

Indoforeign (Agent) Pvt. Ltd. Vs. Union of India and Anr.

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Court : Kolkata

Decided On : Apr-12-2017

Judge : Aniruddha Bose

Appellant : Indoforeign (Agent) Pvt. Ltd.

Respondent : Union of India and Anr.

Advocate for Pet/Ap. : Mr. Chowdhury

Judgement :

Form No.J(2) GA NO.942 OF 2017 WITH APOT NO.94 OF 2017 IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORIGINAL SIDE INDO-FOREIGN (AGENT) PVT. LTD. Versus UNION OF INDIA AND ANR. BEFORE: The Hon'ble JUSTICE ANIRUDDHA BOSE AND The Hon'ble JUSTICE ARINDAM SINHA Date :

12. h April, 2017. MR.RAMESH KR.CHOWDHURY, MR.PROTYUSH CHATTERJEE, ADVOCATES FOR APPELLANT MR.AMITABRATA RAY, MR.BHASKAR PRASAD BANERJEE, ADVOCATES FOR CUSTOMS AUTHORITY Aniruddha Bose, J.:1. The appellant is holder of a licence, at present suspended, which was issued under the Customs House Agents Licensing Regulations, 2004. These Regulations of 2004 stood superseded by the Customs Brokers Licensing Regulations, 2013, which came into effect from 21st June, 2013. There has been subsequent amendment to the 2013 Regulations on 5th

January, 2016 but for the purpose of adjudication of this appeal, this amendment is not of much significance. The present appeal is against the judgement of a learned Single Judge of this Court delivered on 22nd February 2017 dismissing the appellants writ petition, in which the appellant questioned the legality of its order of suspension. The order of suspension was initially passed on 30th December 2016 (CB Order No.11/2016) by the Commissioner of Custom (Airport & Administration) on 30th December 2016, and subsequently confirmed by the same authority on 27th January 2017 upon giving post-decisional hearing.

2. The appellant at the material time was rendering the services for customs clearance of goods to different importers and exporters. Suspension of the appellants license was in relation to transactions of certain importers, for whom the appellant acted as a customs house agent. The substance of allegations in relation to such import transactions was that branded glass chatons were being imported under the guise of artificial stones. or imitation stones., by misdeclaring the description as also the value of the imported items. There are allegations of clearing several consignments in different names using fictitious and non-existing Import-Export Codes. The bills of entry forming the subject of dispute related to the year 200910. The Directorate of Revenue Intelligence had started investigation in connection with such imports at Kolkata, Chennai and New Delhi. In course of such investigation, the appellants officer was also investigated.

3. Show cause notice was issued under Section 28 of the Customs Act, 1962 on 25th November, 2014 and in paragraph 57 of the notice, the summary of allegations pertaining to such import has been highlighted:- By adopting the value of Rs 98 per kg (A.V.) for glass chatons, the redetermined value of the glass chatons in respect of the 63 impugned bills of entry would work out to Rs 20,40,23,350/- (Rupees twenty crore forty lakh twenty three thousand three hundred and fifty only). Consequently, the actual duty liability on the said imports works out to Rs.5,47,77,413/- (Rupees five crore forty seven lakh seventy seven thousand four hundred differential and thirteen duty only) works and out the to Rs.4,87,03,013/- (Rupees four crore eighty seven lakh three thousand and thirteen only). The said amount of Rs.4,87,03,013/- (Rupees four crore eighty seven lakh three thousand and thirteen only) along with interest is liable to be demanded in

terms of proviso to Section 28(1) of the Customs Act, 1962 read with Section 28AA/28AB of the Customs Act, 1962.

. The show-cause notice, annexed at page 59 of the stay petition, was issued by the Additional Director General, Directorate of Revenue Intelligence, Chennai.

4. So far as the appellant is concerned, it was called upon to explain why penalty would not imposed against it under Sections 112 and 114AA of the Customs Act, 1962. The adjudicatory authority found the allegations contained in the notice to show-cause substantiated and imposed penalties upon different noticees including the appellant. Against the appellant, penalty of Rs.9,19,896/- was imposed under Section 112(a) of the Customs Act, 1962, and under the provisions of Section 114A of the Act, penalty was imposed for a sum of Rs.8,07,705/-. The appellant has preferred an appeal against the order imposing penalty before the statutory Appellate Tribunal in Chennai. We find from pages 105 and 106 of the stay petition that copies of the show cause notice were marked, inter alia, to the appellant as well as the Principal Commissioner of Customs (Airport and Air Cargo Complex) at his office at 15/1, Stand Road, Kolkata-700001.

