

(2015) 324 ELT 558

Karnataka High Court

Case No: Writ Petition No. 17539/2015 (T-RES)

Esquire Express India
Pvt. Ltd.

APPELLANT

Vs

Commissioner of
Customs

RESPONDENT

Date of Decision: April 29, 2015

Citation: (2015) 324 ELT 558

Hon'ble Judges: Aravind Kumar, J

Bench: Single Bench

Advocate: Shivadass G., for the Appellant; Jeevan J. Neeralgi, Advocates for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Aravind Kumar, J.

1. Petitioner is seeking for quashing of order dated 09.03.2015, Annexure-A passed by Chief Commissioner of Customs, Bengaluru, whereunder representation filed by petitioner requesting to modify the order in original dated 31.07.2014, Annexure-B, passed by Commissioner of Customs has ordered to forfeit the security furnished by petitioner in terms of Regulation 14(1) of Courier Imports and Exports (Clearance) Regulations, 1998 (for short "Courier Regulations") by rejecting the representation of petitioner.

2. Petitioner herein is a holder of Authorized Courier Registration issued under Courier Regulations by respondent valid upto 11.06.2021. An offence report was made out by Joint Commissioner of Customs, Air Cargo Complex, Bengaluru to the effect that respondent did not engage in international transportation of goods i.e., collecting and delivering of goods to which it had been appointed but had appointed agents namely, M/s. ADP Express Private Ltd. to act as their agent for their Hong Kong shipments and M/s. Universal Courier Pvt. Ltd. for Singapore shipments. On account of petitioner not

obtaining prior permission from the Commissioner of Customs in terms of Regulation 13(j) of Courier Regulations, a show cause notice dated 08.05.2014 came to be issued to petitioner as to why Courier Registration issued to petitioner should not be revoked and security furnished by petitioner should not be forfeited in terms of provisions of Regulation 14(1) of Courier Regulations.

3. On reply being submitted twice and adverting the contentions raised by authorized representative of petitioner, Commissioner of Customs has dealt with all the three contentions raised by authorized representative of petitioner and a finding came to be recorded by order dated 31.07.2014, Annexure-B, which reads as under:

"12.2 Adverting to the stand taken in the reply dated 28.05.2014, at the outset, it needs to be noted that the agreement with ADP has been entered on 03.01.2012. Thus, it was not even in existence on 15.06.2011 when the fact of outsourcing is claimed to have been disclosed to the department. Further, in their letter dated 15.06.2011 addressed to the Commissioner of Customs, Bangalore, there is no mention whatsoever of outsourcing of any of the activities. In the said letter, Esquire Express have requested the department to take on record certain facts (7 of them) for consideration of their request for registration as Authorized Courier. None of these, as already mentioned, indicate outsourcing of any of the activities. In fact, the agreement with Universal Express is dated 5.3.2007 and was already in operation as on 15.06.2011. Therefore, nothing prevented Esquire Express from expressly bringing this agreement on record, on 15.06.2011, and in obtaining the permission in this respect. There is also nothing on record to substantiate that any oral submissions were made to the departmental officials informing them in the matter. In view of this factual position, the submissions of Esquire Express that they had kept the department informed and, therefore, they were under a bonafide belief that the registration was granted after taking note of the fact that they would be outsourcing part of their activities, is incorrect. Consequently, there was also no cause for them to assume that outsourcing had the tacit approval of the department.

12.3 Coming to the second set of submissions made on 27.06.2014, it is admitted by Esquire Express that the activity of door to door delivery had been outsourced in two of the three cases. They have, accordingly, sought ex-post facto approval in these cases. In the third case, as per the Flow Chart-III, it is the Universal who have outsourced the activity relating to filing of CBE-I at Bangalore to Esquire and, as such Esquire need not obtain any permission. I find merit in this submission of the Authorized Courier in as much as the activity which has been outsourced in the third case is by Universal to Esquire and not vice-versa.

