

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89304 OF 2013

[Arising out of Order-in-Original No: 89/2013/CAC/CC(G)/PKA/CBS(Admn)
dated 25th July 2013 passed by the Commissioner of Customs (General), Mumbai.]

Commissioner of Customs (General)

New Customs House, Mumbai - 400001

... Appellant

versus

Kamal Clearing & Forwarding Pvt Ltd

304 Vardhman Chambers, 3rd Floor, 72 Kalyan Street
Masjid (E), Mumbai - 400009

...Respondent

APPEARANCE:

Shri D S Mann, Deputy Commissioner (AR) for the appellant

None for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85757/2024

DATE OF HEARING:

08/02/2024

DATE OF DECISION:

06/08/2024

PER: C J MATHEW

We are here concerned with forfeiture of security deposit under
regulation 20 of the erstwhile Customs House Agents' Licencing

Regulations (CHALR), 2014 fastened on M/s Kamal Clearing and Forwarding Agency Pvt Ltd in order¹ of Commissioner of Customs (General), New Custom House, Mumbai that, though not source of grievance to the licence-holder, was cause of cavil to two Chief Commissioners of Customs who, drawing upon authority conferred upon designated Committee of Chief Commissioners under section 129D(1) of Customs Act, 1962, directed filing of this appeal with the plea that the Tribunal determine, *inter alia*,

‘7(ii) Whether in circumstances of the case, punishment of revocation of licence under Regulation 20 of CHALR, 2004 should not be imposed on CHA M/s. Kamal Clearing & Forwarding Agency Pvt. Ltd.’

following disapproval of the finding in the impugned order that

‘46. In view of the above discussions and findings, I find that though the CHA cannot be allowed to escape culpability for their lapses leading to violation of sub-regulation (a), (d), (e) & (o) of Regulation 13 of CHALR, 2004, as brought out above, the extreme punishment-of revocation of CHA licence is not warranted considering the facts and circumstances of the instant case especially since the licence has been under suspension for over twenty months. I am of the view that forfeiture of the entire Security Deposit tendered by the CHA is appropriate punishment in the context of the specific facts and circumstances connected with the instant case. For this, I wish to place reliance on the order of the Hon'ble High Court of Bombay in the case of M/s, S.S. Clearing and Forwarding

¹ [order no. 89/2013/CAC/CC(G)/PKA/CBS(Admn) dated 25th July 2013]

Agency Pvt Ltd. Vs Commissioner of Customs (General), Mumbai [2011 (263) ELT 353 (Bom)] wherein the Hon'ble High Court maintained the order of the Commissioner of Customs (General) to the extent for forfeiture of the security deposit. I wish to further place reliance on the case of M/s.. K.S. Sawant & Co Vs CC(G), Mumbai reported in 2012 (284) ELT 363 (Tri-Mum) wherein the Hon'ble Tribunal has held that forfeiture of security tendered by the CHA is sufficient punishment and revocation is not warranted and accordingly set aside the order of the revocation subject to the forfeiture of entire security amount. Accordingly, I pass the following order to meet the ends of justice:- '

2. The inquiry authority had held that charges of having breached regulation 13 (a), regulation 13(d), regulation 13(e) of Customs House Agents' Licencing Regulations, 2014 to be proved and that of breach of regulation 13(o) to be partially proved while dropping the charge of having breached regulation 13(n) of Customs House Agents' Licencing Regulations, 2014. The licencing authority had concurred with the inquiry authority in affirming the conclusions on the four charges proved and one charge dropped respectively but, on alleged breach of regulation 13(o) of Customs House Agents' Licencing Regulations, 2014, had held it to have been proved in full. These findings combined with the facts and circumstances surrounding the initiation of proceedings under Customs House Agents' Licencing Regulations, 2014, according to the two Chief Commissioners, warranted revocation of licence. Thus, the issue before us is the commensurateness of the degree of detriment in the impugned order

and not the penalty or the findings thereof.

3. The respondent was not represented at the hearing but from precedent decisions on maintainability of appeal of licencing authority against its own order and arguments on behalf of the appellant, the dispute was reserved for decision. In the meanwhile, the respondent filed a written submission enclosing order² of authority adjudicating upon the offence of misdeclaration of value with intent to claim undue 'drawback', that led to initiation of proceedings for termination of licence against them, declining to impose penalties under section 114 and section 114A of Customs Act, 1962 and intimated acceptance thereof by the competent Committee of Chief Commissioners. This is, perhaps, the most compelling reason for the restriction on appealability of its own order by the licencing authority upon conclusion of proceedings under Customs House Agents' Licencing Regulations, 1994; the entitlement to do so has also been considered on earlier occasions by the Tribunal for dismissal of appeals similarly prosecuted in the past.