5. The order of the adjudicating authority was issued on 4th October 2016. The order, however, is dated 29th September 2016. The respondent no.2, Commissioner of Customs [Airport & Administration]. issued an order of suspending the Customs Broker License of the appellant on 30th December, 2016, taking cognizance of the adjudication order bearing no.833/2016-AIR dated 26.09.2016. Operative part of this suspension order reads: (i) In view of the findings above I hereby order the suspension of CB Licence No.I-12 (Pan-AABCI 3386 BCH001) of M/s. Indo- Foreign (Agents) Pvt. Ltd. with immediate effect and until further orders under Regulation 20(2) of CHALR, 2004 [Now Regulation 19(1) of CBLR, 2013].. (ii) As per Regulation 20(3) of CHALR, 2004, as amended, Customs [Now Brokers Regulation Licensing 19(2) of Regulations, 2013]. an opportunity is given to M/s. IndoForeign (Agents) Pvt. Ltd. or to their authorized representatives to appear before the Commissioner of Customs (Airport & Admn.) for a post-decisional hearing on 11.01.2017 at 03.30 p.m.

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6. The suspension order was confirmed by the same authority on 27th January 2007 upon giving opportunity of hearing to the appellant. In that order, the order of suspension was directed to continue and proceeding for revoking the licence was directed to be initiated. It has been submitted before us by Mr. Chowdhury, learned Counsel for the appellant that the order of suspension was passed beyond the permissible statutory period. This point was urged before the Commissioner of Customs, in course of post-decisional hearing, on the question of continuance of the suspension order. In the order confirming suspension of the appellant, it has been, inter alia, recorded in paragraph 28 thereof: On the contrary from the records of the Customs Brokers Section, I find that the impugned show cause notice F. No.VIII/26/284,285,286, 287, 288 & 289/ 2011-DRI was never received in the Department. As such the question of initiation proceedings stipulated within period the above against the mentioned Customs Brokers on the basis of said SCN i.e. offence report cannot and does not arise.

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7. The appellant assailed the said order of suspension by filing the writ petition before this Court, which was registered as W.P.No.79 of 2017. That writ petition was dismissed by the learned Single Judge on 22nd February 2017. The reason for dismissal of the writ petition on 22nd February 2017 appears from the following passage of the judgement appealed against:- The impugned order is appealable. The petitioner has chosen not to prefer an appeal therefrom. The petitioner has chosen to approach the Writ Court. Existence of a statutory alternative remedy is not a complete bar to a person applying under Article 226 of the Constitution of India. However once a person applies under Article 226 of the Constitution of India, where there is a statutory alternative remedy available, he has to sustain his case on the basis of the parameters available for the enquiry by the Writ Court. A quasi judicial order can be set aside if it is found to be passed in violation of the principles of natural justice, unreasoned, perverse without jurisdiction or to be in violation of the fundamental rights of the petitioner. In the present case, none of those grounds are substantiated. The order has not been demonstrated to be passed in violation of the principles of natural justice or unreasoned or perverse. The Authorities are within their jurisdiction to pass the impugned order. No right of

the petitioner far less a fundamental right, has been established to be violated by the order impugned.

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8. We find from the judgment of the learned single Judge that the applicability of Regulation 20(2) of the Regulations of 2004 was examined while dismissing the writ petition. The decision was delivered considering the aforesaid provision. Stand of the Customs Authorities before us, asserted by Mr. Banerjee, learned Counsel, however, is that the 2004 Regulations is not applicable in the case of the appellant. His submission is that Regulation 19 of 2013 Regulation is attracted in this case. This provision stipulates:- 19. Suspension of licence. (1) Notwithstanding anything contained in regulation 18, the Commissioner of Customs may, in appropriate cases where immediate action is necessary, suspend the licence of a Customs Broker where an enquiry against such agent is pending or contemplated. (2) Where a licence is suspended under sub-regulation (1), the Commissioner of Customs shall, within fifteen days from the date of such suspension, give an opportunity of hearing to the Customs Broker whose licence is suspended and may pass such order as he deems fit either revoking the suspension or continuing it, as the case may be, within fifteen days from the date of hearing granted to the Customs Broker.