12.4 As regards the contention raised in the latest submission dated 23.07.2014, I am afraid the same is sans any merits whatsoever for the following reasons. Regulation 5 specifies the procedure for clearance of import goods whereas Regulation 6 does so in respect of export goods. A plain reading of these Regulations clearly indicates that the procedure so specified relates to filing of documents with Customs and handling of goods

while in customs control. Obviously, these Regulations do not specify all the functions which an Authorized Courier is required to carry out. On the other hand, the definition of "Authorized Courier" as contained in Regulation 3(a) and which has been relied upon in the show cause notice, clearly indicates that the Authorized Courier has to, inter-alia, carry out the door to door delivery of courier consignments. In other words, a person who is not doing door to door delivery cannot be termed as an Authorized Courier. Thus, Esquire Express cannot be termed as the Authorized Courier since they do not undertake door to door delivery. Further, since as per them, the Commissioner has no powers to permit outsourcing of door to door delivery, the position also cannot also be cured. In such a case net result would be that the Esquire Express cannot be allowed to operate as an Authorized Courier, an eventuality which they are so stridently attempting to avoid. Suffice it to say, it is a self defeating argument.

13. As brought out herein above, an Authorized Courier is required to undertake international transportation of goods on a door to door delivery basis. Esquire Express, by way of aforesaid agreements, have outsourced the activities related to door to door delivery and some other activities to other companies. These activities are germane to the Courier business. However, the Regulations do not impose any restrictions on the scope of outsourcing. Therefore, there would not have been any difficulty in according permission for outsourcing had Esquire Express approached the department before such outsourcing."

4. As noticed by Commissioner of Customs, petitioner was required to undertake international transportation of goods on door to door delivery basis. However, petitioner entered into agreements with two separate firms by outsourcing its licensing activity namely which related to door to door delivery to said entities. Undisputedly, petitioner did not obtain prior permission from the Commissioner of Customs which is mandatory under Courier Regulation 13(j) and thereby petitioner had violated the terms agreed to be adhered to as prescribed in the conditions of bond executed by it. As noticed by the Commissioner of Customs this default of petitioner had continued for a period of three (3) years. However, instead of revoking the Courier Registration for said violation and taking a sympathetic view, Commissioner of Customs forfeited the security furnished by petitioner under the bond executed by it and did not revoke the registration issued to petitioner by order dated 31.07.2014, Annexure-B.

5. Assailing the said order petitioner pursued its grievance before Chief Commissioner of Customs by submitting a representation, who on reappreciation of facts and contentions raised was of the view that forfeiture of security amount was inconsonance with the Courier Regulations and act of petitioner being in contravention of Regulation 13(j), it was held by respondent that order passed by Commissioner of Customs forfeiting the security is proper and there being no infirmity in the said order, representation of petitioner came to be rejected.

6. Assailing said order petitioner is before this Court contending inter-alia that Regulation 14(1) of Courier Regulations stipulates that registration of authorized courier may be revoked and also order of forfeiture of security, but there is no option left to the Commissioner to order for any one and the word "and also" found in Regulation 14(1) is to be read conjunctively. It is also contended that Regulation 13(j) only stipulate that written permission of Commissioner of Customs should be obtained before sub-contracting or outsourcing activity is done by Authorised Courier and non-obtaining of permission is only procedural irregularity and said Act is not prohibited under the Courier Regulations. It is also contended for such procedural infraction Commissioner of Customs was not justified in forfeiting the amount and such forfeiture does not appeal to the doctrine of proportionality of punishment. It is also contended that forfeiture of security is an act of deterrent and has curtailed the expansion plans of petitioner's business in other areas. By way of alternate submission he also contends that on account of said forfeiture order passed by the Commissioner of Customs on 31.07.2014, Annexure-B, petitioner is being denied the registration by other jurisdictional Commissionerate across the country and the applications filed by petitioner for grant of Authorised Courier registration is kept pending without any decision taken on said applications and thereby it has resulted in preventing the petitioner from carrying on the business and right of petitioner to carry on the business, is affected. Hence, petitioner seeks for grant of prayer sought for in the writ petition.

7. At this juncture, Sri. Shivadass G., learned counsel appearing for petitioner would submit that contentions raised in the writ petition with regard to interpretation of language employed in Courier Regulation 14 is not pressed. Memo is filed to the said effect and same is placed on record and said issue is not delved upon in this writ petition in view of memo filed.

