

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.11.2012

CORAM

The Hon'ble Mr.Justice R.SUDHAKAR

W.P.No.31897 of 2012

M/s.Deccan Forwarding &
Logistics India Private Limited,
represented by its Director,
Mr.Sanjay Sikka,
No.37(Old No.17), First Floor,
Office No.2, Moore Street,
Chennai 600 001. Petitioner

Vs.

1.The Commissioner of Customs
(Imports),
Custom House,
No.60, Rajaji Salai,
Chennai-600 001.

2.The Assistant Commissioner of
Customs (CHA),
Custom House,
No.60, Rajaji Salai,
Chennai-600 001.

... Respondents

Writ Petition is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus and call for records pertaining to the impugned order dated 14.11.2012 passed by the second respondent in F.No.R-651/CHA and quash the same and further direct the respondents to approve the application dated 02.07.2012 filed by the petitioner for change in constitution of M/s.Deccan Shipping into M/s.Deccan Forwarding & Logistics India Private Limited, in terms of Regulation 15 of the Custom House Agents Licensing Regulations, 2004.

For Petitioner : Mr.G.Derrick Sam

For Respondents : Mr.S.Thirumavalavan.

O R D E R

This Writ Petition is filed praying to issue a Writ of Certiorarified Mandamus and call for records pertaining to the impugned order dated 14.11.2012 passed by the second respondent in F.No.R-651/CHA and quash the same and further direct the respondents to approve the application dated 02.07.2012 filed by the petitioner for change in constitution of M/s.Deccan Shipping into M/s.Deccan Forwarding & Logistics India Private Limited, in terms of Regulation 15 of the Custom House Agents Licensing Regulations, 2004.

2. Heard Mr.G.Derrick Sam, learned counsel appearing for the petitioner and Mr.S.Thirumavalavan, learned counsel appearing for the respondents.

3. The issue raised in the present writ petition is on interpretation of Regulation 15 of the Custom House Agents Licence (CHALR) 2004. Petitioner is a partnership concern and is a Custom House Agent duly licensed on 31.8.2005 bearing Licence No.R.651/CHA-Chennai and it is valid till 2015. The company was reconstituted into a limited company by name and style M/s.Deccan Forwarding & Logistics India Private Limited on 19.1.2012. On incorporation into a new company, an application dated 20.7.2012 was submitted intimating the Department about the change in constitution of the Custom House Agent licence from a firm to a limited company and sought for modification in terms of Regulation 15 of the Custom House Agents Licensing Regulation (CHALR), 2004. Several documents were filed in support of the same. Earlier one J.Abdul Khader, who was acting as a power of attorney agent ("POA" in short), was working in the company. He had passed away and the same was communicated. Now the petitioner company has appointed a new power of attorney by name Shri S.Suryanarayana. The application filed under Regulation 15 for change of constitution of the firm into a limited company was considered and a direction was issued on 14.11.2012 in F.No.R-651/CHA to the petitioner firm and not to the private limited company indicating several issues which need to be clarified for considering the application in terms of Regulation 15.

4. Petitioner is aggrieved by that portion of the letter/direction issued by the Assistant Commissioner of Customs (CHA) declining to accept the appointment of Shri S.Suryanarayana as power of attorney agent of the Custom House Agent in the place of late Abdul Khader on the ground that Shri S.Suryanarayana is not a person qualified under Section 8 of the CHALR, 2004 to be appointed as POA. It was stated that the application under Regulation 15 for change of constitution amounts to issuance of fresh licence and therefore, the petitioner should comply with requirement under the

2004 Regulations. Insofar as other errors which required to be complied, the petitioner states that he will submit the required document and clarify the position.

5. The only grievance now appears to be on the interpretation of Regulation 15 and observation of the authority declining to accept the appointment of power of attorney Shri S.Suryanarayana. Regulation 15 under which application is made reads as follows:-

"REGULATION 15. Change in constitution of any firm or a company - (1) In the case of any firm or a company, holding a licence under these regulations, any change in the constitution thereof shall be reported by such firm or company, as the case may be, to the Commissioner of Customs as early as possible, and any such firm or a company indicating such change shall make a fresh application to the said Commissioner of Customs within a period of sixty days from the date of such change for the grant of licence under regulation 9, and the Commissioner of Customs may, if there is nothing adverse against such firm or company, as the case may be, grant a fresh licence of the category held by the applicant prior to the change in constitution."

6. Regulation 8(1) of Customs House Agents Licensing Regulations, 2004 and proviso which are relevant for the present case reads as follows:-

"REGULATION 8 - Examination of the applicant - (1) Any applicant whose application is received within the last date specified in the notice or publication, as the case may be, referred to in regulation 4 and who satisfies the requirements of regulations 5 and 6, shall be required to appear for the written as well as oral examination conducted by the Director General of Inspection at specified centers and specified dates, once every year, for which intimation shall be sent individually in advance before the date of examination."

Provided that an applicant who has already passed the examination referred to in regulation 8 will not be required to appear for any further examination."