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9. As we have already observed, learned First Court had proceeded on the basis of application of 2004 Regulations. The 2013 Regulations has been promulgated in exercise of power under Section 146(2) of the Customs Act, 1962 in supersession of the Customs House Agents Licensing Regulations 2004, but as respect things done or omitted to be done before such supersession, Regulations has been saved. applicability of 2004 In the initial order of suspension, in the operative part provisions of both the Regulations [20(2) and (3) of 2004 Regulation and 19(1) and (2) of the 2013 Regulations]. have been referred to. Admitted position in this appeal is that when the goods were imported, 2004 Regulations applied. In the judgment appealed against, the learned First Court found the order of the suspension to have been passed in exercise of power under Regulation

20(2) of the 2004 Regulations. There is no appeal against this part of the order of the learned First Court. The authorities also had applicability of 2004 Regulations in mind, but for reasons not clear to us, nor clarified before us on behalf of the Revenue, both the Regulations were referred to in the aforesaid orders. It is not a situation where the provisions of both the Regulations which are referred to in the respective orders are identical. There are certain variations, to which we shall refer to later in this judgment. In this background, we shall proceed on the basis that the order of suspension was issued under the aforesaid provision of the 2004 Regulations. Power of suspension under Regulation 20(2) of the 2004 Regulations is to be exercised by the Commissioner of Customs within fifteen days from the date of receipt of report from the investigating authority. Power under Sub-Clause (3) of the same provision could be exercised in cases where suspension has been effected under the circumstances contemplated in Sub-Clause (2). As per Regulation 19(1) of the 2013 Regulations, however, the timeframe of 15 days has not been stipulated, within which emergency power for suspension is to be exercised. We find the proceedings have been taken against Regulations only. the appellant following the 2004 Moreover, in the order of 27th January 2007, captioned Order-in-Original., while considering the limitation point, it has been observed that the show-cause notice was never received by the department and the authorities had proceeded on the basis that the order of the adjudicating authority (dated 26th September 2016, issued on 4th October 2016) was received by the department in the month of December 2016. The implications are clear that the authorities treated the report of the adjudicatory authority to be report of the investigating authority. This reflects adherence to 2004 Regulations by the authorities.

10. As we have already observed, the learned Single Judge had dismissed the writ petition mainly on the ground that there was efficacious alternative remedy. The learned Single Judge repelled the appellants plea that the order in original could not constitute report of the investigating authority. Clause 20(2) of 2004 Regulations provide:- 20(2) Notwithstanding anything contained in sub-regulation (1), the Commissioner of Customs may, in appropriate cases where immediate action is necessary, within fifteen days from the date of receipt of a report from investigating authority, suspend the licence of a Customs House Agent where an

enquiry against such agent is pending or contemplated.

11. Contention of the appellant petitioner before the learned First Court was that the suspension order could not have been passed beyond fifteen days from the date of receipt of the show cause notice by the authority concerned. Therefore, issue of the initial order of suspension was without jurisdiction, being time barred. His alternative submission, however, is based on Regulation 20(1) of 2013 Regulation, which provides:-

20. Procedure for revoking licence or imposing penalty. (1) The Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the licence or impose penalty requiring the said Customs Broker 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 Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs. 12. Stand of the appellant/writ petitioner on this count is that in this case procedure for revoking licence or imposing penalty ought to have been taken within a period of ninety days from the date of receipt of offence report, even if Clause 20(1) of the 2013 Regulations was applied. Mr. Chowdhury has urged before us that the suspension of licence is an integral part of revocation proceeding and when revocation power cannot be resorted to beyond the timeframe prescribed in the aforesaid Regulations, the order of suspension also would be without jurisdiction. In this regard, Mr. Chowdhurys contention is that the show cause notice. ought to constitute the offence report. and the suspension order was issued much beyond the three months timeframe postulated in the aforesaid provision of the 2013 Regulations.

13. We, however, find that this point was not raised for adjudication before the learned Single Judge and was not considered while passing the order of suspension. Argument before the learned Single Judge was on interpretation of Regulation 20(2) of 2004 Regulations and argument of the parties before the

learned First Court appears to have had been raised also on 2004 Regulations. In earlier part of this judgment, we have already, given our views on this point.

