

Bombay High Court

Having Office At vs The Union Of India on 29 April, 2009

Bench: F.I. Rebello, J. H. Bhatia

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL JURISDICTION

WRIT PETITION NO.2700 OF 2009

A.S.Vasan & Sons (Bombay)

A Partnership Firm,
Through its partner-
Mrs.Bindu Unnikrishnan

Having office at
610, Arenja Corner, Sector-17,
Vashi, Navi Mumbai-400 705
v.Petitioner.

1.The Union of India
Through Central Govt. Advocates,
Dedicated Legal Cell,
New Custom House,
Ballard Estate,

Mumbai 400 001.

2. Chief Commissioner of Customs

Mumbai-I, New Custom House,
Ballard Estate,
Mumbai- 400 038

3. Commissioner of Customs (G)
New Custom House,
Ballard Estate,
Mumbai 400 038

4. Customs & Excise, Service Tax

Appellate Tribunal
Through Asstt. Registrar,

3rd, 4th & 5th Floor, Jai Centre,
34, P.D'Mello Road,
Masjid (East), Mumbai ...Respondents.

Mr.Sujay N. Katawala with Mr.Brijesh Pathak and
Mr.U.P.Warunjikar advs. for the Appellant.

Mr.P.S.Jetly with Mr.R.Kumar advs. for the
Respondents.

CORAM : F.I. REBELLO &
 J.H.BHATIA,
 J.H.BHATIA JJ.
DATE : 29th April, 2009.

JUDGMENT :

[2]

1. Rule. By consent heard forthwith.

2. Petitioner was Licensed Customs House Agent (CHA). The CHA Licence No.11/483 issued to the petitioner expired on 31.12.2007. Petitioner applied for renewal of the said licence within the time prescribed. As the application for renewal was not being decided, the petitioner filed Writ Petition No.310 of 2008 which came to be disposed off by order dated January 25, 2008 pursuant to statement made on behalf of the respondents that the renewal application would be decided within two weeks.

petitioner's

3. Petitioner earlier had made representations, which were received in the office of the respondents on 31.12.2007. In the representation dated 28.12.2007 after setting out various contentions, petitioner had set out as under; "In case any further clarification is essential, we may please be heard". Subsequent to the order passed by this Court in writ petition, the respondent no.3 passed an order that the licence is not to be renewed beyond 31.12.2007 and accordingly, their application in this regard is rejected.

4. Petitioner aggrieved by that order, preferred an appeal before the Chief Commissioner of Customs. That [3] came to be disposed off by communication dated 19.8.2008 whereby the petitioners were informed that there is no statutory provision under the Customs House Agents Licensing Regulations, 2004 (Hereinafter referred to as 'Regulations') for filing an appeal.

Petitioner was informed that accordingly, the matter was referred to the Competent Authority, i.e., Commissioner of Customs (G). Petitioner had also preferred an appeal before the Tribunal (CESTAT). The Tribunal by its order held that the order passed by the Commissioner rejecting renewal of licence is administrative order in nature and not against which an appeal is maintainable quasi judicial before the Tribunal and accordingly, dismissed the appeal.

Petitioners have thereafter come before this Court by way of writ petition impugning the order of the Commissioner.

5. In the first instance, it is submitted on behalf of the petitioners by the learned counsel that under the Regulations, an appeal would be maintainable before the Chief Commissioner of Customs or in alternative, an appeal considering the provisions of Regulation 22(8) could be filed before the CESTAT. It is submitted that the application for renewal for all purposes is a fresh application and accordingly, an appeal would lie. Reliance was placed on the judgment [4] of the Supreme Court in *Falcon Air Cargo and Travels (Del.)*.

