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Fairdeal Enterprises (P) Ltd. Vs C.C. (Airport and Administration)

Writ Petition No. 851 of 2009

Court: Calcutta High Court

Date of Decision: Aug. 25, 2009

Acts Referred:
Constitution of India, 1950 â€" Article 226#Customs Act, 1962 â€" Section 108, 129(1), 129A#Customs House Agents Licensing Regulations, 2004 â€" Regulation 10, 13, 20, 20(1), 20(2)

Citation: (2010) 256 ELT 545

Hon'ble Judges: Indira Banerjee, J

Bench: Single Bench

Advocate: Sudhir Meheta, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

Indira Banerjee, J.
The Court : The short question in this writ application is whether an order of suspension of a Custom House Agents

Licence can be issued without complying with the procedure for revocation of a licence laid down in Regulation 22 of the Customs House Agents

Licensing Regulations, 2004.

2. In this writ application the petitioner has challenged Establishment Order No. 235/2009 dated August 10, 2009 issued by the Commissioner of

Customs (Airport & Administration), Custom House, Kolkata, suspending the operation of the CHA Licence No. F - 5 (PAN No.

AAACF6464C) held by the petitioner No. 1, with immediate effect.

3. The petitioner is a Company incorporated under the provisions of the Companies Act, 1956 and has been carrying on business, inter alia, as a

Customs House Agents since 1987. The petitioner holds a Customs House Agents license, issued under the Customs House Agents Licensing

Regulations, 2004, which is valid till 2016. According to the petitioner, the petitioner has had an unblemished record as a Customs House Agent.

4. In or about April 2009, the petitioner cleared an export consignment purportedly on behalf of one M/s. Swift Freight (I) Pvt. Ltd. The

consignment was apparently covered by a Shipping Bill No. 5543848.

5. The container appears to have reached Haldia Port on April 22, 2009. While the goods were awaiting loading on the vessel, Officers of

Directorate of Revenue Intelligence caused a search and found 6085 Kgs of Red Sanders instead of Hot Dipped Galvanised Tension Bars. The

goods were seized.

6. The petitioner"s representative one Mr. Indranil Roy was examined u/s 108 of the Customs Act, 1962. Various Directors of the petitioner No.

1 were also summoned to the Office of the Directorate of Revenue Intelligence and their statements obtained in June, 2009.

7. According to the petitioner, the petitioner acted bona fide. Whether or not the petitioner acted bona fide, is not for this Court to decide in

proceedings under Article 226 of the Constitution of India.

8. On August 11, 2008 the petitioner was served with the impugned order of suspension, the relevant parts whereof are extracted herein below for

convenience:

Directorate of Revenue intelligence, Kolkata acting on an intelligence, had made a seizure of 6085 Kgs of Red Sanders valued approximately at

Rs. 24,34,000/- on 23-4-2009. The goods were attempted to be exported outside India through Haldia Dock, stuffed in container No. PRSU-

2274463(20") declared to contain Hot Dipped Galvanized Tension Bars vide Shipping Bill No. 5543848 dt. 11-4-09 in the name of M/s.

Noblesse Exports, Kolkata, who on investigation are found to have not filed the aforesaid Shipping Bills or exported the consignment. The CHA

for this consignment is M/s. Fairdeal Enterprise (P) Ltd.

During investigation it revealed that the CHA M/s. Fairdeal Enterprise (P) Ltd., Licence No. F - 5 (PAN No. AAACF6464C) had procured the

customs clearing job from a freight forwarder namely M/s. Swift Freight (I) Pvt. Ltd. Shri Shankar Kumar Mitra, an employee of M/s. Swift

Freight (I) Pvt. Ltd. had given the clearing job to the CHA through Shri Indranil Ray, an employee of the CHA. While procuring the clearing job,

the CHA did not obtain any authorization. In fact, they cleared two export consignments in the name of the aforesaid exporter without obtaining

any authorization. Now, it appears that the said two consignments were also used to smuggle Red-Sanders. The declared exporter and

manufacturer of the goods have categorically denied any connection with the above consignments. The Central Excise Officer whose name and

stamp was used on the Application for/Removal of Excisable Goods for Export (ARE -1), has also confirmed that the signature appearing on the

ARE -1 were not his. Thus, it appears that the documents presented before the Customs were fake and forged. From the facts of the case and

from the statement of Shri Binoy Majumder, Director of M/s. Fairdeal Enterprise Pvt. Ltd., Shri Indranil Roy, Employee of M/s. Fairdeal

Enterprise (P) Ltd., Shri Shankar Kumar Mitra, Import-Export Sales Executive of M/s. Swift Freight (I) Pvt. Ltd., Shri Sujit Moitra, Branch

Manager of M/s. Swift Freight (I) Pvt. Ltd., it appears that the CHA has failed to properly advise his client to comply with the provisions of the

Act by way of ensuring that the information given in the Shipping Bill was correct.

