behind the conspiracy were also arrayed as noticees in the proceedings as noticee Nos. 2, 3 and 8. Out of these three, noticee Nos. 3 and 8 namely, *Ashok Thakur* and *Shakil Khan* could not be apprehended and 8th noticee *Shahanaz Khan* could not be located. The freight forwarder had been found to have assisted the racket in the attempt of illicit export of red sanders and failed to discharge the responsibility and they handled the job without verifying the antecedents of the exporter which tantamounts to not properly carrying out the duty as a forwarding agent and therefore, *Draft Cargoways* were also held liable for penal action under Section 114(i) of the Act. The marketing executive of *Draft Cargoways* was also held liable for penal action as he had assisted the entire racket for material gain. With regard to the appellant the Commissioner holds that they for material gain assisted the racket of attempted smuggling and failed to discharge their responsibilities properly/ legally in dealing with the export goods as a CHA. Further, it was held that the appellant handled the job without verifying the antecedents of the declared exporter, have allowed the freight forwarder, *Draft Cargoways* to use their CHA license for financial considerations. Further *Jetty Sircar Mithun Ghosh* who actually did the clearance work at the dock was not an employee of the appellant and the appellant authorized three employees of *Draft Cargoways* for obtaining *Jetty Sircar* license which tantamounts to not carrying out their obligations as a CHA.

15. Thus, it was held that the appellants have also rendered themselves liable for penal action under Section 114 (i). The Commissioner also noted that by order dated 12.05.2009, the CHA license granted to the appellant was suspended. With regard to the Managing Director of the appellant, the Commissioner noted that he had also assisted the racket in the attempt of illicit export of red sanders for material gain and allowed *Draft Cargoways* to use their CHA license against financial considerations. After noting all the above facts which were referred to in the show cause notice the adjudication proceedings was commenced. The seized red sanders were ordered to be confiscated. With regard to the charge against the appellant and its Managing Director, the Commissioner took note of the submissions of the appellant that their involvement as hirer of container and CHA by itself cannot make them liable for penal action under the Customs Act and at best they can be proceeded against under the relevant regulations. This submissions made by the appellant was accepted by the Commissioner. In other words, the Commissioner was convinced that the involvement of the CHA in the entire matter cannot be solely the reason to take penal action under the Customs Act, but the appellant themselves admitted that at best action could be taken under the relevant Regulation. This aspect was considered coupled with the aspect regarding whether there was criminal involvement on the part of the Customs officers and when there was no specific and direct evidence available in that regard, the Commissioner held that the appellant cannot be made liable for penal action under the Customs Act.

16. Mr. Ananda Sen, Learned Advocate appearing for the appellant would strenuously contend that the proceedings initiated against the Customs Act and the CHALR are based on identical set of facts and one wing of the same department though proposed penal action under Section 114 (i) of the Act dropped the same and with the same set of facts, another wing of the department cannot impose the maximum punishment of revocation of license. To buttress the said submissions, reliance was placed on the decision in *Vijender Singh* where also proceedings against the appellant therein was initiated under the Regulations and for the very same transaction of appellant therein show cause notice was issued as to why penalty should not be imposed under Section 117 of the Customs Act. In the said decision, the Court noted that the first order passed imposing penalty under the Customs Act was set aside by the tribunal on the ground that there is no specific contravention of the Act had been established against the appellant therein and therefore it was held that with the same facts another show cause notice under the relevant Regulations could not have been issued and action could not have been initiated under the Regulations.

17. In the preceding paragraphs, we have noted factual position. The Commissioner did not totally exonerate the appellant from the charge against them but what weighed in the mind of the Commissioner to drop the penalty proceedings was because the appellant themselves stated that mere involvement as a CHA cannot be a ground to take penal action under the Customs Act but at best they can be proceeded under the relevant Regulation.

