
(1987) 02 CAL CK 0003
In the Calcutta High Court

Jeena and Co.

APPELLANT

Vs

Collector of Customs and Others

RESPONDENT

Date of Decision : 06-02-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1987) 13 ECC 117 : (1987) 13 ECR 364

Hon'ble Judges : S.R. Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.R. Roy, J.—The petitioner No. 1 M/s. Jeena & Co., is a clearing and forwarding agent established in the year 1900, having its Head Office at 10, Veer Nariman Point, Bombay and its Calcutta Office at 19B, Shakespeare Sarani, Calcutta. The petitioner No. 2 is one of the partners of the petitioner No. 1.

2. The petitioner No. 1 is the holder of a licence under the Customs House Agents Licensing Regulations, 1984 (hereinafter referred to as "the said Regulation") for carrying on business of clearing and forwarding agency.

3. Mr. J. Sala, a French tourist, sent two consignments on two occasions in the year 1984-85 through the petitioner No. 1. The customs authority duly checked, scrutinised and appraised the said consignments and passed the same for export. The said Mr. Sala who described himself as a French tourist, once again came to the office of the petitioner No. 1 in the middle of August, 1986 with necessary documents for shipment of a consignment of tourist purchases to Rotterdam at No. 4, Netaji Subhas Dock. He met Mr. K.K. Bhattacharjee, Sales Assistant of the petitioner-firm and stated that he had purchased various papier-mache goods and tourist purchases from one M/s. Dona & Co., Srinagar. In that connection he also handed over to the said officer, a covering letter authorising the petitioner No. 1 to forward the consignment, the purchase invoice of M/s. Dona & Co., Srinagar and encashment certificate issued by the Grindlays Bank,

Srinagar and one rubber stamp of Dona & Co., Srinagar (for certificate of country of origin). The said Sri. K.K. Bhattacharjee and other officers of the petitioner No. 1 duly inspected all the aforesaid documents and also the passport, which was produced for checking and recording the number, etc.

4. The documents in respect of the consignments were thereafter placed in the Customs Office on 18th August, 1986. The customs officials after proper checking passed the shipping bill on the same day. The petitioner No. 1 received the consignment of 38 packages from Mr. J. Sala packed in cane baskets wrapped with gunny sheets at their godown on 18th August, 1986 along with delivery challan.

5. On 20th August, 1986 the said consignment of 38 packages was delivered at No. 4, Netaji Subhas Dock for the purpose of scrutiny, checking and appraisal of the customs department. At the time of the checking by the customs officials, two of the packages were opened and at the bottom of the papier-mache goods some packages wrapped tightly in thick paper were found. On examination the said packages were found to contain hashish, a kind of narcotic.

6. Thereafter, all the packages were opened under orders of the customs officers and all of them were found to contain similar materials kept concealed at the bottom of the papier-mache goods.

7. Mr. J. Sala, the owner of the consignment, was searched for but he was not found in his stated address at Grand Hotel. However, ultimately he was arrested at Andaman on or about 26th August, 1986.

8. On 26th August, 1986 in the afternoon, the petitioners received the copy of an order, being No. S-45-C/86 ESTT issued by the Collector of Customs, Calcutta, stating that on search of the impugned consignment charas weighing about 193 kgs. was seized on August 21, 1986 and upon preliminary enquiry it appeared that the petitioner No. 1 was prima facie involved in the attempted export of the said narcotics. It was also stated in the order that since the petitioner No. 1 M/s. Jeena & Co. had failed to discharge their responsibilities as a customs house agent in a proper manner and had also aided and abetted Mr. J. Sala in the attempted export of the impugned consignment of narcotics and that since an enquiry against the petitioner No. 1 was contemplated, the licence of the petitioner No. 1 was suspended under Clause (2) of Regulation 21 of the Regulations of 1984 (Vide Annexure "A").

9. It is the said order of suspension of the licence with immediate effect, that the petitioners have challenged in the present writ petition under Article 226 of the Constitution.

10. According to the respondents in their affidavit-in-opposition, an enquiry made into the matter revealed that the petitioner No. 1 M/s. Jeena & Co. had acted in contravention of the Customs House Agents Licensing Regulations, 1984

and had also aided and abetted the attempted exportation of prohibited goods by Mr. J. Sala committing thereby an offence under the Narcotic Drugs & Psychotropic Substances Act, 1985 as well as the Customs Act, 1962. That two senior personnel of the petitioner No. 1, namely, Sri. K.K. Bhattacharjee and Shri J. Thakur were arrested and the licence of the petitioner No. 1 was Suspended pending full enquiry into the matter.