It thus appears that the CHA has violated the provisions of Regulation 13(a) and 13(d) of the CHALR "2004.

9. Mr. Sudhir Meheta, learned Advocate appearing on behalf of the petitioner, submitted that the power to suspend a Customs House Licence

could only be exercised upon compliance with the provisions of Regulation 22 for revocation of a licence.

10. For the sake of convenience Regulations 20, 21 and 22 of the Customs House Agents Licensing Regulations, 2004 are extracted herein

below:

Regulation 20. Suspension or revocation of licence. - (1) The Commissioner may, subject to the provisions of Regulation 22, revoke the licence of

a Customs House Agent and order for forfeiture of part or whole of security, or only order forfeiture of part or whole of security, on any of the

following grounds, namely:

(a) failure of the Customs House Agent to comply with any of the conditions of the bond executed by him under Regulation 10;

(b) failure of the Customs House Agent to comply with any of the provisions of these regulations, within the jurisdiction of the said Commissioner

of Customs or anywhere else;

(c) any misconduct on his part, whether within the jurisdiction of the said Commissioner of Customs or any where else which in the opinion of the

Commissioner renders him unfit to transact any business in the Customs Station.

(2) Notwithstanding anything contained in sub-regulation (1), the Commissioner of Customs may, in appropriate cases where immediate action is

necessary, suspend the licence of a Customs House Agent where an enquiry against such agent is pending or contemplated.

Regulation 21. Prohibition. - Notwithstanding anything contained in regulation 22, the Commissioner of Customs may prohibit any Customs House

Agent from working in one or more sections of the Customs Station, if he is satisfied that such Customs House Agent has not fulfilled his

obligations as laid down under Regulation 13 in relation to work in that section or sections.

Regulation 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 stating the grounds on which it is proposed to suspend or revoke the licence and requiring the said Customs

House Agent to submit, within such time as may be specified in the notice, not being less than forty-five 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 Commissioner of Customs or Assistant Commissioner of

Customs.

(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.

(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.

(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.

(5) All the conclusion of the inquiry, the Deputy Commissioner of Customs or Assistant Commissioner of Customs shall be prepare a report of the

inquiry recording his findings.

(6) The commissioner of Customs shall finish 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 sixty

days, any representation that he may wish to make against the findings of the Deputy Commissioner or Assistant Commissioner of Customs.

(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.

(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 u/s 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.

11. In support of his submission Mr. Meheta relied on the unreported judgment of this Court dated March 25, 2008 in WP No. 195 of 2008

(Mishra & Misra (Agencies) Enterprises and Anr. v. Union of India and Ors.), the judgment and order dated January 16, 2008 in WP No. 8 of

2008 (Indian Merchantile Agency and Ors. v. Commissioner of Customs (Administration), Kolkata and Ors.), the judgment dated March 13,

2009 in Hindustan Shipping Agency and Anr. v. Union of India and the order dated June 8, 2005 in WP No. 1249 of 2005 (Goodhope Clearing

and Forwarding Private Limited and Anr. v. Commissioner of Customs (Administration) and Ors.).

12. In Mishra & Mishra (Agencies) Enterprises and Anr. (supra) and Indian Merchantile Agency and Ors. the Court held that the requisites of

Regulation 22 were to be complied with for exercise of power vested under Regulation 20.

13. In Goodhope Clearing and Forwarding Pvt. Ltd. (supra) the Court set aside an order of suspension on the ground of non-compliance with the

requisites of Regulation 22. In Hindustan Shipping Agency and Anr. (supra) the Court held as follows:

Regulation 20(1) deals with "revocation" of licence and sub-regulations (a)(b) and (c) of the Regulations deal with the grounds on which a licence

can be revoked. Regulation 20(2) confers power on the Commissioner of Customs to "suspend" the licence of a Customs House Agent where

immediate action is necessary. Interestingly power of suspension of licence ""where immediate action is necessary"" is under Regulation 20 which, as

title indicates, deals with ""Suspension or revocation of licence "". Though it starts with a non-obstante clause and is an independent provision,