That apart, the Commissioner also found that there is no evidence linking the Customs officers. Therefore, the Commissioner thought fit to drop the penalty proceedings. The order nowhere exonerates the appellant from the allegations which were the basis for issuance of the show cause notice. In the opinion of the Commissioner penal action under the Customs Act was not warranted. More so because, the appellant themselves reconciled to the fact that they can be proceeded under the relevant Regulations (CHALR). Therefore, placing reliance the proceedings of the Commissioner dropping the penalty proceedings can in no manner impact the order revoking the license granted to the appellant. Therefore on the facts, the decision in *Vijender Singh* is distinguishable. The decision in *Ramaratan* would be wholly inapplicable to the facts of the present case as in the said matter, the Division Bench of the High Court of Bombay took note of the findings rendered by the Criminal Court which was taken note of by the Tribunal and such order was affirmed. Equally the decision in *East & West Shipping Agency* is also distinguishable as the Court granted relief since the order passed by the Settlement Commission was not challenged and that being a judicial proceeding in terms of Section 127 M of the Customs Act, findings rendered therein were held to be binding on the department.

18. Mr. Ananda Sen placed reliance on the decision in *Shiva Khurana* and it was argued that the duty of the CHA is as a mere agent and not that of a revenue official who is empowered to investigate and enquire into the veracity of the statement made orally or in a document and there is nothing in the

Regulations nor in the Customs Act which can cast the higher responsibility on a CHA. This decision cannot be applied to the case on hand as the appellant themselves have admitted that they have received the authorization from the freight forwarder and not the exporter. In the earlier part of this judgment, we have interpreted Regulation 13 (a) and (d) by holding that the appellants/CHA was under a statutory obligation to obtain an authorization from the exporter who has employed them as a CHA. Further the appellant was duty bound to advise his client who is the exporter and not the freight forwarder to comply with the provisions of the Act and in case of non-compliance the CHA has to bring the matter to the notice of the Customs department. Therefore, on the facts which are not in dispute, the case of the appellant cannot improve by placing reliance on the decision in *Shiva Khurana*. At this juncture, it would be beneficial to take note of the decision of the Hon'ble Supreme Court in ***Commissioner of Customs Versus K.M. Ganatra & Co.***¹² where in the Hon'ble Supreme Court quoted with approval the order passed by the Mumbai Tribunal which explains the important position of the CHA in the following terms:

"The CHA occupies a very important position in the Custom 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 importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA

¹² AIR (Online) 2016 (SC) 536

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.”

19. Thus, any contravention of the obligations cast on the CHA even without intent would be sufficient to invite upon the CHA the punishments listed in the Regulations.

20. In **Shri Kamakshi Agency** the role of the CHA had been set out in the following terms:-

The very purpose of granting a license to a person to act as Custom 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 licence 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 licence 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 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 show 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 licence 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 or 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.

21. The above decision was referred to in **H.B. Cargo Services** and affirmed the maximum punishment as provided for under the regulation to be imposed on the earlier CHA. In **Shri Rama Thenna Thalayan**, the case was also one of the smugglings of red sanders and the Court took note of the fact that the very admission of the CHA itself is sufficient to hold that they acted recklessly, negligently in using their CHA license and affirmed the penalty which was imposed upon.

22. In **K.V. Prabhakaran** the following where two substantial questions of law framed for consideration among the 7th questions which are as follows:

- 1) *“Whether the Tribunal was justified in sustaining the Order-in-Original, imposing penalty when admittedly the said Order-in-Original only, found violation of the provisions of Customs Broker Licensing Regulations, 2013?”*
- 2) *Whether the Tribunal misdirected itself in its enquiry in the appeal in holding that the appellant would be liable for penalty in terms of Section 114 of the Customs Act, 1962, when admittedly, no positive material has been placed to show overt acts of abetment with prior knowledge, especially when the Appellant had no reason to believe that the goods tendered for export was indeed the cargo which was stuffed in the container?”*

23. In the said case the CHA whose license was revoked had taken a defence, as was argued before us in this appeal, that the containers were sealed by the Customs Officers and the question of verification or holding the CHA liable for the attempt of smuggling cannot be made. The Court after taking note of the various decisions which was cited at the bar held that lending the CHA license to a third party for mis-usage without knowing the actual importer and the goods to be imported is a serious issue and the CHA having misused the license acted recklessly and carelessly by lending support to unscrupulous persons for facilitating smuggling activities, cannot be viewed lightly. Accordingly, the substantial questions of law framed were answered against the CHA. The said decision could very well be applied to the facts of the case on hand.

