

Kothari and Sons Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-31-1995

Reported in : (1995)LC428Tri(Mum.)bai

Appellant : Kothari and Sons

Respondent : Collector of Customs

Judgement :

1. This appeal is directed against the Order-in-Original No.S/8-12/89ADMN, dated 20-10-1994, of the Collector of Customs, Bombay, ordering, vide Regulation 21 of the Customs House Agents Licensing Regulations, 1984, forfeiture of the security deposit of Rs. 25,000/- of the appellants.

2. On receipt of report from the Air Cargo Complex at Sahar Air Port at Bombay, proceedings were initiated vide Regulation 23 of the said Regulations, against the appellants, holders of CHA Licence No. 11/671, on the ground that the said licencees attended clearance of Baggage of a passenger without the passenger's willingness or proper authority from him, and though they had attended the Baggage forms but had failed to maintain proper records and accounts of about 104 baggage forms, and had also failed to exercise the necessary supervision to ensure proper conduct of their employee, Mr. Gul Gurbax Malkani, and had thus, contravened the provisions of Regulations 14(a), 14(k) and 20(7) of the said Regulations. The cause for initiation of enquiry and proceedings arose when, in the month of January 1989, one of their employees Mr.

Gul Malkani was found in the Baggage Hall of the Customs Air Cargo Complex, unauthorisedly clearing the Baggage Declaration Form No. 153, filled in by one Mr. Siddique Hussain Sahib Katingari as authorised representative of her mother Smt. Bibi Safiya, whose unaccompanied baggage was to be cleared. On issuance of the Notice to show cause, the appellants accepted that Mr. Gul Malkani was in their employment and was posted at the Air Cargo Complex, but contended that said Mr.

Malkani, was merely helping the said authorised person to get the clearance done, and had not undertaken the work as the employee of the CHA firm, and that mere rendering of a help to a person not conversant with the procedure, could not be termed as contravention of Regulation 14(a). They also pleaded that they had been exercising full and adequate supervision over their employees and there was no contravention of Regulation 20(7). About non-maintenance of proper account for 104 forms, they submitted that they had in all, 20 employees working at different places, carrying out various jobs entrusted to them, who on completion of their jobs would come back to the office and hand over the documents, which would be filed according to convenience at the office and the accounts were being prepared by the Accountant when he came to the office. They also pleaded that those forms were duly accounted for and were shown to the Customs Officer, and hence there was no contravention of Regulation 14(k).

3. Enquiry as contemplated under the Regulations was conducted. The enquiry officer held all the charges as duly established. The Collector, on due notice and hearing given to the appellants, concurred with the findings of the enquiry authority and passed the impugned order.

4. Besides pleading that the appellants have not contravened any of the Regulations, and that the finding arrived at by the authority below is not correct and deserves to be set aside. Mr. H.R. Shetty, the Id.advocate, has pleaded that the order of the Collector is bad in law, inasmuch as, he has no powers to order only forfeiture of the security deposit, but has to either order suspension or cancellation of the licence. For this purpose, he has read the Regulation 21(1) of the Regulations and has emphasised on the word "and" used as prefix to the

phrase "also order for forfeiture....". As an alternative plea, he has submitted that order for forfeiture of the entire security deposit amount is too harsh and the same ought to be appropriately reduced.

Referring to the Supreme Court judgment in Union of India v. Paras Laminates (P) Ltd. - 1990 (49) E.L.T. 322 (S.C.) he has pleaded that the Tribunal possesses inherent powers to pass such orders as may be deemed just and equitable.