4. Like all such proceedings which privilege the 'servant' in a 'master-servant' relation alone to have appellate recourse against detriment to tenure and conditions of service, disciplinary proceedings against 'customs brokers', even if not in 'master-servant' relation but of 'creator-creature' equation that alters the terms of licenced right to

² [order-in-original no. 04/COMMR/MS/PACE/ICD-PPG/2020 dated 28th August 2020]

practice an occupation, is governed by special law incorporated as section 146 of Customs Act, 1962. While establishing this institution for specific purposes, the Central Board of Excise & Customs (CBEC) was enabled to design the regulatory framework for ‘customs brokers’ to be licenced, supervised and terminated; the termination, and alteration of conditions of licence, was to be subject to appellate recourse, under section 146 of Customs Act, 1962 and in the Regulations too, at the instance of ‘customs brokers’ only. This was held so by the Tribunal in *Commissioner of Customs (General), Mumbai v. Mukadam Freight Systems Pvt Ltd* [2018 (359) ELT 612 (Tri-Mumbai)] thus

‘8. The Regulations vest the authority to bring into being, and erase out of existence, a customs house agent in Commissioner of Customs. No higher authority is envisaged for the discharge of any function in relation to customs house agents. Even the Regulation making authority, the Central Board of Excise & Customs (C.B.E. & C.), has not retained any role - supervisory, monitorial, or Regulatory - to itself in the scheme of administration of these agents. The Regulations empower the establishment of a distinctive appellate mechanism; however, the authority to frame the Regulations has, in its wisdom, empowered the Tribunal by reference to it in Regulation 23. The option to appeal is specifically permitted in the Regulations only to an aggrieved licensee. A harmonious reading of the penal and appellate provisions and the exclusion of any higher authority, even by mention, in the Regulations make legislative intent very clear : that if the progenitor of the licence, the author of its being, has decided to the detriment of a licensee, such aggrieved entity

may file an appeal to the Tribunal and a decision to retain the licence carries with it a finality that does not admit of any intervention under the Regulations. The licensing authority is not envisaged as an appellant under the Regulations. The absurdity of the proposition of appealing against oneself canvassed on behalf of the appellant will be dealt with in due course.

9. Licence holders are professionals who earn their livelihood by rendering services to the import and export community. The discontinuance of a licence, whether temporarily or permanently, is detrimental to the licensee, its employees and their dependents. Hence, akin to conditions of service of officers of Customs, the licensing regulations stipulate a procedure for revocation that is closely parallel to the disciplinary proceedings preceding any detriment to conditions of service. The relationship between a licensed customs house agent and the licensing authority is not much different from that of 'master-servant.'

10. It is axiomatic that in all such proceedings, culminating in termination of such a relationship or is, in any other way, detrimental to the servant, the principles of natural justice require that the power to penalise vests with the author of its being, viz., the appointing authority, that there be a code of conduct which, when violated, brings retribution in the form of a penalty, that the entity who is sought to be proceeded against is served with charges, and supporting evidence thereof, which is subject to an enquiry as a pre-requisite for imposition of penalties. There is no scope for insinuating any higher authority to exercise superintendence over the appointing authority.

11. In terms of Customs House Agents Licensing Regulations, 1984 (which we are concerned with in the present instance), the power to license is vested in the Commissioner of Customs. That authority is, therefore, the 'master' to whom the agent owes its existence. It is the Commissioner of Customs who is responsible

for the operation and functioning of the Customs House and any detriment to efficient functioning of the Customs House will ultimately reflect on that authority. There is no other authority more concerned with weeding out of unacceptable elements and, therefore, there is no cause for any other authority to sit in judgment on the decision of a Commissioner that continued operation of licensee is detrimental to the functioning of the Customs House.

