OD-16

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

CUSTA/13/2020

COMMISSIONER OF CUSTOMS (ADMN. & AIRPORT)
VS.
M/S. MALLICK CLEARING AGENCY

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 18th September, 2024

Appearance :
Mr. Bhaskar Prosad Banerjee, Adv.
Mr. Kaustav Kanti Maiti, Adv.
...for appellant

Ms. Micky Chowdhury, Adv.
Mr. B.N. Pal, Adv.
...for respondent

The Court : This appeal filed by the Customs department under Section 130 of the Customs Act, 1962 (the Act). The appeal was admitted on 13th January, 2021 on the following substantial questions of law :-

i) Whether setting aside of the order in original by the Learned Tribunal is justified when the respondent has not followed any of the condition mentioned under Regulation 11(a), 11(d), (k) and 11(n) of the CBLR 2013 ?

ii) Whether the Learned Tribunal's order is correct when it is admitted and apparent on the face of the record that the respondent has not obtained any job clearance from the exporter and the authorization has been obtained through intermediaries after filing of the shipping bill ?

We have heard Mr. Bhaskar Prosad Banerjee, learned counsel appearing for the appellant and Ms. Micky Chowdhury, learned counsel for the respondent.

The short issue which falls for consideration in this appeal is whether the Learned Tribunal was right in allowing the assessee's appeal by the impugned order and setting aside the order passed by the Commissioner of Customs revoking the Custom House License granted under Regulation 18 of the Custom Broker Licensing Regulation, 2013 (CBLR) and ordering forfeiture of the security deposit under Regulation 18 (new Regulation 14) of CBLR, 2018.

Learned counsel appearing for the appellant sought for interim order so that the Customs Broker License of the respondent can be operated. It is submitted by the learned counsel for the Department that this Court by order dated 21st April, 2022 dismissed such a prayer holding that no interim order can be granted to the respondent as the appeal has to be heard. Firstly, the order dated 21st April, 2022 is only an interim order where the Court recorded a prima facie finding. Therefore, any such prima facie finding cannot operate as a bar of this Court to consider the correctness of the order passed by the Tribunal when the appeal is heard finally.

Having disposed of the preliminary objection raised by the learned counsel for the appellant, we consider as to whether the learned Tribunal was right in setting aside the order passed by the Commissioner of Customs revoking the Customs Broker License granted to the respondent. The only allegation in the show cause notice issued by the Directorate of Revenue Intelligence (DRI) is that the respondent on receipt of the KYC documents, authorization letter IEC of M/s. Panel Pin Manufacturing Company Pvt. Ltd. had initiated the clearance work without meeting authorized person of the exporter and work was received through many people in between acting as middlemen. Apart from this there appears to have been no other specific allegation of any malpractice or misfeasance. This aspect was considered by the Tribunal and on facts it concluded that respondent cannot be penalized for not physically interacting with the exporter which is not provided under the CBLR. More importantly, what is required to be seen is that Excise seal of the shipper were found to be intact. This has been admitted by the Department. Even in the Order-in-original dated 26th July, 2018 in paragraph 4 wherein the adjudicating authority has recorded that the container was opened and examined in the presence of the Customs Officer, representative of the Customs Broker and two independent witnesses on 6th May, 2017 and during the examination the container was found to be sealed with an agent seal and two lead seals and that the seals were found intact as attached to the container. It is only thereafter seals were broken.

Reading the order of adjudication does not show as to whether the Department/DRA investigated as to how seal came to be fixed by the authorities and whether there was any involvement of the officials in the said process. Be that as it may, the learned Tribunal has considered the facts of the case and has arrived at the finding that the relevant provisions of the CBLR does not envisage physical verification of the exporters and antecedents nor verification of the factory premises of the exporter concerned. One other aspect which needs to be also taken note of is that the proceedings initiated under the provisions of the Customs Act culminated in an order passed by the Commissioner of Customs (Port), Kolkata dated 14th February, 2019 imposing a penalty of Rs.10 Lacs on the partner of the respondent Surendra Nath Mallick. This order was challenged before the Tribunal in Customs Appeal No.76489 of 2019, which appeal was allowed by the learned Tribunal by order dated 6th February, 2024 and in paragraph 10 of the said order the Tribual has held that it is a settled proposition in law that for imposition of penalty it is necessary to establish a substantive role on the part of the concerned person or the shipper of mens ria on the part of such person. After pointing out the above legal position, the Tribunal set aside the finding of the adjudicating authority. The said order appears to have attained finality. One more aspect which has been brought to our notice by the learned counsel for the respondent is that the DRI initiated criminal proceedings against the partner of the respondent and based on a petition filed by DRI before the Chief Metropolitan Magistrate, Kolkata. An order was passed on 8th August, 2023 stating that the adjudicating authority did not recommend prosecution against the partner of the respondent who was arrayed as accused no.1. There is also a communication sent by the Senior Intelligence Officer (Group III), Kolkata Zonal Unit, DRI stating that necessary verification has been done regarding the Customs Broker namely, Surendra Nath Mallick and nothing adverse was noted against the firm or the respective person. Thus, the other collateral proceedings have also ended in favour of the partner of the respondent.

Thus, considering the factual position we are of the view that the view taken by the learned Tribunal is one of the plausible views and the same cannot be faulted.

For the above reasons, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM, C.J.)

(HIRANMAY BHATTACHARYYA, J.)

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