24. In ***Bhaskar Logistics Services Private Limited***, the Court refused to interfere with the factual findings recorded by the authorities as under Article 226 of the Constitution of India, the Court will only evaluate the correctness of the decisions making process and not the decision itself. In fact, the scope of the present appeal has been clearly circumscribed under the provisions of the Customs Act and the Court is required to decide the substantial questions of law and therefore the contentions advanced on behalf of the appellant have to be tested on the anvil as provided under Section 130 of the Act. Ongoing through the order passed by the Commissioner revoking the licence issued to the CHA, and the order passed by the Tribunal we find that there is no error in the decision-making process nor is there any perversity in the manner in which the authority or the tribunal have adjudicated the facts in issue. Hence, it is not a fit case where the Court will interfere with such findings. It was argued by the Learned Advocate appearing for the appellant that though the tribunal on the earlier round of litigation had remanded the matter to the Commissioner to take into consideration the order dropping penalty proceedings under the Customs Act and are re-do the matter, such order has been brushed aside. On perusal of the order passed by the Commissioner dated 19.12.2013, we find the submissions to be incorrect, as the Commissioner has analysed the scope of both the proceedings and rightly held that the action initiated under the CHALR was without prejudice to the action taken under the provisions of the Customs Act. To put it differently though the Regulation has been framed under Section 146 of the Customs Act the Regulations assumes importance as

the appellant is a licensee under the Regulations. In fact, it can be interpreted to mean a special law which governs the duties, responsibilities and obligations of a CHA. Therefore, the dropping of the penalty proceedings in the case on hand cannot have any impact on the revocation of the licence granted under the CHALR. As already noted, while dropping the penalty proceedings the appellant has not been exonerated but as the appellant themselves stated that at best they can be proceeded against under the Regulation (CHALR) the Commissioner was of the view that penal action need not be initiated under the Customs Act. Therefore, the Commissioner on remand has rightly understood the scope of remand and the purport and import of the order-in-original dated 05.01.2012. There is a categorical finding on fact which could not be assailed by the appellant, to the effect that the appellant did not know who the exporter was and the appellant did not directly receive the export order or the consignment from the exporter. This having been admitted, it would clearly show that they have failed to discharge their statutory obligations under Regulation 13 (b) and 19 (8) of the CHALR.

25. Thus, we find that the order passed by the tribunal does not suffer from any illegality or perversity for us to interfere and consequently the substantial questions of law have to be answered against the appellant.

26. The learned Advocate appearing for the appellant submitted that the punishment of revocation of licence is a major punishment and considering the facts and circumstances of the case is wholly disproportionate. To buttress the said submissions, reliance was placed on the decision in **Ashiana Cargo**

Services. In the said, G Cards were issued to two employees of M/s. V K International and it was found that those employees were misusing the G Cards and indulging in illegal narcotics exports. Action was initiated against V K International under the provisions of the CHALR for contravention of Regulation 13 (b) (e) and 19 (8). This ultimately culminated in an order revoking the CHA license under Regulation 20 (1) which was challenged before the Learned Tribunal. Before the Tribunal, there was a difference of opinion wherein one of the Learned Members held that the punishment of revocation was too harsh. The other Learned Member held that the punishment of revocation was justified under the facts and circumstances. The matter was referred to a third member who held that the punishment of revocation of licence was justified. The matter travelled to the High Court wherein it was contended that there is no finding of culpability or *mens rea* on the appellant/CHA and there is no direct or indirect involvement and the department did not establish the direct involvement of the CHA with the nefarious activities of the employees of V K International. The Court examined as to the proportionality of penalty awarded and after noting the decisions of the Hon'ble Supreme Court in **Coimbatore District Central Cooperative Bank Versus Coimbatore District Central Bank Employees Association** ¹³. It was held that the consequences of revocation being serious, the proportionality doctrine must inform the Commissioner's analysis and this is also the exercise the Court must undertake though with the major of deference

