

A COMMISSIONER OF CUSTOMS

v.

M/S K. M. GANATRA & CO.

(Civil Appeal No. 2940 of 2008)

B JANUARY 14, 2016

[DIPAK MISRA AND N. V. RAMANA, JJ.]

C *Customs House Agents Licensing Regulations, 1984 – Regulations 10, 13, 14 – Misuse of Customs House Agent licence (CHA) issued in favour of respondent – Transfer of licence by respondent and was a habitual offender in the same manner – Cancellation of license by Commissioner of Customs – However, direction for restoration of licence after expiry of three years from the date of suspension of the licence by the tribunal – High Court upheld the order – On appeal, held: Transfer of licence in*
D *contravention of the Regulations is a serious violation – Misconduct reflects a chain of acts and thus, the discretion exercised by the tribunal is inappropriate – In view of the important position of CHA in the Custom House, misconduct is to be seriously viewed – Orders of High Court and tribunal set aside and that of the Commissioner restored – Custom House Agent Licensing Regulations, 2004 –*
E *Regulations 12, 13(b), 13(d), 20(1)(c), 13(n).*

Allowing the appeal, the Court,

F **HELD: 1.1** The tribunal can dislodge or confirm or modify the order. The vesting of jurisdiction with the tribunal by the statute is beyond any pale of controversy. When a jurisdiction is exercised, it has to be exercised in accordance with law, regard being had to the factual matrix of the case. The tribunal having been conferred the power to modify the order, restricting the period of revocation would definitely come within the sweep of the said power. As regards the issue whether the said jurisdiction
G has been properly exercised in the instant case, on a perusal of the order passed by the Commissioner, it is clearly perceptible that there has been number of violations by the respondent. The enquiry report which formed the plinth of the order of the Commissioner demonstrates that by virtue of the transfer of the
H licence in contravention of the Regulations, on many an occasion,

immense financial loss has been caused to the revenue. As the factual matrix would exposit, it is a serious violation. The misconduct reflects a chain of acts. In such a situation, the discretion exercised by the tribunal is inappropriate. [Para 14] [172-D-G]]

1.2 In **Noble Agency* case the tribunal observed that the Customs House Agent (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 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 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. Reg 14 of the Customs House Agents 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. As such the misconduct has to be seriously viewed. The orders of the High Court and the tribunal is set aside and that of the Commissioner is restored. [Para 15, 16] [172-G-H; 173-A-D]

Noble Agency v. Commissioner of Customs, Mumbai
2002 (142) E.L.T. 84 (Tri. - Mumbai) – approved.

Case Law Reference

2002 (142) E.L.T. 84 (Tri. - Mumbai) approved. Para 15

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2940 of 2008

From the Judgment and Order dated 10.08.2007 of the High Court of Judicature at Bombay in Customs Appeal No. 71 of 2007

V. Mohana, B. V. Niren, Binu Tamta, B. Krishna Prasad for the Appellant.

V. M. Doiphode, Rajesh Kumar, Krishana Kumar R. S., K. K. L. Gautam for the Respondent.

The Judgment of the Court was delivered by

A **DIPAK MISRA, J.** 1. The respondent, M/s. K.M. Ganatra &
Co., was granted a Regular Customs House Agent (CHA) licence under
Regulation 10 of the Customs House Agents Licensing Regulations, 1984
(for brevity ‘the 1984 Regulations’) framed under Section 146 of the
Customs Act, 1962 (for brevity ‘the Act’). While the respondent was
B carrying on the business, a letter was received from the Joint Director,
DRI, BZU, Mumbai wherein it was mentioned that certain units based
in Moradabad and Rampur area were misusing DEEC and DEPC
Scheme and submitting fictitious or forged shipping bills either with a
view to obtain inadmissible Duty Entitled Pass Books (DEPBs) or for
fulfilling the export obligations against advance licences under Duty
C Exemption Entitlement Certificate (DEEC) Scheme, and to obtain waiver
of BG conditions against the DEEC Licence as per the Exim Policy,
though in reality no physical export of goods was taking place. In essence,
the communication was to the effect that documents were fabricated to
show that goods were exported.