11. The petitioners also filed an affidavit-in-reply controverting the material averments contained in the affidavit-in-opposition.

12. Mr. Dipankar Ghosh, the learned Counsel, representing the petitioners, questioned the impugned action of suspending the licence of the petitioner No. 1 by the customs authorities on two different grounds. His first contention was that the impugned order (Annexure "A") was not in consonance with Regulation 21 of 1984 and secondly, that Clause (2) of Regulation 21 under which the order of suspension was made, was ultra vires the Constitution.

13. These contentions of Mr. Dipankar Ghosh were seriously controverted by Mr. Jatin Ghosh, the learned Counsel representing the respondents. According to Mr. Jatin Ghosh, the impugned action is quite in accordance with Regulation 21 of 1984 and that Regulation 21 (2) is not ultra vires the Constitution as alleged.

14. Coming now to the rival contentions of the parties, it may be considered at the outset whether the impugned order suspending the petitioners' licence under Regulation 21(2) of the Regulations, 1984 is in accordance with the said Regulation. If it is not so, the order may be struck down on that ground alone and it may not be necessary to enter into the question of vires of the relevant provision.

15. For convenience Regulation 21 of the Customs House Agents Licensing Regulations, 1984 is set out hereunder:--

21. Suspension or revocation of licence.--

(1) The Collector may, subject to the provision of Regulation 23, suspend or revoke the licence of a Customs House Agent so far as the jurisdiction of the Collector is concerned and also order for forfeiture of security on any of the following grounds:

(a) failure of the Customs House Agent to comply with any of the conditions of the bond executed by him under Regulation 11;

(b) failure of the Customs House Agent to comply with any of the provisions of these Regulations, whether within the jurisdiction of the said Collector or anywhere else;

(c) any misconduct on his part whether within the jurisdiction of the said Collector or anywhere else which in the opinion of the Collector renders him unfit to transact any business in the customs station.

(2) Notwithstanding anything contained in Sub-Regulation (1), the Collector 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.

16. To understand and appreciate whether the impugned order (Annexure "A") is in accordance with the said Regulation, the said order is also set out below:--

GOVERNMENT OF INDIA OFFICE OF THE COLLECTOR OF CUSTOMS CUSTOMS HOUSE, CALCUTTA.

File No. S. 45-6/86 Estt. Dated 26-8-1986. Memo.

Whereas consignment of export cargo concealing charas weighing about 231 kgs. gross (193 kgs. nett) valued at approximately Rs. 11.50 lakhs (Rs. 1.15 crores approximately in the international market) has been seized on 21-8-1986 at shed No. 4 N. S. Docks, Calcutta;

Whereas M/s. Jeena & Co., Customs House Agents (licence No. J-11) had acted as an agent on behalf of the exporter, Mr. J. Sala, for the clearance of the said consignment through the Customs and had filed a shipping bill No. 0566 dated 18-8-1986 (Ex. Pumari, Rot. No. 534/86) duly signed by Mr. J. Thakur, the Deputy Manager of the Company declaring the contents as the consignment as "tourist purchases";

Whereas upon preliminary enquiries it appears that M/s. Jeena & Co., are prima facie involved in the attempted export of the said narcotics inasmuch as they appear to have inter alia committed the following acts of commission and omission:--

(a) M/s. Jeena & Co., were not in possession of any letter of authorisation issued by the exporter as required under Clause (a) of Regulation 14 of the Customs House Agents Licensing Regulations, 1984.

(b) M/s. Jeena & Co., had not verified the passport of the exporter before handling the goods on his behalf. Further no attempts were made to verify the address of the exporter. The address of the exporter in the shipping bill was declared as c/o. Grand Hotel, Calcutta; on enquiries, however, it appears that the exporter never stayed at Grand Hotel during the relevant period.

(c) Mr. K.K. Bhattacharjee, Senior Cargo Executive of M/s. Jeena & Co., appears to have handled the consignment and had got the country of origin certificate prepared in his office and got it signed by one Mr. Tapash Kr. Chakra-borty who is a transport contractor and handles cargo for M/s. Jeena & Co.