¹³ (2007) 4 SCC 669

towards the Commissioners conclusion. After noting the facts of the case and also that the appellant therein did not have knowledge that the illegal exports were effected by using of G Cards given to V K International's employees, there were no active or passive facilitations by the appellant therein. The Court also noted that providing G Cards to non-employees is in violation of the CHALR Regulations. But the revenue did not argue that this by itself was sufficiently grave so as to justify the extreme measure of revocation. Taking note of these factors as well as the stand of the revenue in the said case, the court held that presence of an aggravating factor is important to justify the penalty of revocation. After discussing and taking note of the several decisions including the decision relied on by the revenue in the case of **H.B. Cargo Services and others** the Court held that there is a factual finding that CHA was not aware of the misuse of the G Cards and therefore, the Court held that in the absence of any *mens rea*, the punishment of revocation of this CHA license was not proportional and accordingly the order was set aside.

27. In **Union of India and Another Versus G. Ganayutham** ¹⁴, the Hon'ble Supreme Court considered the position of proportionality in administrative law in England and India and held as follows:

The current position of proportionality in administrative law in England and India can be summarized as follows:-

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out

¹⁴ (1997) 7 SCC 463

if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.

(3) (a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him arrived at the primary judgment in the matter he had done.

(b) If the Convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the

Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4) (b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principles of 'proportionality' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Article 19, 21 etc. are involve and not for Article 14.

Punishment in disciplinary matters:

Wednesbury & CCSU tests:

- (1) Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of 'proportionality'. There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to 'irrationality' there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in 'outrageous' defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain 'Ranjit Thakur'.*
- (2) In Ranjit Thakur, this Court interfered with the punishment only after coming to the conclusion that the punishment was in*

outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words, this Court felt that, on facts, Wednesbury and CCSu tests are satisfied. In another case, in B.C Chaturvedi Versus Union of India [1995] (6) SCC 749] a three Judge Bench said the same thing as follows (SCC P. 762 para 18)

“The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusions on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal it would appropriately would the relief, either by directing the disciplinary authority/appellate authority to reconsider the penalty imposed or to shorten the litigation, it may itself, in exceptional and rare case, impose appropriate punishment with cogent reasons in support thereof”

Similar view was taken in Indian Oil Corporation Versus Ashok Kumar Arora [1997 (3) SCC 72] that the Court will not intervene unless the punishment is wholly disproportionate.

28. In **Coimbatore District Central Cooperative Bank** while considering the doctrine of proportionality it was held as follows:

“Proportionality is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise the elaboration of a rule of permissible priorities

De Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ("balancing test") permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant consideration, the latter ('necessity test') requires infringement of human rights to the least restrictive alternative [‘Judicial Review of Administrative Action’ (1995); pp 601-605; para 13.085; see also Wade and Forsyth; ‘Administrative Law’; (2005); p. 366]

29. In **Chairman Cum Managing Director Coal India Limited and Another Versus Mukul Kumar Chowdhury and Others** ¹⁵, the doctrine of proportionality was explained in the following terms:

The doctrine of proportionality is, thus, well recognized concept of judicial in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault.

30. The above decisions were taken note of in **OTA Kandla Private Limited** and it was held as follows:

In view of the above principles laid down by the Hon'ble Supreme Court in various judgments it clearly transpires that the judicial review of administrative action or of proportionality of punishment is permissible only if the