Regulation 20(2) does not lay down the procedure to be followed by the authority following immediate suspension. Therefore, as no procedure

has been enumerated following immediate suspension, answer, if any, has to be found from the Regulations itself. Regulation 22 which deals with

the ""procedure for suspending or revoking licence under Regulation 20"", provides the answer. Regulation 22(1) provides the procedure for

suspending the licence of an agent. Hence, as Regulation 20(2) does not lay down the follow up procedure, the procedure under Regulation 22 is

to be followed. Regulation 22 postulates ""The Commissioner of Customs shall issue a notice in writing to the Customs Agent stating the grounds on

which it is proposed to suspend"", ""the licence and requiring the said Customs House Agent to submit, within such time as may be specified in the

notice, not less than forty five days, to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him a written

statement of defence and also to specify in the said statement whether the Customs House Agent desires to be heard in person..""
Thus, as seen,

the agent is not only by notice should be informed of the grounds of suspension but at the same time he should be granted opportunity to submit a

written statement of defence ""within such time as may be specified in the notice"". The words ""and requiring the said Customs House Agent to

submit"" ""a written statement of defence"" is a pointer to that effect. The language of Regulation 22(1), as evident, is plain and unambiguous. The act

of immediate suspension of an agent under Regulations 20(2) and the procedure under Regulation 22(1) are inseparable and cannot be read in

isolation. Since an action by the authorities under Regulation 20(2) does not provide a remedy, procedure under Regulation 22, as noted, is to be

followed. Otherwise it would enable the authority to suspend an agent with immediate effect for an indefinite period thus giving an uncontrolled and

unguided power to the State.

14. I am, however, unable to agree that the provisions of Regulation 22 of the Customs House Agents Regulations are to be read into Regulation

20 Sub-regulation (2) which provides for immediate suspension.

15. It is true as observed in M/s. Hindustan Shipping Agency and Anr. (supra) that the heading of Regulation 20 reads suspension or revocation of

licence. The heading does not, however, curtail a specific substantive provision. Regulation 20 Sub-regulation (1) makes it absolutely clear that

notwithstanding anything in Sub-regulation (1), the commissioner of customs might, in appropriate cases, where immediate action is necessary,

suspend the licence of a Customs House Clearing agent, where an inquiry against such agent is pending or is contemplated.

16. It is well settled that Headings or Titles may be referred in constructing statutory provisions, to resolve ambiguity or doubt. The Headings do

not, however have a controlling effect and cannot be used to give a different effect to clear words in a statutory provision. Reference may be made

to the judgments of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Ahmedbhai Umarbhai and Co., Bombay, , Frick India Ltd.

v. Union of India reported in AIR 1990 SC 689, Bharat Damodar Kale v. State of A.P. reported in AIR 2003 SC 4563. The same principles of

interpretation apply to statutory Regulations.

17. Compliance with the requisites of Regulation 22 has clearly been excluded. When Regulation 20(2) excludes the application of the procedure

prescribed by Regulation 22 in case of action under the said Regulation, it is doubtful whether this Court can insist on compliance with the

procedure prescribed under Regulation 22.

18. The view taken by this Bench finds support from an order of a Division Bench of Bombay High Court in Commissioner of Customs (General)

v. S.A. Dalai & Co. reported in 2008 (221) E.L.T. 488 (Bom.). However, in that case, it was found on facts that the suspension was not

immediate and accordingly the Division Bench did not interfere with the order of the Tribunal setting aside the suspension.

19. There can be no doubt that power under Regulation 20(2) has serious civil consequences for a customs house clearing agent, and the

principles of natural justice must be complied with. However, in cases that require immediate suspension post decisional hearing may suffice. A

post decisional hearing must be given immediately after suspension. Furthermore, the power under Regulation 20(2) to suspend the licence should

not be exercised lightly, but only in exceptional cases. Interim suspension has to be short and investigation has to be carried out with utmost

expedition. In a case of indefinite suspension, the remedy of judicial review under Article 226 might be invoked.

20. The charges against the petitioner are serious.

21. Having regard to the special facts and circumstances of the case, this Court is ex facie satisfied that immediate suspension was called for and

necessary. This Court is not inclined to pass any interim order as prayed for by the petitioner. This Court is of the prima facie view that the writ

application is liable to be dismissed.

22. Since, however, Benches of co-ordinate strength have taken a view different from that taken by this Bench, judicial propriety demands that the

writ application should be decided by a Division Bench. This writ application may be placed before the Hon''ble Chief Justice for assignment to a

Division Bench.

23. Urgent certified copy of this order, if applied for, be supplied to the parties, upon compliance with all requisite formalities.