(d) During the search of the premises of M/s. Jeena & Co., a rubber stamp of the suppliers at Srinagar has been recovered which appears to have been used for embossing the country of origin certificate prepared for the clearance of the aforesaid consignment;

Whereas Mr. Thakur, Deputy Manager of M/s. Jeena & Co., and Mr. K.K. Bhattacharjee, Senior Cargo Executive of M/s. Jeena & Co., have been arrested in connection with the aforesaid seizure and have been remanded to jail custody till 5th September, 1986 by the jurisdictional Magistrate;

Whereas it appears that M/s. Jeena & Co., have failed to discharge their responsibilities as Customs House Agent in a proper manner and have also aided and abetted the said Mr. J. Sala in the attempted export of the said consignment of narcotics and whereas an enquiry against M/s. Jeena & Co., is contemplated, I hereby order the suspension of the Customs House Agent licence granted to M/s. Jeena & Co., to act as a Customs House Agent with immediate effect and until further orders in terms of Clause (2) of Regulation 21 of the Customs House Agents Licensing Regulations, 1984.

(G. Sarangi) Collector of Customs.

To

M/s. Jeena & Co., E-Merck House, 19B, Shakespeare Sarani, Calcutta-700 071.

17. Mr. Ghosh, the learned Counsel representing the petitioners in this connection drew my attention to paragraph 3 of the impugned order which contains the grounds on which the Collector of Customs held that the petitioner No. 1 was involved "in the attempted export of the said narcotics".

18. Coming to applicability of the grounds so recorded, Mr. Ghosh, referring to the ground No. (a) contended that Clause (a) of Regulation 14 which provides that a Customs House Agent shall obtain an authorisation from the company or individual by whom he is for the time being employed as Customs House Agent and produce such authorisation whenever required by an Assistant Collector of Customs does not prescribe any form for such authorisation and moreover, such authorisation should be produced only when required by an Assistant Collector of Customs and in the instant case there is nothing to show that any such authorisation was ever requisitioned by the Assistant Collector. Mr. Ghosh in this connection also drew my attention to Annexure "A" to the affidavit-in-reply, which is a blank form of Shipping Bill for Free Goods and contended that such shipping bill, containing all the relevant particulars about the goods, is required to be signed by the exporter. Mr. Ghosh contended that a shipping bill may, accordingly, be very well considered as the necessary authorisation as required by Regulation 14(a) and that in the instant case the shipping bill so signed by the exporter, was produced before the customs authorities by the petitioner No. 1 for checking, etc.

19. In my judgment, this contention of Mr. Ghosh is not without substance. As a matter of fact, no specific form for authorisation under Regulation 14(a) has been prescribed and there is also nothing dependable to indicate that any such authorisation by Mr. J. Sala to the petitioner No. 1 was/were requisitioned by the Assistant Collector of Customs and on such requisition the petitioner No. 1 failed

to produce it. Thus it cannot prima facie be said that the petitioner No. 1 M/s. Jeena & Co. was not in possession of any letter of authorisation issued by the exporter as required under Clause (a) of Regulation 14.

20. Regarding the grounds (b), (c) and (d), it was contended by Mr. Ghosh that no such Regulations are there calling upon a Customs House Agent to act in accordance therewith.

21. Mr. Jatin Ghosh, the learned Counsel representing the respondents, in this connection drew my attention to Sub-Regulation (7) of Regulation 20, which provides that the Customs House Agent shall exercise such supervision as may be necessary to ensure the proper conduct of its employees in the transaction of business as agent and shall be held responsible for all acts or omissions. Reference in this connection may be made to ground No. (c) under paragraph 3 of the impugned order where some allegations have been made against two employees of the petitioner No. 1. But even assuming that Sub-Regulation (7) of Regulation 20 covers ground No. (c) in the impugned order as referred to above, the allegations so made are yet to be established and it should also have to be specifically found that the said allegations violate in any way Sub-Regulation (7) of Regulation 20.

22. Mr. Jatin Ghosh also referred me to certain other Regulations of the Regulations of 1984 laying down the duties and responsibilities of a Customs House Agent, but they are not quite relevant at this stage since the action in suspending the licence of the petitioner No. 1 has been taken under Regulation 21(2). The said Sub-Regulation (2) of Regulation 21 provides that notwithstanding anything contained in Sub-Regulation (1), the Collector 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.

