

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO.12 OF 2019

Commissioner of Customs (II) ..Appellant
Versus
Poonam Courier Pvt. Limited ..Respondent

Mr. Vijay Kantharia a/w Mr. Ram Ochani, for the Appellant.
Mr. Prakash Shah a/w Mr. N. D. George & Mr. Jas Sanghavi i/by PDS
Legal, for the Respondent.

CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.
DATE : 3rd NOVEMBER, 2020

P.C. (Per Ujjal Bhuyan, J.):

Heard Mr. Vijay Kantharia, learned counsel for the appellant
and Mr. Prakash Shah, learned counsel for the respondent.

2. This appeal has been preferred under section 130 of the
Customs Act, 1962 assailing the order dated 10.04.2018 passed by the
Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at
Mumbai (briefly 'the CESTAT' hereinafter) in Appeal No.C/85171/2018
(Poonam Courier Pvt. Ltd. Vs. Commissioner of Customs).

3. Appeal was admitted on 10.06.2019 on the following
substantial question of law :-

“Whether on the facts and circumstances of the case and in
law, was the Tribunal justified in entertaining the appeal

against order of the Commissioner under Regulation 14(1) of the Courier Imports and Exports (Clearance) Regulations, 1998 (the Regulation) without the party/appellant before it exhausting its remedy of representation before the Chief Commissioner under Regulation 14(2) of the Regulation ?”

4. Short point for consideration is whether without availing the remedy provided under Regulation 14(2) of the Courier Imports and Exports (Clearance) Regulations, 1998 (briefly “the Regulations” hereinafter) CESTAT would have the jurisdiction to entertain an appeal under section 129A of the Customs Act, 1962 (‘Customs Act’ for short).

5. Though not very relevant, we may briefly mention that order in original dated 05.04.2017 was passed by the Commissioner of Customs, Airport Special Cargo Commissionerate, Mumbai against the respondent. Operative portion of the said order reads as under :-

“26.1 I order revocation of registration granted to M/s. Poonam Courier Pvt Ltd under Regulation 10 of Courier Imports & Exports (Clearance) Regulations, 1998 (as amended) to operate as an Authorized Courier in terms of Regulation 14(1) of the Courier Imports & Exports (Clearance) Regulations, 1998 for their failure to comply with the conditions of the bond and violation of various provisions of the said regulations.

26.2. I also order for forfeiture of Rs.10,00,000/- (Rupees Ten Lakhs Only) submitted by M/s. Poonam Courier Pvt Ltd as security at the time of Registration/renewal of the Courier Licence, in terms of

regulations 14(1) of the said Regulations.

26.3. I impose penalty of Rs.50,000/- (Rupees Fifty Thousand Only) on M/s. Poonam Courier Pvt Ltd under section 158(2)(ii) of the Customs Act, 1962 for violation of provisions of Courier Imports & Exports (Clearance) Regulations, 1998 (as amended).”

6. Against the aforesaid order respondent had initially moved the Principal Chief Commissioner of Customs under Regulation 14(2) of the aforesaid Regulations. Subsequently, the said representation was withdrawn whereafter appeal was filed before the CESTAT under section 129A of the Customs Act. By the order dated 10.04.2018 the appeal was allowed and deregistration and detrimental consequences upon the respondent were set aside.

7. Thereafter the present appeal has been preferred by the Commissioner on the substantial question of law as extracted above.

8. Mr. Vijay Kantharia, learned counsel for the appellant submits that when Regulation 14(2) of the Regulations provides for a remedy to the aggrieved person, without availing such remedy, CESTAT should not have entertained the appeal. In support of his contention, he has placed reliance on two decisions :- (1) *Cicily Kallarackal Vs. Vehicle Factory, (2012) 8 SCC 524* (2) *Oriental Export Corporation Vs. Union of India, 2013 SCC Online Bom 1839*.