(Del.) Delhi High Court has noted that non-renewal and revocations are conceptually and contextually different. It held that "revocation" is the calling back of a thing granted or destroying or making void of some deed that had existence, and the act of revocation made it void. Renewal of a licence means a new licence granted by such act. Its effect is to prevent discontinuance or forfeiture. Renewal comes at a stage when the period of currency of the licence and *Others v.*

is over and its validity is extended. In *Gajraj Singh State Transport Appellate Tribunal and Others (1997) 1 Supreme Court Cases 650*, the Supreme Court in the case under the Motor Vehicles Act has been pleased to hold that the renewal of licence means a new licence granted by way of renewal. It was, therefore, sought to be contended that application for renewal being a fresh application and considering Regulation 9(4), an appeal would lie.

6. Let us, therefore, consider whether an appeal is maintainable. Under Regulation 5, an application for a licence to act as a Customs House Agent in a Customs Station shall be made in Form A and shall, inter alia, contain the name and the address of the person applying and the other particulars as set out therein.

[5] Regulation 9 deals with grant of licence in Form B.

Regulation 9(3) reads as under;

"9(3) The Commissioner of Customs may reject an application for the grant of licence to act as Customs House Agent if the applicant is involved in fraud or forgery, or any criminal proceedings are pending before any court of law against him or he has been convicted in any court of law."

Regulation 9(4) is relevant. It reads as under:

"9(4) Any applicant aggrieved by the order of the Commissioner of Customs passed under sub-regulation (3) may appeal to the Chief Commissioner of Customs or Chief Commissioner of Customs and Central Excise, as the case may be, within a period of thirty days from the communication of such order."

. Other relevant Regulation is Regulation 11 which reads as under:

"11. Period of validity of a licence.-

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|---|----|
| licence. (1) | A |
| licence granted under regulation 9 shall | be |
| valid for a period of ten years from the date | of |

| | |
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| issue and shall be renewed from time to time | in |
| accordance with the procedure provided | in |
| sub-regulation (2). | |

(2) The Commissioner of Customs may, on

application made by the licensee before the expiry of the validity of the licence under sub-regulation (1), renew the licence for a further period of ten years from the date of expiration of the original licence granted under regulation 9 or of the last renewal of such licence, as the case may be, if the performance of the licensee is found to be satisfactory with reference, inter alia, to the following:-

[6]

(a) quantity or value of cargo cleared by such licensee conforming to norms as may be specified by the Commissioner;

(b) absence of instances of any complaints of misconduct including non-compliance

of any of the obligations specified in regulation 13.

(3) The fee for renewal of a licence sub-regulation (2) shall be Rs.5,000/-.

7. If we read Regulation 9 with Regulation 11 and even if an application for renewal is treated as a fresh licence, the Regulations permitted appeal only where an application is rejected under Regulation 9(3).

under Regulation Regulation 11 does not so provide.

9, the Commissioner of Customs Secondly, may reject an application for the grant of licence to act as Customs House Agent if the applicant is involved in fraud or forgery, or any criminal proceedings are pending before any court of law against him or he has been convicted in any court of law. These are, therefore, the considerations for the grant of a new licence based on the first application for CHA licence.

8. On the other hand, so far as Regulation 11(2) is concerned, it provides for renewal and while considering renewal, what has to be considered is, if the performance of the licensee is found to be satisfactory in terms set out under Regulation 11(2).

[7] These are the requirements after the licence has been granted. Application for grant of licence and for revocation of that licence are distinct and different.

No appeal is provided under Section 11 whereas, an appeal is provided under Regulation 9(4) in those cases, where an application for licence is rejected under regulation 9(3). We are, therefore, clearly of the opinion that no appeal lies against the order of the Commissioner rejecting an application for renewal.

It may be mentioned that in case of Customs House Agent licence, our attention was invited to the judgment of Calcutta High Court in M.Dutta Agency Commissioner of Customs 1998 (101) E.L.T. 581 (Cal.).

(Cal.) v.

It was contended before Calcutta High Court that the appeal would lie against the refusal to renew CHA licence. Considering the language of Section 129A(1)(a) of Customs Act, 1962, the learned Judge held that an appeal is provided against the suspension or revocation but not for refusal to renew CHA licence. We are clearly of the opinion that no appeal lies against the order rejecting an application for renewal. In absence of any other remedy it is open to this Court to exercise its extraordinary jurisdiction in case where an application for renewal is rejected.