12. *It cannot be said that revenue collection stands on that very footing. Levy of duties and the intent of the law relating to collection of revenue flows from legislative authority. For the purposes of tax administration, officers are commissioned to assess duty liability and to effect, wherever not levied or short-levied, recovery of duties. A finality in tax matters is not, therefore, intended to be vested in an administrative authority because collection of the Legislated tax is for the benefit of the citizens of the country and in accordance with the power to tax having been invested by the citizenry on the sovereign Legislature. The adjudication and appellate orders are, for that reason, subject to scrutiny of the review authority established in the taxing statute itself as enacted by the sovereign Legislature. There is no such provision for review in the Customs House Agents Licensing Regulations, 1984.*

13. *The consequential question that begs an answer is the scope of taking recourse to the general provision in Chapter XV of Customs Act, 1962 on the assumption that Regulation 23 of the Customs House Agents Licensing Regulations, 1984 is a special provision contemplating appeal only to aggrieved licensee and that Revenue authorities cannot be discriminated against. Such a proposition does not appear to be congruent with legislative intent as the special provision itself is not warranted if general provision in Section 129A of Customs Act, 1962 could have been*

resorted by an aggrieved licensee. On the contrary, legislative intent is abundantly clear in empowering the Regulation making authority to provide for an appellate mechanism distinct from that enacted by the sovereign Legislature in the Customs Act, 1962 and the Regulation-framing authority has, in accord with the wisdom of generations, entitled only the licensee to appeal. As the sovereign Legislature has specifically empowered a separate appellate structure, the intent to deny the replication of the normal appellate remedy to the disciplinary authority against its own order is emphatic. We cannot countenance reading down the general provisions of review and appeal to apply to dropping of disciplinary proceedings against customs house agents in the face of specific and deliberate non-inclusion of such contingency in Section 146 of Customs Act, 1962 and the Regulations framed thereunder.'

5. Nothing further would remain in this appeal except that Learned Authorised Representative submitted that an appeal filed against the said order is pending before the Hon'ble High Court of Bombay and that the general provision for appellate remedy under section 129A of Customs Act, 1962 cannot be abridged for which decision of the Hon'ble High Court of Madras in *Commissioner of Customs, Chennai v. Freight Field (Madras) Pvt Ltd [2020 (373) ELT 78 (Mad)]*, with particular reference to,

'46. In view of the aforesaid Judgment of the Karnataka High Court which we affirm and agree and in view of the reasons stated hereinabove, we are of the opinion that, no party in an adjudicating proceedings can be rendered remediless by way of appeal and if any such contrary view is taken by Courts of law, that will be detrimental to the basic structure as enshrined in our

Constitution, i.e., Judicial review. Therefore our conclusion in this regard is fully forfeited by the aforesaid reason also.'

on maintainability of appeals by the licencing authority against its own order before the Tribunal was cited.

6. We find that the issue had been agitated by an aggrieved 'custom house agent' before the Hon'ble High Court of Bombay and, though in the context of empowerment of 'prohibition' under the prevailing Regulations, Commissioner of Customs (General), Mumbai had then argued on non-maintainability of appeal before the Tribunal in the light of limitation in recourse to appellate remedy under the governing Regulations. Not only is the contrary stand now taken by Learned Authorised Representative inconsistent thereby but is also inconsequential in the light of the decision of the Hon'ble High Court of Bombay in *SR Sale & Co v. Commissioner of Customs (General), Mumbai*³ in disposal of

2. the following substantial questions of law:

“(a) Whether the CESTAT was justified in holding that in view of the provisions of Regulation 22(8) of the CHALR, 2004, no appeal lies to the CESTAT against an order passed by the Commissioner of Customs under Regulation 21;

-(b) Whether Regulation 22(8) of the CHALR, 2004 is ultra vires the provisions of the Customs Act, 1962 inasmuch as the same takes away the substantive right of Appeal to the CESTAT as provided under Section 129A of the Customs Act, 1962;

-(c) Whether Regulation 21 of the CHALR, 2004 is ultra

³ [order dated 5th April 2013 in customs appeal no. 21 of 2013]

vires the provisions of the Customs Act, 1962.”

answered thus

‘12. The procedure for suspending or revoking a licence under Regulation 20 is specified in Regulation 22. Broadly speaking, Regulation 22 requires the issuance of a notice to show cause, an opportunity to file a written statement and the holding of an enquiry in the course of which evidence can be produced. At the conclusion of the enquiry, a report is prepared, a copy of which is to be furnished by the Commissioner to the CHA who has a further opportunity to make a representation. Thereupon, the Commissioner is empowered to pass an order thereon.

13. Regulation 22(8) provides as follows:

“(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.”