9. On the other hand, Mr. Prakash Shah, learned counsel for the respondent submits that the issue raised in the present appeal has already been answered by two decisions of this Court in *Principal Commissioner of Customs Vs. Bombino Express Pvt. Ltd., 2018(13) G.S.T.L. 52(Bom.)* and *Commissioner of Customs(II), Airport Special Cargo Vs. Lynx Express Pvt. Ltd., 2020(372) E.L.T. 696(Bom.)*. Therefore, the appeal should be dismissed.

10. Submissions made have been considered.

11. In so far the two decisions cited by Mr. Vijay Kantharia are concerned, we find that both the decisions pertain to exercise of writ jurisdiction by the High Court under Article 226 of the Constitution of India when the relevant statute provided for adequate and efficacious alternative remedy which were not availed of by the person aggrieved; instead writ jurisdiction of the High Court was invoked, which was disapproved in both the judgments. The situation in the present case is altogether different. CESTAT as a statutory tribunal is a creature of the statute and exercises powers and functions conferred by the statute. It is constituted under section 129 of the Customs Act and exercises jurisdiction under section 129A in the manner provided in section 129C. It can only pass such orders as is provided in section 129B. It does not possess plenary jurisdiction like a High Court exercising jurisdiction under Article 226 of the Constitution of India. The self imposed restrictions which a High Court exercises while refraining from invoking its writ jurisdiction in the face of adequate and efficacious alternative remedy is not available to a

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statutory tribunal like the CESTAT whose powers and functions are circumscribed by the statute. Therefore the two decisions relied upon by learned counsel for the appellant are not at all applicable to the facts and circumstances of the case.

12. On the other hand, we find that the decisions of this Court in *Bombino Express Pvt. Ltd. (supra)* and *Lynx Express Pvt. Ltd. (supra)* are directly on the point. However, before we advert to the two decisions, we may refer to the provisions contained in Regulation 14 which reads as under :-

“Regulation 14. Deregistration. - (1) The [Principal Commissioner of Customs or 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 following grounds namely :-

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

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

[(c) misconduct on the part of the Authorized Courier whether within the jurisdiction of the said [Principal Commissioner or Commissioner as the case may be] of anywhere else, which in the opinion of the [Principal Commissioner or Commissioner as the case may be] renders him unfit to transact any business in the Customs Station:]

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Provided that no such revocation shall be made unless a notice has been issued to the Authorized 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 [Principal Commissioner of Customs or Commissioner of Customs, as the case may be] considers that any of such grounds against an Authorized 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 Authorized Courier. If no ground is established against the Authorized Courier, the registration so suspended shall be restored.

(2) Any Authorized Courier or the officer of the Customs authorized by the [Principal Chief Commissioner of Customs or Chief Commissioner of Customs, as the case may be] in this behalf, if aggrieved by the order of the [Principal Commissioner of Customs or Commissioner of Customs, as the case may be] passed under sub-regulation (1), may represent to the [Principal Chief Commissioner of Customs or Chief Commissioner of Customs, as the case may be] in writing against such order within sixty days of communication of the impugned order to the Authorized Courier and the [Principal Chief Commissioner of Customs or Chief Commissioner of Customs, as the case may be] shall, after providing the opportunity of being heard to the parties concerned, dispose of the representation as expeditiously as may be possible.”

13. The Regulations had been made by the then Central Board of Excise and Customs in exercise of the powers conferred by section 157 read with section 84 of the Customs Act. Section 157 deals with the general power to make regulations. The erstwhile Central Board of Excise and Customs and now after amendment, Central Board of Indirect Taxes and Customs has been conferred the power to make regulations consistent with the Customs Act. Likewise, the Board has been conferred the power to make regulations regarding goods imported or to be exported by post or courier under section 84. Evidently, it is a subordinate piece of legislation.