5. Mr. K.P. Mishra, the Id. SDR has, however, submitted that the evidence on record clearly establishes misbehaviour on the part of an employee of the appellants and the record also shows that Mr. Naresh Kothari, the proprietor of the appellant firm was present at the Baggage Hall at that time. He has further pleaded that, non-maintenance of proper record, regularly in the way as contemplated under the Regulations, by the firm is virtually admitted. He has read the reply to the Show Cause Notice to substantiate his plea. As regards the legal issues raised, the Id. SDR, has submitted (which during the course of submission is also admitted by the Id. advocate for the appellant) that, two simultaneous proceedings were initiated under the Regulations, against the appellant, and in the other one, where also, the order has been passed on the same day as to the date of impugned order, the Collector of Customs has ordered suspension of the licence for a specified period. In his submission, when the order for suspension of the licence is passed on the same day, in another proceedings, by the same Collector, non-reiteration of the same, in the impugned order, could not nullify the same as not in conformity with the provisions of Regulation 21(1) of the Regulations. He also pleads that the reading of the said provisions shows that the Collector is empowered to either (i) suspend or (ii) revoke the CHA licence, or (iii) can forfeit the security deposit. As regards, showing of the leniency, he pleads that no discretion is given to forfeit part of the security deposit. In his submission, it is not the penalty imposed where quantum could be interfered with.

6. Considering the submissions and taking up first the legal ground raised, as to validity of the order, relevant portion of Regulation 21(1) of the Regulations reads thus: (1) The Collector may, subject to the provisions of [Regulation] 23 suspend or revoke the licence of a Customs House Agent, so far as the jurisdiction of the

Collector is concerned and also order forfeiture of security on any of the following grounds:- Plain reading of the provision indicates that the jurisdictional Collector, has powers to either suspend or revoke the CHA licence, and has powers to "also" order forfeiture of the security deposit.

Significantly the conjunction "or" put in between "suspension" and "revocation" is conspicuously missing when it has come to empower him to forfeit the security deposit. Though of course, the word "may" used in the beginning gives him a discretion as to whether, he should order forfeiture of security deposit, there is absolutely no indication available, expressly or impliedly, that he is empowered to order forfeiture of security deposit irrespective of whether he chooses to suspend or revoke the licence. If the empowerment was to select one type of punishment to the exclusion of the other, and forfeiture of the security deposit was to be taken as punishment independently and to the exclusion of the other two punishments, namely suspension and revocation, then the conjunction "or" would have been inserted, where at present the words "and also" exist. Further the word "also" used connotes the meaning "in addition" when the entire provision is harmoniously read. The punishment of only forfeiture of security, simplicitor to the exclusion of ordering either suspension or revocation is thus not provided for. When the wordings are clear and unambiguous, no authentication from any judicial pronouncement may be called for, though plenty of them would be available, in regard to interpretation of similar provisions in other penal laws.

7. The impugned order, therefore, could have been held as not in conformity with the Regulations, but for the fact that, here some special circumstances exist in the form of admitted position, that, two nearly simultaneous proceedings were conducted against the appellants and the final orders in regard to both have come to be passed on the same day, where in one the licence is ordered to be suspended for a specified period by virtue of the powers under the Regulation 21(1) of the Regulations, whereas in the impugned order, the security deposit is forfeited. Both the orders are passed by the same officer. It would have been proper for the said officer to make an observation in the impugned order that because suspension of the licence is duly ordered in the other proceedings, no separate order was being passed and that would have met with the technical

requirement. All the same such hyper technicalities, if not complied with by an Executive Head, holding of the order as bad in law, would not be justified by overlooking the admitted factual position, particularly of simultaneous passing of two orders.

8. Though, the submission of the Ld. SDR that the word "or" used earlier would also govern the empowerment to order for forfeiture of security deposit alone, cannot be endorsed or accepted; considering the specific and special circumstances, the plea raised by the appellants as to invalidity of the impugned order also cannot be accepted and is, therefore, rejected.

9. On merits, three charges have been levelled against the appellant (i) their employee had been attending to the clearance of baggage without due authorisation (ii) there were irregularities noticed in their maintaining account, and 104 forms had not been recorded and (iii) the CHA had failed to exercise due supervision.

