

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

CUSTOMS APPEAL NO.10 OF 2022

The Principal Commissioner of Customs
(General)

New Customs House,
Ballard Estate,
Mumbai-400 001

... Appellant

Versus

Mahavir Logistics,
215/5783, Arunodaya Darshan CHS,
90 Ft. Road, Ghatkopar (East),
Mumbai-400 075

... Respondent

* * *

Ms. Maya Majumdar a/w Mr. Karan Adik for the Appellant.

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**CORAM : DHIRAJ SINGH THAKUR &
VALMIKI SA MENEZES, JJ.**

DATE : 7 DECEMBER 2022

: JUDGMENT :

[Per DHIRAJ SINGH THAKUR, J.]

. The present Custom Appeal has been preferred under Section 138 of the Customs Act, 1962 (“the Act”) against the Order dated 11 January 2021, passed by the Customs Excise and Service Tax Appellate Tribunal, Mumbai (CESTAT) in Customs Appeal No.85932 of 2020.

2 The following substantial question of law is framed for our consideration :

Whether the CESTAT is right in law in allowing the appeal of the CB being the first breach irrespective of the contravention of provisions of Regulations of the Customs Brokers Licensing Regulations and gravity of the offence ?

3. Briefly stated the material facts are as under :

The Respondent is a duly licenced Customs Broker. A show cause notice dated 26 February 2018 issued under Regulation 20 of the Customs Broker Licensing Regulations, 2013 (CBLR, 2018) was served upon the Respondent pursuant to an inquiry conducted against the Respondent. In the show cause notice, it was alleged that as per the information obtained from the Additional Director General, Directorate of Revenue Intelligence, Mumbai Zonal Unit, M/s Forus Enterprises, New Delhi had evaded payment of customs duty amounting to Rs.54,07,368/-. It was alleged that during the course of investigation, it was found found that the clearance of imports were actually made by one Anil Kumar Vachhar, using the name and Import Export Code (IEC) of M/s Forus Enterprises. The Customs House Broker, the Respondent herein, it was alleged, was aware of the said fact and yet had helped Shri Anil Kumar Vachhar in clearing the said goods.

4 A show cause notice, beside the Respondent M/s Mahavir

Logistics, also named M/s Unnati Shipping Agency P. Ltd. and two others as Customs Broker Firms, who had made clearances of the goods imported by the beneficiary importer M.s Anil Kuamr Vacchar.

5 The value of the goods imported is stated to have been mis-declared, in regard to which, penalty proceedings were also initiated besides the confiscation of goods in terms of Section 111(m) of CBLR, 2013.

6 By virtue of show cause notice dated 26 February 2018, the Respondent was asked to show cause as to why licence bearing No.11/1819 be not revoked and security deposited be not forfeited and penalty be not imposed under Regulation 18 read with 20 and 22 of the CBLR, 2013 for its failure to comply with the provisions of Regulations. The stand of the Customs Broker before the Adjudicating Authority was that it had satisfied itself about antecedent of import-export code (IEC) holders from the DGFT website, which was an authentic website, PAN card provided by the importer, which is also an authentic instrument, bank attested signatures and copy of the ledger.

The adjudicating authority, however, held the Respondent Customs Broker guilty of negligence as also held that it had failed to discharge its duty under CBLR, 2013 (now CBLR, 2018). It was also held that the Customs Broker was not diligent in undertaking KYC of the background of the importers and accepted documents without verifying the signatures on the authority letter and PAN card of the IEC holders. It was also held that had the Customs Broker been vigilant, loss to the revenue of the Government could have been prevented. In those circumstances, the adjudicating authority, the Commissioner of Customs, Mumbai Zone-1, in addition to revoking the Customs Broker Licence of the Respondent, ordered the forfeiture of the entire amount of the security deposit furnished by the Respondent under Regulation 18 of CBLR, 2013 (now Regulation 14 of the CBLR, 2018) as also imposed penalty of Rs.50,000/-.

7 An appeal was preferred by the Respondent before the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, which came to be decided by virtue of the Order dated 11 January 2021. The CESTAT, in principle, upheld the findings recorded by the Adjudicating Authority, however, it set aside the Order to the extent of revocation of Customs Broker

Licence while upholding and confirming the forfeiture of the security deposit and the imposition of penalty of Rs.50,000/-. According to the CESTAT, the Order to the extent of revocation of the Customs Broker Licence of the Respondent was highly disproportionate.