8. Per contra, Sri. Jeevan J. Neeralgi, learned counsel appearing for respondent would support the order passed by Chief Commissioner of Customs dated 09.03.2015, Annexure-A and submits that in view of the fact that petitioner had not taken prior permission as required under Regulation 13(j), though amounts to violation of Courier Regulations as well as violation of bond conditions, which had been executed by petitioner, Commissioner has taken a lenient and sympathetic view and instead of revoking the license granted to him has refrained from doing so and has only forfeited the amount and as such, there is no infirmity in the order passed by Commissioner and as such, he prays for dismissal of the writ petition.

9. Having heard the learned Advocates appearing for parties and on perusal of case records and also bestowing my careful attention to the contentions raised at the bar it requires to be noticed that petitioner has obtained Courier Registration as per Courier Regulations on 26.07.2011 and has been carrying on its operations across the globe. Petitioner has been in the business of private cargo by air and sea freight across the world. It is also not in dispute that petitioner has two decades of experience in private round the clock freight forwarding to all types of industries across the globe. Petitioner

knowing fully well the manner, method and mode in which it requires to operate in India, has applied for grant of registration under the provisions of Courier Regulations to operate at Bengaluru Airport Cargo Complex, Devanahalli, Bengaluru for import and exports of goods through courier mode. On an inspection being conducted and offence report was made by the Joint Commissioner, Air Cargo Complex, Bengaluru, which was to the effect that petitioner did not engage itself in the international transportation of goods i.e., collecting and delivering of goods as per Courier Regulations, it had outsourced its job by appointing agents namely M/s. ADP Express Private Ltd. to act as an agent to their Hong Kong shipments and M/s. Universal Courier Pvt. Ltd. for Singapore shipments. Hence, the Joint Commissioner of Customs was of the view that in terms of Regulation 13(j) of Courier Regulations the authorized courier was not entitled to enter into sub-contract or outsource its functions permitted or required to carry out by it in terms of Courier Regulations, without obtaining written permission of the Commissioner of Customs and it was also found that petitioner had not obtained such prior permission before entering into such agreements with these two companies referred to supra. Accordingly, a show cause notice came to be issued on 08.05.2014 as to why Courier Registration issued to petitioner should not be cancelled and the amount furnished by petitioner way of security by executing a bond should not be forfeited.

10. Reply submitted to show cause notice on 28.05.2014 by petitioner indicated that non obtaining of such permission is only procedural infraction and as such, it was contended by petitioner that it does not warrant revocation of registration and petitioner also sought to take umbrage under the communication dated 15.06.2011, which is at Annexure-D, to contend that Commissioner of Customs had already put on notice with regard to its proposed expansion of business at Singapore and Hong Kong and has further attempted to put the blame at the doors of respondent that no additional information was sought for and as such, petitioner sought for dropping of proceedings in the personal hearing held on 12.06.2014 and it was attended to by the learned Advocate appearing for petitioner as well as Official of petitioner-company. Respondent after considering all the contentions raised in the reply dated 28.05.2014 and 27.06.2014 noted that alleged agreements entered into between the petitioner and M/s. ADP Express Pvt. Ltd., was on 03.01.2012 and as on the date of submission of communication dated 15.06.2011, Annexure-D, there was no contract for outsourcing at all and as such, it has been rightly held that contention of petitioner that they had kept the department informed about outsourcing was incorrect and the alleged bonafide belief of petitioner that registration was granted after taking note of said fact namely petitioner would be outsourcing a part of its activity, is factually incorrect. Said finding is based on proper appreciation of facts and there is no infirmity, whatsoever.

11. It is also not in dispute that petitioner sought ex-post facto approval of outsourcing and submission made by petitioner that it is M/s. Universal Courier Pvt. Ltd., who have outsourced the activity relating to filing of CBE-I at Bengaluru through petitioner and as such, petitioner was not under obligation to obtain permission, came to be accepted. On

this amongst other grounds as indicated in the order dated 31.07.2014, Annexure-B, the registration granted to petitioner was not revoked but the security furnished by petitioner was forfeited in terms of Regulation 14(1) of the Courier Regulations. Regulation 14(1) of Courier Regulations reads as under:

"14. Deregistration:--(1) The Commissioner of Customs may revoke the registration of an Authorised Courier and also order forfeiture of security on any of the following grounds namely:--

(a) failure of the Authorised Courier to comply with any of the conditions of the bond executed by him under regulation 11;

(b) failure of the Authorised Courier to comply with any of the provisions of these regulations;

(c) a misconduct on the part of the Authorised Courier;

Provided that no such revocation shall be made unless a notice has been issued to the Authorised Courier informing him the grounds on which it is proposed to revoke the registration and he is given an opportunity of making a representation in writing and a further opportunity of being heard in the matter, if so desired.