23. Thus under Sub-Regulation (2) of Regulation 21 the Collector has been given very wide discretionary powers to suspend the licence of a Customs House Agent notwithstanding anything contained in Sub-Regulation (1), where immediate action is necessary. So in order to take action under Sub-Regulation (2) the Collector of Customs need not confine himself to the grounds as specified in Sub-Regulation (1), but in order to take such action the Collector must be fully satisfied that "immediate action is necessary". Obviously, such satisfaction should not be merely Subjective satisfaction of the Collector but the reasons for being satisfied should be specifically recorded in the order itself. This should be done to justify the action of the Collector under Sub-Regulation (2) of Regulation 21 which undoubtedly entails grave civil consequences, namely, total suspension of the business of the Customs House Agent till a proper enquiry is started and concluded under Regulation 23 for which again no time limit has been prescribed. Significantly there is no provision for appeal or review by the Customs House Agent against the action as taken under Sub-Regulation (2). Thus before taking action under Sub-Regulation (2) of Regulation 21 the Collector must be fully

satisfied that the case is an appropriate case and that immediate action is necessary.

24. It was contended by Mr. Jatin Ghosh that since the Collector of Customs, who has been authorised to take action under Sub-Regulation (2) is a very responsible and a high ranking officer, there is no possibility of such power being misused or being used arbitrarily. In reply to this contention of Mr. Ghosh reference may be made to one of the latest decisions of the Supreme Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . In paragraph 99 of the said decision the Supreme Court under similar circumstances observed as follows:--

It was urged that the Board of Directors would not exercise this power arbitrarily or capriciously as it consists of responsible and highly placed persons. This submission ignores the fact that however highly placed a person may be, he must necessarily possess human frailties. It also overlooks the well known saying of Lord Acton, which has now almost become a maxim in the Appendix to his "Historical Essays and Studies", that "Power tends to corrupt, and absolute power corrupts absolutely.

It, therefore, appears that however high and responsible and executive authority may be, he is subject to the human frailties and unguided and uncanalised powers vested in him are always likely to be misused.

25. In the instant case Sub-Regulation (2) of Regulation 21, which gives such unguided and uncanalised powers to the Collector of Customs, clearly provides that action under the said Sub-Regulation can be taken only in appropriate cases where immediate action is necessary and when any action taken under the said Regulation is challenged before a Court of law, the Court is not debarred from interfering with such orders unless it is strictly in accordance therewith. The necessary inference that can be drawn in the circumstances is that the impugned order must be a speaking order and should particularly disclose that the Collector of Customs while exercising the power was fully conscious about the requirements of the provision. Because, unless that is done it will not be possible for the Court to decide whether the action is strictly in accordance with the relevant provision when such action is challenged before the Court. It may be mentioned in this connection that in the affidavit-in-opposition sworn by the Collector of Customs himself, reasons have been sought to be assigned to supplement the impugned order suspending the licence of the petitioner No. 1 under Regulation 21(2). The reasons thus sought to be assigned are wholly irrelevant in view of the decision of the Supreme Court in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, where in paragraph 8 the Supreme Court has made the following observations:--

The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of

affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

26. In support of the said decision the Supreme Court referred to one of its earlier decisions in Commissioner of Police, Bombay Vs. Gordhandas Bhanji, . There it was observed that

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

27. Similarly in Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India AIR 1976 SC 1985 the Supreme Court observed that

It is now settled law that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes...The rule requiring reasons to be given in support of an order is like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.

28. In this connection it may be mentioned that the reasons assigned for taking action under Sub-Regulation (2) of Regulation 21 have been given in the last paragraph of the impugned order. The said reasons are three fold namely, that M/s. Jeena & Company (1) have failed to discharge their responsibilities as a Customs House Agent in a proper manner, (2) have also aided and abetted. Mr. J. Sala in the attempted export of the consignment of narcotics and (3) an enquiry against M/s. Jeena & Company is contemplated.

29. There is, however, nothing to indicate therefrom that the Collector of Customs was satisfied that in the circumstances so disclosed, immediate action was necessary.

30. Incidentally, the grounds as referred to above, do not appear to have anything inherent in them justifying immediate action which is one of the most relevant considerations for making an order under Sub-Regulation (2) of Regulation 21. As stated earlier Regulation 23 provides an exhaustive procedure for holding an enquiry against a defaulting Customs House Agent in order to take suitable action against him for revoking his licence under Regulation 21. But since such an enquiry is expected to take reasonable time Sub-Regulation (2) of Regulation 21 authorises the Collector of Customs to suspend the licence where he considers that such action is immediately necessary. In other words such

extraordinary power can be exercised where the Collector feels that serious consequences are likely to follow if the licence is not immediately suspended.