9. Having so said, the next question before us is whether the impugned order is liable to be set aside.

[8] Apart from various challenges made, the learned counsel for the petitioners has submitted as under:

1. That the order was passed without giving an opportunity to the petitioners. The order visits petitioner with civil consequences. Once, that is the case, the order is violative of principles of natural justice and fair play and the impugned order is liable to be set aside;

2. It is further submitted that the learned Commissioner while considering the application for renewal placed reliance on the original order passed against Mr.Unnikrishnan, who was partner of the petitioner firm. Our attention is invited to the order passed against Unnikrishnan which was thereafter set aside by the Tribunal and consequently, the order of the learned Commissioner suffers from non-application of mind. On this count also, it is submitted that the order should be set aside.

. On the other hand, on behalf of the respondents, the learned counsel submits that there is no statutory right to be heard under the Regulation and in those cases, where a party has to be heard in person, the Regulations have so provided. It is, therefore, submitted that the question of giving personal hearing would not arise in the matter. It is further submitted that the order passed against Unnikrishnan was in respect of penal proceedings. Unnikrishnan was a partner of the petitioner's firm. Mere setting aside of the order against Unnikrishnan would be of no consequence as it was in penal proceedings whereas, in the instant case, what is being considered was an application for renewal.

[9]

10. We have heard the learned counsel for the Parties. In the first instance, there can be no dispute that the order rejecting application has visited the petitioner with civil consequences. In a case where an order whether it be administrative or quasi judicial, visits the party with civil consequences in absence of any statutory exclusion under the Regulations, there would be a right to a hearing. The right to hearing would include right to a person being heard in person if such a request is made.

petitioner in In the instant case, we may point out that the representation dated 28.12.2007 had sought for hearing in the circumstances set out therein. Merely because the regulation expressly does not provide for a hearing, would not mean that the petitioner should not be given a hearing. This is all more so considering that the respondent no.3 has relied on the original order in the case of Unnikrishnan, thus, denying the petitioner a fair opportunity of explaining why the order in Unnikrishnan ought not to be considered. In our opinion, therefore, as no notice of hearing was given to the petitioners by the respondent no.3, the impugned order is liable to be set aside on that count alone.

[10]

11. Considering the arguments in the instant case, we find that the Tribunal has relied on the order passed against C.R.Unnikrishnan and has quoted extensively from the said order. After quoting from the said order, the learned Commissioner proceeded on the footings that Unnikrishnan as a partner of the CHA firm was involved in the export fraud. Admittedly, in proceedings taken out by Unnikrishnan against the said order, it was set aside. Once the Tribunal has proceeded to rely upon an order which was set aside that by itself would disclose non-application of mind or relying irrespective on of irrelevant material.

the fact that whether the This order is in Unnikrishnan was in respect of the penal proceedings or not. Considering that irrelevant material was considered, it would vitiate the order much as considering extraneous material. On this count also, therefore, the impugned order is liable to be set aside.

12. On behalf of the petitioner, the learned counsel sought to contend that considering paragraph 1 of the order of the learned Commissioner and the very fact that no hearing was given to them, the respondent no.3 ought not to hear the matter. In our opinion, there is no material before us warranting an order to transfer the proceedings from the respondent no.3 to [11] any other authority. Merely because some observations are passed cannot result in holding that authority is biased and against the petitioner. We, therefore, decline to transfer the proceeding.

13. We make it clear that the respondent no.3 before proceeding to hear and dispose off the matter to give an opportunity to the petitioner as they had sought such an opportunity and be uninfluenced by what has been stated in the earlier order. With the above observations, present petition can be disposed off.

14. In those circumstances, petition is made absolute in terms of prayer clause (a)(1). The respondent no.3 to dispose off the appeal not later than 12 weeks from today.

15. Rule made absolute accordingly. No order as to costs.