10. Clubbing charge (i) and (iii) for due appreciation, the crux of the allegation is that one Mr. Gul Malkani, an employee, prevailed upon one Mr. Siddique, who had come with due authorisation from his mother, to get her baggage released, to attend to the work of clearance, on payment of Rs 200/and was actually attending to the work of such clearance, without due authorisation from the party, and that though Mr. Naresh Kothari, the proprietor who was present at the Baggage Hall, he did not exercise effective supervision over his employee Mr.

Malkani.

11. There is no denial to the fact that Mr. Gul Malkani, was at the relevant time, an employee of the appellant and was deputed at the Air Cargo Complex, on behalf of the appellants. The evidence made available on record, shows that he was attending to the work of Baggage clearance for Mr. Siddique. This aspect is also not seriously challenged, as even according to the appellant, Mr. Malkani had volunteered to render a helping hand to Mr. Siddique. The statement of Mr. Siddique, as is reflected from the order passed by the Collector, however, is to the effect that he was not willingly availing of the services of Mr.

Malkani. In any case, Mr. Malkani, having entered the Baggage Hall, by virtue of his holding pass, as an employee of a licensed CHA, could not have attended to any clearance work without due authorisation. If he had only provided guidance, it was not required of him to have entered the Baggage Hall with BDF. Mr. Malkani, being an employee, and holding customs pass on that count, could not have transacted any business of clearance on his own, and he would not have even ventured to do so, when the proprietor Mr. Naresh Kothari was present in the same hall.

The Collector as also the Enquiry Authority, have after considering the plea, come to a specific conclusion and there appears no cogent reason to interfere with the same.

12. As regards the other allegation regarding irregular maintenance of record, in the reply filed by the appellant to the show cause notice, they themselves state, that various employees assigned different jobs would on completion thereof, come to the office and surrender the documents and all such documents would be filed "according to the convenience in the office". They also mentioned that the accounts were being prepared by the Accountant "as and when" he came to the office.

The lack of regularity in maintenance of accounts is clear, and there is no reason to interfere with the finding of the Collector.

13. Thus, on merits, there is nothing which warrants interference with the finding arrived at by the Collector.

14. An alternate plea is made to appropriately reduce the quantum of the amount forfeited. Once again reading Regulation 21(1), the empowerment to the Collector is for forfeiting the security deposit.

The same is not qualified with any prefix or suffix of the type, that he may forfeit such amount of the security deposit as he may deem it proper. Thus, though he has discretion to order or not to order the forfeiture of security deposit, if he chooses to order forfeiture thereof vide Regulation 21(1), he has to order forfeiture

of entire deposit. As is evident from Regulation 11 and Form No. 51 prescribed thereunder, the security deposit is made for faithful behaviour of the Agent and their employees, as also to reimburse the loss to the Government accruing on account of their negligence. Whereas for the later part, such amount as is calculated, could be deducted from the security deposit amount, but so far as the first count is concerned, the same, read with Regulation 21(1) provides for forfeiture of the entire security deposit amount.

15. The Id. advocate for the appellant has referred to the Supreme Court judgment in *Union of India v. Paras Laminates (Pvt.) Ltd.* - 1990 (49) E.L.T. 322 (S.C.). Para 8 of the said judgment reads thus: "There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on 'Interpretation of Statutes', (eleventh edition) where an act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution." The inherent powers, which the Supreme Court have observed as exercisable by the Tribunal, are those which could make the provisions fully effective but have simultaneously observed that such inherent powers are limited. Applying the said ratio here, when the Regulations themselves do not invest any discretion in the Collector to order forfeiture of any part of the security deposit, in exercise of his powers under Regulation 21(1) of the Regulations, exercise of any inherent powers de z the provisions may not be contemplated.

16. Even otherwise, considering the contravention as also the security deposit amount, as also the admitted position that in another proceedings their licence is suspended vide Regulation 21(1) for a specified period (and it is reported that the said order with minor modification as to the period of suspension is even sustained by the Tribunal), there does not appear any justifiable ground to exercise even the inherent powers, even if they are available, to reduce the amount.

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