14. We have been taken by the learned counsel for the parties through the judgment of the learned First Court as well as the two orders of the statutory authority. In our opinion, there was no consideration of the limitation point in detail before the statutory authority or before the learned Single Judge. In the judgment appealed against, the learned Single Judge accepted the Revenues contention that the Order-in-Original constituted the report of the investigating authority. The limitation question is a jurisdictional issue and it is well within the power and jurisdiction of the Writ Court to examine that issue while testing validity of the action or order of a Revenue Authority even if there is an alternative remedy available to assail such an order of a statutory body. Respondent no.2 also had not examined this factor in detail in the order sustaining the order of suspension. No proper definition of the terms offence report. under the 2013 Regulations or report from the investigating authority. as employed in clause 20(2) of the 2004 Regulations has been brought to our notice by the learned counsel for the Revenue. It appears from the order of 27th January 2017 that the authority proceeded on the basis that the Show-cause notice as well as the order of adjudicating authority could fit this description. The reasoning in the order of suspension dated 27th January 2017 for not taking cognizance of the show cause notice as the report of the investigating authority is that there was no material to show its receipt. Mr. Chowdhurys submission on the other hand has been that the show cause notice had to be treated as the report of an investigating authority, as such notice is issued after completion of the investigation. According to him, order of an adjudicating authority in a show cause proceeding cannot constitute either report of an investigating authority or an offence report.

15. As we have already pointed out, a copy of the show-cause notice, dated 25th November, 2014 had been marked to the Principal Commissioner of Customs (Airport & Air Cargo Complex), Kolkata. The initial suspension order was issued on 30th December 2016. In the order confirming suspension, passed on 27th January 2017, the Commissioner observed that the copy of the notice was never received by his department. This observation was made while dealing with the appellants

plea that statutory time limit had lapsed for invoking power under clause 20(2) of the 2004 Regulations, having regard to the date of issue of the notice to show cause. As regards receipt of the order of the adjudicator, the concerned authority has observed:- what I find from the records, in that the order-in-Original bearing No.833/2016-AIR dated 26.9.2016 passed by the Principal Commissioner of Customs, Chennai-VII. In the instant matter was received by the Department only in December 2016.

16. Even if that order of the adjudicating authority is treated to be the report of investigating authority, considering the provisions of Regulation 20(2) of the 2004 Regulations, that observation in the order confirming suspension is inadequate to bring the initial suspension order issued on 30th December 2016 within the 15 days timeframe. We find that the authority issuing the order of suspension has not addressed the question of limitation in its proper perspective. Furthermore, there is no positive finding that the show cause notice was never received in the Kolkata office of the Commissioner Customs, in spite of a copy thereof being marked for the said authority. There is a presumption that an official act would be done in due course. The authority concerned has not properly dealt with, in our opinion, the jurisdictional issue of the suspension proceeding on the ground of the same being time-barred, as contended by the appellant.

17. Having reached this finding, we direct that the part of the order dated 30th December, 2016 by which the appellants licence was initially suspended and the composite order confirming the order of suspension and initiation of revocation proceeding dated 27th January 2017 shall not be given effect to by the authorities concerned. The action taken on the basis of those orders, to the extent the same suspends the appellants licence or initiates revocation proceeding shall be permanently stayed. The authorities, however, shall be entitled to take a fresh decision on the question of suspension of the appellants licence or revocation of the same upon giving opportunity to hearing to the appellant on the limitation issue raised by the appellant. The direction not to give effect to the suspension order of 30th December, 2016 shall be subject to the decision the authorities may take upon giving the appellant opportunity of hearing. The appellant shall be entitled to carry on its business under its subsisting license provided there is no other legal

impediment in doing so, till fresh decision is arrived at by the concerned authority. Respondent No.2 will inform all concerned accordingly.

18. As we are remanding the matter to the authorities, we are not determining the question as to whether the order of the adjudicating authority deciding on the show cause notice would constitute report of an investigating body or not. That question is left to be decided by the adjudicating authority. We also make it clear that in this judgment we have only addressed the question as to whether the power of suspension under Clause 20(2) of the 2004 Regulations could be invoked against the appellant in the factual background of this case and we have not addressed or adjudicated on any other question. So far as revocation proceeding, as contemplated in the order of 27th January 2017 is concerned, the same shall be guided by determination on the question of compliance of the timeframe as stipulated in the Regulations.

19. This order disposes of the stay petition. As we have decided the dispute on points of law only and no prayer for filing any affidavit was made and no affidavit was called for, allegations made in the stay petition shall be deemed to have not been admitted by the Revenue. The appeal shall also stand disposed of in the above terms. We accordingly, set aside the judgement of the learned First Court and the orders of suspension are invalidated, subject to the conditions we have spelt out earlier in this judgment.

20. As Mr. Banerjee, learned Counsel appearing for the Revenue has agreed to waive service of notice of appeal on behalf of the respondents, other formalities relating to filing of paper books etc. shall stand dispensed with.

21. There shall be no order as to costs.

22. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard. (ANIRUDDHA BOSE, J.) (ARINDAM SINHA, J.) nm