D 2. On the basis of the aforesaid information, investigations were
initiated and certain firms were identified which were involved in the
misuse of the licence in the aforesaid manner. During the investigation
it was found that an endeavour had been made to give the impression
that they were *bona fide* exporters. The shipping bills were filed and
for the said purpose, services of CHA licence of the respondent licensee
E was utilised. It had further come to the notice of the authorities that
after due investigation and interrogation, it had allowed its licence to be
used by certain unauthorised persons for monetary consideration. After
the said aspect came to light, the licence was suspended under Regulation
21(2) of the 1984 Regulations and an enquiry was held against it under
F Regulation 23 of the 1984 Regulations. The enquiry officer held the
enquiry and submitted the report on 25.10.2005 holding, *inter alia*, that
the misconduct alleged against the respondent that it had allowed the
unauthorised persons to handle the shipping bills stood proved, and
accordingly opined that the articles of charge under Regulations 12, 13(b),
13(d), 20(1)(c), 13(n) of the Custom House Agent Licensing Regulations,
G 2004 (for short, ‘the 2004 Regulations’) were established.

3. On the basis of the said enquiry report, the Commissioner of
Customs (General), New Customs House Ballard Estate, Mumbai on
22.08.2006, after affording appropriate opportunity of hearing to the
respondent and analysing the facts and the material brought on record,
H came to hold that there had been misuse of the licence issued in favour

of the respondent and further the violation was serious in nature and it did tantamount to involvement in fraudulent activity affecting the revenue. Being of this view, it cancelled the licence and revoked the entire security deposit. A

4. Aggrieved by the aforesaid order, the respondent preferred Appeal No. C/1135/06 – Mum before the Customs, Excise & Service Tax Appellate Tribunal (for short, 'the tribunal'). The tribunal, by its decision dated 12.12.2006 opined thus :- B

"We have considered the submissions. We find that it is an admitted fact that the appellant has allowed Shri Vipul Shah to carry on business on monthly rental basis or a consignment basis which has resulted in fraudulent exports by his client whose credentials were not looked into by the CHA. This cannot be considered as a mere commission agent being employed by the CHA. In fact no authorization from the customer in favour of the CHA is on record and the copy produced by the appellant is without any date and there is no evidence that it was procured before taking up the business of the exporters in question. On the other hand the appellants contend that the same was recovered by the DRI but could not show any panchnama to that effect. We find that the tribunal has in the case of Noble Agency held that the statement of defence witness that employer for whom he was working did not have CHA licence and that he was using licence of the noticee CHA on payment of monthly sums is sufficient to prove subletting of licence. The decision has been concurred with in the case of Nanda International Vs. Commissioner of Customs, Chennai – 2004 (176) I.L.T. 524 (Tri. -Chennai) the only difference being that since in latter case the licence remained revoked for a period six years & therefore, a lenient view was taken and the licence was restored though forfeiture of security deposit was upheld. In the instant case, we find that the licence has been suspended for the last two years and has now been revoked permanently. We consider it too harsh a punishment as it deprive the CHA of his livelihood. We consider that revocation for a period of three years from the date of suspension of licence (i.e. 1.3.2004) would be sufficient and on expiry of three years licence may be restored on taking fresh security deposit as we confirm the order of the Commissioner in forfeiting the security deposited by the appellant earlier." C
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A We have reproduced the said paragraph only to highlight that
though the tribunal has taken into consideration the admissions made by
the respondent, findings recorded by the Commissioner and the act of
violation by the respondent, yet it has exercised the discretion by directing
restoration of the licence after the expiry of three years from the date of
B suspension of the licence on the ground that factual matrix warranted a
lenient view to be taken.