14. While Regulation 14(1) empowers the Principal Commissioner of Customs or Commissioner of Customs to revoke the registration of an authorized courier and also order for forfeiture of security; Regulation 14(2) provides for an opportunity to the aggrieved courier or an authorised officer of customs to represent before the Principal Chief Commissioner of Customs or Chief Commissioner of Customs if aggrieved by an order passed under Regulation 14(1). Thus, the remedy provided under Regulation 14(2) is by way of a representation to the higher authority.

15. On the other hand, section 129A of the Customs Act deals with appeals to Appellate Tribunal. Section 129A(1)(a) makes it abundantly clear that any person aggrieved by a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority may appeal to the Appellate Tribunal against such decision or order.

16. In *Bombino Express Pvt. Ltd. (supra)* this Court took the view that merely because a remedy of making a representation is provided by Regulation 14(2) that would not displace the appellate authority of the Tribunal. It was held thus :-

“12. The Tribunal found that even this mechanism is in place. Eventually, everything is traceable to the Customs Act, 1962 and once the said Act provides for an appeal and that appeal would lie to this Tribunal against the order-in-original, then, merely because a representation or a remedy of making a representation is provided by the Regulations, that does not displace the appellate authority of the Tribunal. We do not think that the Tribunal, in the facts and circumstances of the case, has acted perversely in entertaining the appeal. More so, when the attempt of the Revenue was to question its jurisdiction on more than one occasion. Additionally, we have found that the Tribunal, if approached and it is regularly done in the cases of the Customs House Authorisation Regulations by the aggrieved agent, then, against the orders of the Tribunal restoring the licences or authorisation, the Revenue has brought appeals under the Customs Act, 1962 before this Court. Therefore, one opportunity being provided in the scheme of the law to the aggrieved courier does not cause serious prejudice to the Revenue. More so, when it can always approach this Court against the orders of the Tribunal.”

17. The aforesaid decision was followed subsequently by this Court in *Lynx Express Pvt. Ltd. (supra)*, wherein it has been held as follows:-

“6. * * * * *

The Division Bench held that what is provided in the Regulation 14(2) is a representation and ultimately the remedy of appeal is available under the Customs Act, 1962 and rejection or otherwise of such representation will not take away the jurisdiction of the Tribunal to entertain the appeal from Order-in-Original. In the present case the appellant has withdrawn the appeal but if there is no merger and what is decided is only a representation, then withdrawal of the appeal will also fall within the ambit of the view taken by this Court in *Principal Commissioner of Customs v. Bombino Express Pvt. Ltd.*. In view of the dicta of the Court in the case of *Principal Commissioner of Customs v. Bombino Express Pvt. Ltd.*, we cannot accept the argument advanced by the appellant that the Tribunal had no jurisdiction to entertain the appeal.”

18. We may also examine this issue from another angle. Remedy of appeal to the CESTAT is provided under section 129A of the Customs Act i.e., by the parent enactment. This right of appeal is a substantive right of an aggrieved person. It is not a matter of procedure but is a vested right conferred by the statute. Being a statutory right, it can only be circumscribed by the conditions of the statute granting it. On the other hand, an additional remedy of making representation to the higher authority is provided under Regulation 14(2) of the Regulations, which as we have noted is a subordinate legislation. Such a remedy cannot supplant or curtail the remedy of appeal granted by the empowering statute; at best it can be construed as a supplementary remedy. As has been provided in section 157, the Regulations have to be read in a manner which is consistent with the provisions of the Customs Act and not in derogation of

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it. Therefore, for non-availing of the additional or supplementary remedy provided by the subordinate legislation, an aggrieved person cannot be non-suited in appeal, a statutory remedy provided by the parent enactment.

19. In the light of the findings rendered by this Court with which we are fully in agreement as well as considering the discussions made above, we do not find any merit in the appeal. Consequently, the substantial question of law is answered in the negative and against the appellant. Appeal is accordingly dismissed.

20. However, there shall be no order as to costs.

21. This order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

ABHAY AHUJA, J

UJJAL BHUYAN, J