Provided further that, in case the Commissioner of Customs considers that any of such grounds against an Authorised Courier shall not be established prima facie without an inquiry in the matter, he may conduct the inquiry to determine the ground and in the meanwhile pending the completion of such inquiry, may suspend the registration of the Authorised Courier. If no ground is established against the Authorised Courier, the registration so suspended shall be restored.

(2) Any Authorized Courier xxxxxxxx may be possible."

12. A plain reading of above said Regulation would clearly indicate that Principal Commissioner of Customs and Commissioner of Customs, as the case may be, may revoke the registration of an authorized courier and also order forfeiture of security on any of the ground specified to in (a) to (c) thereunder. Clause (a) would indicate that in the event of authorized courier failing to comply with the conditions of bond executed under Regulation 11, it would entail in revocation and forfeiture. Likewise, failure of authorized courier to comply with any of the provisions of regulations would also result in revocation and forfeiture. Regulation 13(j) would indicate that authorised courier would not be entitled to sub-contract or outsource its functions permitted or required to be carried out by it in terms of said regulations to any other persons without written permission of Principal Commissioner of Customs and Commissioner of Customs, as the case may be. Concededly in the instant case petitioner had not obtained the written permission and only by relying upon the communication dated 15.06.2011, Annexure -D petitioner has made an attempt to take umbrage under it to buttress its argument that Department had

already been intimated of petitioner's intention to expand its business at Hong Kong and Singapore and as such, it was awaiting further instructions from the Department, to stave off its obligation of obtaining written permission as contemplated under Regulation 13(j). At the cost of repetition, it requires to be noticed that as on the date of submitting communication dated 15.06.2011 to petitioner it had not entered into contract with M/s. ADP Express Pvt. Ltd. and said contract came into existence only on 03.01.2012 and as such, petitioner cannot be heard to contend that respondent had been made aware of such contract. Contention raised in this regard stands rejected.

13. In view of the fact that Commissioner of Customs instead of revoking licence had taken a lenient view and forfeited the bond amount, cannot be held either as being without authority or being disproportionate to prove infraction or not being in consonance with the Courier Regulations for reasons more than one:

"Firstly, Regulation 14(1)(b) would clearly indicate that when there is infraction or violation of Courier Regulation, authority would be entitled to forfeit the bond amount. Secondly, when there is violation of any of the conditions of bond executed by the authorized courier under Regulation 11 it would result in authority invoking forfeiture clause and forfeiture the amount to Department. Hence, this Court is of the considered view that for myriad reasons stated hereinabove it cannot be held that orders passed by the Authorities is contrary to Courier Regulations or forfeiture being disproportionate to prove violation of Courier Regulation."

14. Insofar as second prayer is concerned, this Court is of the considered view that it cannot be entertained for reasons more than one:

"Firstly, there is no cause of action for the petitioner to urge the said prayer before this Court, inasmuch as, application said to have been made by petitioner is before the Commissionerate of Jaipur and as such, it is for the petitioner to pursue its remedy before the jurisdictional High Court. Secondly, application filed by petitioner has not been rejected and language employed in the communication dated 27.03.2014, which is part of Annexure-S would indicate that said application is kept pending on the ground of non receipt of any report from the Commissioner of Customs, Bengaluru. If it is so, it is open to petitioner to pursue its grievance before jurisdictional High Court. For these reasons, this court is not inclined to entertain the second prayer also."

15. In that view of the matter, I proceed to pass the following:

ORDER

"(i) Writ petition is hereby dismissed with costs.

(ii) Order dated 09.03.2015, passed by Chief Commissioner of Customs, Bengaluru at Annexure-A is hereby affirmed.

(iii) Petitioner shall pay costs of Rs. 10,000/- to respondent within an outer limit of four (4) weeks from the date of receipt of copy of this order and file a Memo to said effect in this writ petition.

(iv) Failure to do so, registry is directed to issue a certificate to respondent certifying said amount is due to respondent by petitioner so as to enable the respondent to recover the same from petitioner as arrears of Land Revenue."

Ordered accordingly.