5. Dissatisfied with the order of the tribunal, the revenue
preferred Customs Appeal No.71 of 2007 before the High Court of
Judicature at Bombay. The Division Bench of the High Court, by the
C impugned order dated 10.08.2007, did not accept the stand of the revenue
that subletting of CHA is a serious violation and that apart, the respondent
is a habitual offender in committing the offence of subletting and in that
factual backdrop, the tribunal was not justified in restricting the period of
revocation to a span of three years. After repelling the stand of the
revenue, the High Court further proceeded to observe that the tribunal
D has appositely exercised the discretion and taken a reasonable view and
hence, the order of the tribunal did not warrant any interference. The
said order is the subject matter of appeal by special leave before this
Court.

6. We have heard Ms. V. Mohana, learned senior counsel along
E with Ms. Binu Tamta, learned counsel for the appellant and Mr. V.M.
Doiphode, learned counsel for the respondent.

7. Learned counsel for the respondent submitted that the present
appeal does not deserve to be considered in view of the grounds taken in
paragraph 'G' of the special leave petition. The said ground reads as
F under :-

"G That this Hon'ble Court, on similar facts involving violation of
Regulations 12, 13(a), 13(b), 13(d), 19(8) of the CHALR in the
case of Commissioner of Customs vs. Sri Prakash Gawade SLP
(C) No.5375 was pleased to issue notice and stay the impugned
judgment of the High Court vide order dated 16.03.2007."

8. It is urged by the learned counsel for the respondent that the
said special leave petition which had given rise to Civil Appeal No.4520
of 2007 which has been dismissed, and therefore, the present appeal
deserves to be dismissed. To appreciate the submission, we may
reproduce the order dated March 24, 2014 dismissing the appeal. It reads
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as follows :-

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“1. We have heard learned counsel for the parties to the lis.

2. We find no merit in the Civil Appeal. Accordingly, the Civil Appeal is dismissed. However, the question of law raised is kept open to be agitated in an appropriate case. I.A. No.7 is also disposed of accordingly.

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Ordered accordingly.”

9. It is manifest from the aforesaid order that the two-Judge Bench, while dismissing the appeal, has kept the question of law open. The question of law raised is where there is transfer of licence and as a matter of fact the same is established in addition to the fact that the licensee is a habitual offender in the same manner, whether the tribunal should exercise the power under the Regulations to modify the action taken by the competent authority. That being the issue raised in this appeal, we have noted the said aspect first. We are unable to accept the submission of the learned counsel for the respondent and, therefore, we shall proceed to address the issue on merits.

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10. It is submitted by Ms. Mohana, learned senior counsel appearing for the revenue that when it has been established after conducting the necessitous investigation that the licensee has violated the terms of the licence and the Regulations and it habitually involved in the similar kind of activity, the discretion of the tribunal was totally uncalled for. It is urged by her that whenever a statutory authority is conferred with the jurisdiction for modifying an order, appropriate reasons have to be ascribed and it should not be done without proper ascription of reasons as that would be reflective of non-application of mind. It is her further submission that when the order is demonstrative of flagrant violation of the statutory Regulations relating to licence which has financial implication, no leniency should have been shown.

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11. Learned counsel for the respondent would contend that in similar circumstances, the period was restricted and once the discretion has been exercised by the tribunal and that has been given stamp of approval by the High Court, this Court should be slow to exercise its jurisdiction under Article 136 of the Constitution of India.

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12. As is noticeable, the respondent was granted a regular licence under Regulation 10 of the 1984 Regulations. Regulation 11 deals with

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A execution of bond and furnishing of security. Regulation 12 stipulates the period of validity of a regular licence. Regulation 13; which stipulates that the licence is not transferable, reads as follows :-

B “13. Licence not transferable.—Every licence granted or renewed under these Regulations shall be deemed to have been granted or renewed in favour of the licensee and no licence shall be sold or otherwise transferred.”