¹⁵ Mumbai AIR 2010 SC 75

decision of the decision maker is found to be illegal, unreasonable, irrational or suffering from any procedural impropriety, and that the High Court in exercise of jurisdiction under Article 226 or 227 should not interfere with the legal orders of Administrative Authorities, So far as the facts of the present case are concerned, as stated hereinabove, respondent No. 3- the CEGAT has upheld the order of respondent No. 2 revoking the licence of the petitioner as CHA on the ground of petitioner having committed breach of statutory regulations and the misconduct by misusing its licence. In the opinion, of this Court, once the decision of the respondent Authorities that the petitioner committed violation of statutory regulations and the misconduct if found to be within the legal parameters, all the legal consequences as a result of such violation and the breach have to follow. The case of the petitioner being the case of contravention of said regulations and misuse of licence as CHA, the respondent Authorities have rightly revoked the licence of the petitioner. The said decision having been arrived at by the respondents, after taking into consideration all relevant material and the said Regulation, and after following the due process of law, it could not be said that the said decision was illegal, unreasonable, perverse or irrational. Under the circumstances, it could also be not said that the punishment of revocation of licence was a harsh punishment or the punishment de hors the doctrine of proportionality. The petitioner having failed to point out any perversity or unreasonableness on the part of respondent authorities warranting judicial intervention, this Court does not find any merits in the present petition.

31. Bearing the above legal principles in mind namely as to how the doctrine of proportionality has to be applied, if we examine the facts of the case on hand, we find that the appellant has not been completely exonerated by the Commissioner while dropping the penal action under the Customs Act. The admitted fact is that the appellant did not receive the export order from the exporter which is mandatory under the Regulations. Merely by placing reliance on the "Let Export Order" said to have been given by the Customs authorities at the first instance cannot exonerate the appellant nor can it in any manner waive or dilute the obligations of the appellant as the CHA as specified under the Regulations. As pointed out earlier intention is irrelevant. The case of the appellant is that they reposed trust and confidence on the freight forwarder, unfortunately the regulation does not provide for conducting the operation as a CHA based on trust and faith on a freight forwarder, as the obligation is on the CHA. Even a solitary instance of a violation, considering the complexity of the problem and the evidence which was available can be sufficient to impose the maximum penalty of revocation. In the order passed by the Commissioner while initiating penal action against the exporter there is a reference to an earlier export done by the very same exporter stated to have exported sponge iron and the department is of the reasonable belief that the earlier export would also have been export of red sanders. That apart, we find that the wordings in the letter of authorization dated 07.11.2008 alleged to have been given by the exporter is curiously worded. If the exporter Himalayan Tour and Travels was a genuine exporter, there would be no necessity to give any

undertaking that the Cargo does not contain any contraband. The letter does not specify as to from where the cargo has been procured more importantly the exporter claims himself to be a tour operator as well as an importer-exporter. There was nothing placed on record by the exporter to indicate that he was a regular exporter of sponge iron or any other product.

32. Therefore, we can safely hold that the letter given by the exporter dated 07.11.2008 is a document which has been created so as to enable the appellant to wriggle out of the conspiracy which was hatched. Therefore, the adjudicating authority as well as the tribunal rightly did not give any credence to the letter dated 07.11.2008.

33. Therefore, indirectly the appellant has paved way for denigrating the environment of the country by aiding an attempt to plunder its natural resources more particularly a very rare species of tree which predominantly grows in the Indian Sub-continent. Thus, we are not persuaded to exercise any leniency in favour of the appellant and the decision in the case of **Ashiana Cargo** is clearly distinguishable on facts and it does not persuade us to exercise any compassion or leniency in the case of the appellant.

34. Thus, for all the above reasons, we affirm the order passed by the tribunal and consequently confirm the punishment of revocation of the CHA

license granted to the appellant and forfeiture of the security deposit. The substantial questions of law are answered against the appellant. No costs.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)



(P.A.- PRAMITA/SACHIN)

OD-1

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

CUSTA/4/2015
WELCOME AIR EXPRESS PVT. LTD.

Vs.

COMMISSIONER OF CUSTOMS (AIRPORT & ADMINISTRATION)

BEFORE:

The Hon'ble JUSTICE T. S. SIVAGNANAM

AND

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 14th July, 2022.

[Via Video Conference]

Appearance:

Mr. Rittick Chowdhury, Adv.

Mr. S. K. Poddar, Adv.

...for appellant

The Court : - This appeal has been listed under the caption "To Be Mentioned".

It is pointed out that spelling mistake has occurred while reflecting the names of both of us in page 46 of the judgment and order dated 4th May, 2022. Accordingly, spelling mistake is rectified and correct spelling is reflected.

This order shall form part of the judgment and order dated 4th May, 2022.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

SN/GH.