31. In the instant case the consignment in question having already been detained the incriminating goods in question having been seized and criminal proceedings having been started against concerned persons, there was prima facie no urgency in suspending the licence of the petitioner No. 1 in exercise of the extraordinary powers conferred by the Regulation 21(2).

33. It is no doubt true that the recovery of the narcotics has exposed the petitioner No. 1 to enquiry and has put its past record of long 86 years to serious test. But that does not justify immediate suspension of the licence in the absence of anything to show that without such immediate action very serious consequences would have followed.

34. Serious consequences have however, followed in this case but that is on account of the arbitrary order passed by the Collector of Customs, since the effect of such order has been the total suspension of the business of the petitioner No. 1 since August 26, 1986 and the enquiry under Regulation 23 is yet to commence.

35. Now the impugned order, apart from its being not in consonance with Regulation 21(2) of the Regulations of 1984 also suffers from non-compliance with the audi alteram partem rule though it has entailed grave and serious civil consequences. It is true the Regulation 21(2) is silent on the point, but in the circumstances of the case there should have been observance of the rule since there is nothing to show that in view of the extreme urgency of the matter such observance would have frustrated the entire cause. Mr. Dipankar Ghosh in this connection preferred me to the decision of the Supreme Court in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, where in paragraph 42 the Supreme Court made the following observations after considering a large number of decisions on the point both Indian and foreign; In short, the general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms exclude this rule of prior hearing but contemplates a post decisional hearing amounting to full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage.

36. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature and no full review or appeal on merits against that decision is provided, Courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short this rule of fairplay.

must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The Court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But to recall the words of Bhagwati, J., the core of it must, however, remain namely, that the person affected must have reasonable opportunity of being heard and the hearing must be genuine hearing and not an empty public relations exercise.

37. In the instant case the impugned administrative decision involves civil consequences of a grave nature in the sense that the business of the petitioner No. 1 has come to a standstill and there is no provision for review or appeal on merits against that decision and that being so, a minimal hearing should have been given to the petitioners particularly when there is nothing dependable to indicate that it would have paralysed the administrative process or frustrated the alleged need for utmost promptitude.

38. Thus the impugned order apart from its being not in accordance with Regulation 21(2) is also violative of the audi alteram partem rule and that being so, it is liable to be struck down.

39. Mr. Dipankar Ghosh, the learned Counsel for the petitioners also challenged the vires of Regulation 21(2) on the following grounds:--

(i) That the Regulation confers unguided, uncontrolled and uncanalised discretionary power;

(ii) that there is no time limit regarding duration of the suspension and Regulation 23 also does not provide when in case of a contemplated enquiry the said enquiry should be started;

(iii) that there is no check against abuse or arbitrary use of the power in the sense that there is no provision of appeal or review against any order passed under the Regulation and

(iv) that the Regulation does not specifically provide for recording of reasons for passing the order of suspension.

40. Prima facie these are all weighty grounds and strike at the reasonableness of Regulation 21(2) exposing prima facie its constitutional infirmity. As observed by the Supreme Court in AIR India Vs. Nergesh Meerza and Others, that:

It is true that a discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as violative of Article 14.

41. However, since I am going to strike down the impugned order suspending the licence of the petitioner No. 1 on other grounds, I have refrained from entering into the question of vires or the alleged constitutional infirmity of Regulation 21(2) in all its details. I have simply exposed the apparent unreasonableness of the Regulation in the light of the contentions raised by Mr. Dipankar Ghosh. Since

it is not necessary, I do not express any view whether Regulation 21(2) is ultra vires the Constitution in view of the well established principle that if the desired relief can be granted on other grounds, Courts will be slow to declare a statutory provision as ultra vires as it may involve far reaching consequences.

42. In the result, the writ petition succeeds. The rule issued be made absolute and the impugned order dated August 26, 1986 (Annexure "A") suspending the licence of the petitioner No. 1 under Regulation 26(2) of the Customs House Agents Licensing Regulations, 1984 is hereby struck down.

43. The respondents will, however, be at liberty to proceed against the petitioners in accordance with law.

44. No order is made for costs.

45. Verbal prayer for stay of operation of this order made on behalf of the respondents is considered and refused.

46. Certified copy of the order if applied for to be issued as early as possible.