13. Regulation 14 deals with the obligations of Custom House Agent. The said Regulation, being pertinent, is reproduced below :-

C “14. Obligations of Custom House Agent.—A Custom House Agent shall:

D (a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as Custom House Agent and produce such authorisation whenever required by an Assistant Commissioner of Customs or Deputy Commissioner of Customs;

E (b) transact business in the Customs Station either personally or through an employee duly approved by the Assistant Commissioner of Customs or Deputy Commissioner of Customs, designated by the Commissioner;

(c) not represent a client before an officer of Customs in any matter to which he, as officer of the Department of Customs gave personal consideration, or as to the facts of which he gained knowledge, while in Government service;

F (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 Assistant Commissioner of Customs or Deputy Commissioner of Customs;

G (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 relating to clearance of cargo or baggage issued by the Commissioner of Customs from a client who is entitled to such information;

H (g) promptly pay over to the Government, when due, sums

received for payment of any duty, tax or other debt or obligations owing to the Government and promptly account to his client for funds received for him from the Government or received from him in excess of Governmental or other charges payable in respect of the clearance of cargo or baggage on behalf of the client; A

(h) not procure or attempt to procure directly or indirectly, information from the Government records or other Government sources of any kind to which access is not granted by proper officer; B

(i) not attempt to influence the conduct of any official of the Customs Station in any matter pending before such official or his subordinates by the use of threat, false accusation, duress or the offer of any special inducement or promise of advantage or by the bestowing of any gift or favour or other thing of value; C

(j) not refuse access to, conceal, remove or destroy the whole or any part of any book, paper or other record, relating to his transactions as a Custom House Agent which is sought or may be sought by the Commissioner; D

(k) maintain records and accounts in such form and manner as may be directed from time to time by an Assistant Commissioner of Customs or Deputy Commissioner of Customs and submit them for inspection to the said Assistant Commissioner of Customs or Deputy Commissioner of Customs or an officer authorised by him whenever required; E

(l) ensure that all documents prepared or presented by him or on his behalf are strictly in accordance with orders relating thereto; F

(m) ensure that all documents, such as bills of entry and shipping bills delivered in the Customs Station by him show the name of the importer or exporter, as the case may be, and the name of the Custom House Agent, prominently at the top of such documents;

(n) in the event of the licence granted to him being lost, immediately report the fact to the Commissioner; G

(o) ensure that he discharges his duties as Custom House Agent with utmost speed and efficiency and without avoidable delay; and

- A (p) not charge for his services as Custom House Agent in excess of the rates approved by the Commissioner from time to time under Regulation 25.”

Regulation 19 provides for maintenance and inspection of accounts. We have referred to the said Regulation as it casts number of obligations on the Customs House Agent. Regulation 21 deals with the suspension or revocation of licence. Regulation 23 deals with procedure for suspending or revoking licence under Regulation 21. It is apt to note here that the Central Board of Excise and Customs, in exercise of the power conferred under sub-section (2) of Section 146 of the Act in supersession of the Customs House Agents Licensing Regulations, 1984, except as respect things done or omitted to be done before such supersession, brought the 2004 Regulations. It is not in dispute that the investigation has been carried on, order has been passed under Regulation 20(c) of the 2004 Regulations. The said order of revocation was assailed before the tribunal under Section 129A read with Regulation 22(8) of the 2004 Regulations. Section 129B pertains to the jurisdiction of the tribunal and nature of the orders that the tribunal can pass. The said provision reads as follows :

E “Section 129B. Orders of Appellate Tribunal.-(1) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.”

F Regulation 22 of the 2004 Regulations reads as follows :

G “22. Procedure for suspending or revoking licence under Regulation 20.—(1) The Commissioner of Customs shall issue a notice in writing to the Customs House Agent within ninety days from the date of receipt of offence report, stating the grounds on which it is proposed to suspend or revoke the licence and requiring the said Customs House Agent to submit within thirty days to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defense and also to specify in the said statement whether the Customs House Agent desires to be heard in person by the said Deputy

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Commissioner of Customs or Assistant Commissioner of Customs. A

Provided that the procedure prescribed in regulation 22 shall not apply in respect of the provisions contained in sub-regulation (2) to regulation 20.