14. Regulations 20, 21 and 22 contemplate three separate eventualities. The first, which is the most drastic, is the power to revoke the licence of a CHA under Regulation 20 on grounds which are stipulated in sub-regulation (1). The second is a suspension of the licence of an agent where immediate action is considered to be necessary by the Commissioner of Customs and where an enquiry is pending or contemplated. The third, which is a power to impose a prohibition in Regulation 21 operates to prevent an agent from working in one or more sections of a Customs Station. A prohibitory order under Regulation 21 does not constitute either a revocation of a licence or suspension of a licence. The effect of a prohibitory order under Regulation 21 is to prevent an agent from working in a customs station or in one or more sections thereof. Regulation 22(8) has provided for a right of appeal against an order of revocation of a licence or of

suspension under Regulation 20 or Regulation 22(7). Regulation 22(7) operates in the area of the suspension or revocation of a licence. Thus, the subordinate legislation has contemplated an appeal against an order of revocation or suspension, but no appeal against an order of prohibition under Regulation 21 in respect of the area of one or more sections of a customs station. But, according to the Appellant, an appeal would lie against a prohibitory order issued under Regulation 21 under Section 129A of the Customs Act, 1962. It is this aspect of the matter that would warrant consideration.

*15. Section 129A provides an appeal to the Tribunal by a person aggrieved by orders of the nature provided in clauses (a) to (c). Clause (a) is a decision or order passed by the Commissioner of Customs as an adjudicating authority. The Appellant relied upon the definition of the expression “adjudicating authority” in Section 2 as meaning any authority competent to pass an order or decision under the Act. A decision taken by an authority under subordinate legislation is as a matter of statutory interpretation, regarded as a decision taken under the Act. This principle has been enunciated in the judgment of the Supreme Court in *Indramani Pyarelal Gupta vs. W.R. Nattu* [(1963) 1 SCR 721]. This, however, would not be dispositive of the issue which arises in this case because essentially what the Court has to consider is whether the general appellate provisions that are contained in Section 129A would apply to action which is initiated against a CHA under the Regulations of 2004. Section 146 provides for the licensing of an agent for carrying on business within a customs station involving import or export of goods or entry or departure of a conveyance. The entire subject matter of the licensing of CHAs which commences from invitation of applications and covers qualifications of eligibility, the holding of examinations, award of licences, obligations of CHAs and disciplinary control are governed by the regulations. Section 146(2) contemplates*

that the Regulations are intended to fulfill the purpose of carrying out of the provisions of the section. That the Regulations may also govern the remedies which are available to a CHA against an order passed in the disciplinary jurisdiction is made abundantly clear by clause (f) of Section 146(2). Section 146(2)(f) clarifies by way of illustration that the Regulations can govern the appeals, if any, against orders of suspension or revocation. If recourse to the general power of an appeal under Section 129A was intended by Parliament to be available in disciplinary matters involving CHAs, there was no necessity of including a provision such as that which is contained in Section 146(2)(f). The provisions of Section 129A have to be harmoniously construed with those of Section 146. There is no question, in our view, of there being any inconsistency between the two statutory provisions. Similarly there is no repugnancy between the provisions of Regulation 20(8) and Section 129A. Section 146 operates in a field different from Section 129A. Section 146 governs the licencing of CHAs and contemplates the making of regulations governing all aspects of the licensing of CHAs including disciplinary control. Remedies against orders passed in the disciplinary jurisdiction are to be provided in the regulations. The Regulations constitute a self contained code relating to the licensing of CHAs. The Regulations provide for disciplinary control over CHAs and have provided an appellate remedy against orders of revocation or suspension. An order of prohibition under Regulation 21, preventing a CHA from operating within one or more sections of a customs station is not subject to an appeal under the Regulations. The subordinate legislation has considered that such an order does not possess the consequence of either a revocation of a licence or for that matter, the suspension of a licence pending enquiry since such an order prohibits a CHA from operating in one or more sections of a customs station. The wisdom of the delegate of the legislature in not providing an appeal in such a case does not fall for re-evaluation by the Court.

It is trite law that there is no inherent right of appeal. An appeal is a creation of a statute or, as in the present case, the creation of a statutory provision (Section 146) read together with the regulations. A CHA is, however, not without remedy against an order of prohibition which is amenable to the jurisdiction of the High Court under Article 226 of the Constitution. (emphasis supplied)

16. For these reasons, we have come to the conclusion that the Tribunal is justified in holding that an appeal is not maintainable against an order of prohibition under Regulation 21 of the Regulations of 2004. In view of this decision, we answer Question (a) in the affirmative and Questions (b) and (c) in the negative. The appeal shall accordingly stand disposed of in the aforesaid terms. There shall be no order as to costs.'

7. The Hon'ble High Court of Bombay has, thus held that the limiting scope of appellate remedy in the Regulations governing 'customs brokers' is deliberated restriction and that, in such circumstances, the general provision for appeal cannot be resorted to. The judgement of the jurisdictional High Court is binding on us.

8. For the above reasons, we dismiss the appeal.

(Order pronounced in the open court on 06/08/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)