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

CUSTOMS APPEAL NO. 6 OF 2022

The Principal Commissioner of
Customs (General),
New Customs House,
Ballard Estate, Mumbai. .. Appellant
Vs.
Unnati Shipping Agency P. Ltd.
Room No. 208, 2nd Floor,
45/47 Mint Chamber,
5, Mint Road, Fort, Mumbai .... Respondent

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Mr.Karan Adik with Mr.Dhananjay B. Deshmukh, Advocate for appellant.
Mr.S.K. Mathur, Advocate for respondent.

CORAM : DHIRAJ SINGH THAKUR AND VALMIKI SA MENEZES, JJ.

DATE : 23rd NOVEMBER 2022

PER DHIRAJ SINGH THAKUR J. (OPEN COURT) :

1. The present Custom Appeal has been preferred under section 138 of the Customs Act, 1962 against the order, dated 11th January 2021 passed by the Customs Excise and Service Tax Appellate Tribunal, Mumbai (CESTAT) in Customs Appeal No.85927 OF 2020.

2. The following questions of law have been framed for our consideration :

(i) Whether the CESTAT was right in setting aside the Order-in-Original on the ground that the punishment of revocation of license of CB, is disproportionate even though the charges under Regulation 11(a), 11(d), 11(e) and 11(n) were proved?

(ii) Whether the CESTAT was right in setting aside the order-in-Original of the revocation of the CB license and held that it is first breach of CB and punishment of revocation of license of CB is too harsh when in the facts and circumstances of the case, it was second breach by the CB?

(iii) Whether the CESTAT was right in law in partly setting aside the Order-in-Original even after coming to the conclusion that the CB has violated the Regulations under CBLR 2013 and failed to discharge his obligations?

(iv) Whether the CESTAT was right in law in setting aside the order of revocation of license when the Inquiry report and Order-in-Original clearly held CB responsible for the irregularities?

(v) Whether the CESTAT, being the last fact finding authority, has passed a cryptic order without examining the facts of the case in its totality?

3. Briefly stated the material facts are as under :

The respondent is a duly licensed Customs Broker. A show cause notice dated 26th February 2018 issued under Regulation 20 of the the Customs Broker Licensing Regulation, 2013 ('CBLR, 2013') 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 Rs.54,07,368/-. It was alleged that during the course of investigation, it transpired that the clearance of imports were actually made by one Shri Anil Kumar Vachhar, using the name and Import Export Code (IEC) of M/s. Forus Enterprises. The Custom House Broker, respondent herein, it was alleged, was aware of the said fact and yet had helped Shri Anil Kumar Vachhar in clearing the said imports.

On account of mis-declaration of the value of the imported goods by M/s. Forus Enterprises and the actual importer Shri Anil Kumar Vachhar, penalty proceedings were also sought to be initiated in that regard besides the confiscation of goods in terms of section 111(m) of CBLR, 2013.

4. By virtue of the show cause notice, the respondent was asked to show cause, as to why the licence, bearing No.11/1779 issued in its name be not revoked and the security deposit be not

forfeited and the penalty be not imposed under Regulation 18 read with Regulations 20 and 22 of the CBLR, 2013 on account of its failure to comply with the provisions of the CBLR, 2013.

5. Written submissions were filed to the show cause notice which were considered by the Adjudicating Authority, i.e., the Principal Commissioner of Customs (General) Mumbai Zone-I and finally an order came to be passed on 16th September 2020, whereby besides revocation of the Customs Broker Licence of the respondent, penalty of Rs.50,000/- was imposed with forfeiture of the amount of Rs.5,00,000/- which was the security deposit with the respondent.

The Adjud icating Authority held the respondent guilty of negligence as also violation of the obligations, which were otherwise supposed to be discharged by the respondent as a Customs Broker under the CBLR, 2013.

It was held that the respondent had not been careful and diligent in undertaking the KYC of the background of the importer and accepted documents without verifying the signatures on the authority letter and the PAN Card of the IEC holder. It was held that the Director of Customs Broker, respondent herein, had never met or contacted the IEC holder Shri Balam Singh Rawat, while clearing the imported consignments filed in the name of M/s.Forus Enterprises. It needs to be mentioned that Shri Balam Singh Rawat was the sole proprietor of M/s. Forus Enterprises.

6. An appeal was preferred by the respondent before the CESTAT, which came to be decided by virtue of order dated 11th January 2021. The CESTAT, in principle, upheld the findings recording 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.

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

8. 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.

9. 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?

10. 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.

11. In ***Ranjit Thakur Vs. Union of India & Ors.*** [1]**,** the Apex Court, while 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 A 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 B logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil

1 (1987)4 SCC 611

Service Unions v. Minister for the Civil Service, [1984] 3 Weekly Law Reports 1174 (HL) Lord Deplock 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 l 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."

24. In ***Chairman-cum-Managing Director, Coal India Ltd. and anr vs. Mukul Kumar Choudhuri & ors.***[2]**,** it was has 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

2 (2009) 15 SCC 620

of proportion to the fault. Award of punishment which is grossly in access 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 10 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 would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations.

25. 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,

3 (2011) 13 SCC 553

> 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."

26. 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, 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."

4 (2011) 13 SCC 553

12. Keeping in view of the ratio of the judgments discussed hereinabove and considering the fact that the respondent had, in fact, discharged a part of its obligation under the CBLR, 2013, although not in its entirety, we feel that the order with regard to revocation of the Customs Broker Licence would have been excessive in the facts and circumstances of the case and the issue has been rightly dealt with by the CESTAT.

13. In our opinion, no substantial question of law arises in the present appeal. The appeal is accordingly dismissed.

[VALMIKI SA MENEZES, J.] **[DHIRAJ SINGH THAKUR, J.]**