(2) The Commissioner of Customs may, on receipt of the written statement from the Customs House Agent, or where no such statement has been received within the time-limit specified in the notice referred to in sub-regulation (1), direct the Deputy Commissioner of Customs or Assistant Commissioner of Customs to inquire into the grounds which are not admitted by the Customs House Agent. B C

(3) The Deputy Commissioner of Customs or Assistant Commissioner of Customs shall, in the course of inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material to the inquiry in regard to the grounds forming the basis of the proceedings, and he may also put any question to any person tendering evidence for or against the Customs House Agent, for the purpose of ascertaining the correct position. D

(4) The Customs House Agent shall be entitled to cross-examine the persons examined in support of the grounds forming the basis of the proceedings, and where the Deputy Commissioner of Customs or Assistant Commissioner of Customs declines to examine any person on the grounds that his evidence is not relevant or material, he shall record his reasons in writing for so doing. E

(5) At the conclusion of the inquiry, the Deputy Commissioner of Customs or Assistant Commissioner of Customs shall prepare a report of the inquiry recording his findings and submit his report within ninety days from the date of issue of a notice under sub-regulation (1). F

(6) The Commissioner of Customs shall furnish to the Customs House Agent a copy of the report of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, and shall require the Customs House Agent to submit, within the specified period not being less than thirty days, any representation that he may wish to make against the findings of the Deputy Commissioner of Customs or Assistant Commissioner of Customs. G H

A (7) The Commissioner of Customs shall, after considering the report of the inquiry and the representation thereon, if any, made by the Customs House Agent, pass such orders as he deems fit within ninety days from the date of submission of the report by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, under sub-regulation (5).

B (8) Any Customs House Agent aggrieved by any decision or order passed under regulation 20 or sub-regulation (7) of regulation 22, may prefer an appeal under section 129A of the Act to the Customs, Central Excise and Service Tax Appellate Tribunal established under sub-section (1) of section 129 of the Act.”

C 14. Relying on the statutory provisions, it is submitted by learned counsel for the respondent that the tribunal has jurisdiction to confirm, modify or annul the decision. There can be no cavil over the issue that the tribunal can dislodge or confirm or modify the order. The vesting of jurisdiction with the tribunal by the statute is beyond any pale of controversy. The dispute pertains to exercise of such jurisdiction. When a jurisdiction is exercised, it has to be exercised in accordance with law, regard being had to the factual matrix of the case. The tribunal having been conferred the power to modify the order, restricting the period of revocation would definitely come within the sweep of the said power.

D The issue would, as stated earlier, be whether the said jurisdiction has been properly exercised in the case at hand. On a perusal of the order passed by the Commissioner, it is clearly perceptible that there has been number of violations by the respondent. The enquiry report which formed the plinth of the order of the Commissioner demonstrates that by virtue of the transfer of the licence in contravention of the Regulations, on many an occasion, immense financial loss has been caused to the revenue.

E As the factual matrix would exposit, it is a serious violation. The misconduct reflects a chain of acts. In such a situation, we are disposed to think that the discretion exercised by the tribunal is inappropriate.

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G 15. In this regard, Ms. Mohana, learned senior counsel for the appellant, has placed reliance on the decision in *Noble Agency v. Commissioner of Customs, Mumbai*¹ wherein a Division Bench of the CEGAT, West Zonal Bench, Mumbai has observed:-

“The CHA occupies a very important position in the Custom

H ¹ 2002 (142) E.L.T. 84 (Tri. - Mumbai)

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 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. ...”

We approve the aforesaid observations of the CEGAT, West Zonal Bench, Mumbai and unhesitatingly hold that this misconduct has to be seriously viewed.

16. Resultantly, we allow the appeal and set aside the orders of the High Court and the tribunal and restore that of the Commissioner. There shall be no order as to costs.

Nidhi Jain

Appeal allowed.

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