8 We have heard the learned counsel for the parties and gone through the orders on record.

9 There is no appeal preferred by the Respondent against the Order passed by the CESTAT. From the record, we also noticed that the mis-declaration as regards the value of the goods was also made good by the beneficiary importer. The stand of the Respondent before the authorities below consistently had been that it had verified the credentials of the IEC holder from the website of the DGFT and that the KYC documents were accordingly scrutinized as per its obligations in terms of the CBLR, 2013. It was also the stand of the Respondent that the CBLR, 2013 did not envisage a physical verification of the antecedents of the importer as the Customs Broker is located in Mumbai and an importer may be situate elsewhere in the Country. A physical verification would entail expenses which would be beyond the meagre commission which a

Customs Broker is entitled to receive for the services rendered by him for clearing the imports through the Customs. The emphasis was that it had actually verified the antecedents and satisfied its obligation towards verification of the KYC norms of M/s. Forus Enterprises, whereas the stand of the revenue is that the Respondent had failed to discharge its obligations under the CBLR, 2013 to verify the antecedents of the actual importer, i.e., Shri Anil Kumar Vachhar.

10 In the present case, since the authorities below have all held that there was failure on the part of the Respondent to follow the KYC norms and since the Respondent is not in appeal against the Order of the CESTAT, the only issue that is required to be considered is whether the Order passed by CESTAT to the extent it set aside the Order of the Adjudicating Authority for revocation of the Customs Broker licence of the Respondent on the grounds of proportionality is sustainable or not? This Bench has dealt with an identical matter on facts and in law in the case of *The Principal Commissioner of Customs (General) Vs. Unnati Shipping Agency P. Ltd, Customs Appeal No.6 of 2022*, decided on 23 November 2022. In that case also names of M/s Unnati Shipping Agency P. Ltd. and M/s Mahavir Logistics, both figured in the show cause notice, which

was served on the Respondent. The factual matrix including the allegations contained in the show cause notice and the alleged violation of the relevant provisions of law, as also the Order of the Adjudicating Authority, are identical.

11 In that case also the adjudicating authority had passed the Order for forfeiture of security deposit, imposed penalty of Rs.50,000/- and ordered revocation of the Customs Broker Licence of the Customs Broker (Unnati Shipping). The Tribunal, however, while upholding the Order as regards the imposition of penalty and forfeiture of the security deposit had set aside the Order to the extent of revocation of the Customs Broker Licence of M/s Unnati Shipping Agency P. Ltd. on the ground of proportionality. This Bench by virtue of judgment and Order dated 23 November 2022 upheld the Order of the CESTAT by placing reliance on the doctrine of proportionality.

12 The doctrine of proportionality is a well recognized concept of judicial review which Courts invoke to test the punishments imposed which are disproportionate to the alleged misconduct.

13 In *Ranjit Thakur Vs. Union of India & Ors.*¹, the Apex Court, while

1 (1987)4 Supreme Court Cases 611

testing the imposition of punishment on the principle of proportionality held :

25. Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court- Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court- Martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 Weekly Law Reports 1174 (HL) Lord Diplock said:

"... Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second irrationality ' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community..."

27. In the present case the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain

uncorrected in judicial review.”

14 In *Chairman-cum-Managing Director, Coal India Ltd. and anr vs. Mukul Kumar Choudhuri & ors.*², it was held :

19. The doctrine of proportionality is, thus, well recognized concept of judicial review 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. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.

20. One of the tests to be applied while dealing with the question of quantum of punishment would be : would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.

21. In a case like the present one where the misconduct of the delinquent was unauthorized absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's Rules and Regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer

2 (2009) 15 Supreme Court Cases 620

would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations.

15 In *Union of India & ors vs. Bodupalli Gopalaswami*³, the Apex Court has held :

"28. Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

16 In *S.R. Tewari vs. Union of India and anr.*⁴, the Apex Court has held :

"29. In *Union of India & Ors. Vs. R.K.Sharma*, this Court explained the observations made in *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611 observing that if the charge was ridiculous, the punishment was harsh or strikingly disproportionate,

3 (2011) 13 Supreme Court Cases 553

4 (2013) 6 Supreme Court Cases 602

it would warrant interference. However, the said observations in Ranjit Thakur are not to be taken to mean that a court can, while exercising the power of judicial review, interfere with the punishment merely because it considers the punishment to be disproportionate. It was held that only in extreme cases, which on their face, show perversity or irrationality, there could be judicial review and courts should not interfere merely on compassionate grounds.”

17 Since the facts and issues involved in the that case are not different from the one which we are concerned with in the present case, we do not see any justification or reason to take a different view in this case than the one taken in the case of Unnati Shipping.

18 In the facts and circumstances of the case we are of the opinion that although the Respondent failed to discharge its obligation under CBLR, 2013, yet it cannot be denied that efforts were made by the said Respondent to discharge a part of its obligations under the said Regulations and, therefore, the Order with regard to revocation of the Broker Licence would be excessive in the facts and circumstances of the case.

19 Be that as it may, we are of the opinion that no substantial question of law arises in the present case. The appeal is accordingly dismissed.

(VALMIKI SA MENEZES, J.) (DHIRAJ SINGH THAKUR, J.)

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