7. In the present case, the power of attorney agent Shri S.Suryanarayana has passed the examination under the 1984 Regulations and that is not disputed by the respondents. All that the Assistant Commissioner states in the letter is that the said S.Suryanarayana is not a person qualified under Regulation 8 of the CHALR, 2004 and therefore, it is one of the reasons as to why the request for change of constitution cannot be considered unless the said Suryanarayana qualifies under 2004 Regulations. Proviso to Regulation 8 clearly states that examination of the applicant will not be necessary, if he has already passed the examination referred to in Regulation 8. Further, Regulation 15 only speaks about change in the constitution of the firm or company for which fresh application should be made. That cannot be confused with the eligibility of a particular candidate to be appointed as power of attorney agent if he is otherwise qualified. The authority has confused himself with application under Regulation 15 with the status of a candidate for appointment as power of attorney in the place of late Abdul Khader.

8. At the outset, clubbing of two issues appears to be inappropriate. The respondent is not justified in denying the approval of appointment of Shri Suryanarayana as power of attorney of CHALR only on the ground that he has not qualified under 2004 Regulations. The said observation by the said authority is not as per the 2004 Regulation and the decision of the Apex Court in Sunil Kohli & others - vs. - Union of India and others reported in 2012-TIOL-45-SC-CUS (Civil Appeal Nos.4042 to 4051 of 2012 dated 27.4.2012). In the above decision, the Apex Court held as follows:-

"An analysis of above reproduced clauses makes it clear that the procedure prescribed in the 1984 Regulations and the 2004 Regulations for grant of licence to act as Custom House Agent is substantially similar. In terms of Clause 4 of the 1984 as also the 2004 Regulations, the Commissioner is empowered to invite applications in the month of January every year for grant of the specified number of licences as assessed by him, to act as Custom House Agents. An application for grant of licence to carry the business as Custom House Agent is required to be made in the prescribed form along with the necessary documents. If the Competent Authority is satisfied that the applicant fulfills the prescribed eligibility conditions then he can be considered for grant of licence. However, there was a significant difference in the schemes of the two sets of regulations inasmuch as while the 1984 Regulations

postulated grant of temporary licence and prescribed holding of such licence as a condition of eligibility for appearing in the examination conducted for grant of regular licence, the 2004 Regulations do not envisage grant of temporary licence and possession of such licence is not sine qua non for participating in the process of grant of licence under Clause 9 of the 2004 Regulations. Of course, the applicant is required to clear the written as well as oral examinations to be held in terms of Clause 8 of those regulations. At the same time, the language of the opening paragraph of the 2004 Regulations and proviso to Clause 8(1) thereof make it clear that those who have already passed the examination are not required to appear in any further examination. It is also evident from the plain language of the opening paragraph of the 2004 Regulations that the actions already taken under the earlier regulations, that is, the 1984 Regulations were saved. In other words, the examinations held under the 1984 Regulations did not get nullified with the enactment of the 2004 Regulations and the candidates who had qualified the examinations held under the 1984 Regulations are not required to again qualify the examination which may be held under the 2004 Regulations. As a corollary, it must be held that those who had cleared the examinations held between 1995 and 2003 under the 1984 Regulations would be eligible for grant of licence subject to their fulfilling other conditions of eligibility.

Although, the language of Clause 4 of the 1984 Regulations and the 2004 Regulations suggest that every year the Commissioner is required to make an assessment of the number of licences proposed to be granted and then invite applications for grant of such licences, Public Notices dated 20.06.2003 and 24.02.2005 do not contain any indication of such an assessment having been made by the Commissioner before inviting applications for grant of licences. Therefore, the Division Bench of the High Court was not justified in introducing the concept of vacancies in what it thought to be the cadre of Custom House Agents and limit the number of licences to be granted to

the candidates, who successfully qualified the examinations conducted under the 1984 Regulations.

The clarification issued by the Board vide Circular dated 10.06.2004 and the decision of the Commissioner to dump 563 applications received pursuant to Public Notice dated 20.06.2003 are contrary to the language of proviso to Clause 8 of the 2004 Regulations and the prefatory statement contained in those regulations and, therefore, the same cannot be relied upon for denying licences to the appellants. The matter deserves to be considered from another angle. The Regulations framed by the Board under Section 146(2) of the Customs Act are in the nature of delegated legislation.

The language of that section and other provisions of the Customs Act do not indicate that the Board is empowered to make Regulations with retrospective effect. Therefore, the 2004 Regulations would operate prospectively and would not in any manner affect the eligibility and entitlement of those who had qualified the examination held under the 1984 Regulations for grant of licences to act as Custom House Agents. The saving clause contained in the opening paragraph of the 2004 Regulations unmistakably show that while enacting the new Regulations, the Board did not want to adversely impact the right of those who had qualified the examination held under the 1984 Regulations because the nature of the examinations envisaged under the two sets of Regulations is substantially similar.

In view of the above, we hold that the learned Single Judge was right in issuing direction for grant of licences to the appellants subject to their fulfilling the conditions specified in Clauses 6 and 9 of the 2004 Regulations and the Division Bench of the High Court committed an error by modifying the order of the learned Single Judge.

In the result, the appeals are allowed, the impugned judgment is set aside and order

dated 23.7.2005 passed by the learned Single Judge in Civil Writ Petition Nos.12808-73 of 2004 is restored. The parties are left to bear their own costs."

(emphasis supplied)

9. In the above case, the Apex court had an occasion to consider the eligibility of a candidate who qualified under 1984 Regulation, but was denied the grant of licence referring to the 2004 Regulation. The Apex Court clearly held that under the 2004 Regulations read with proviso to Clause 8(1), candidates who have already passed the examination under the 1984 Regulation should be considered for grant of licence under the 2004 Regulation. The reasoning given in the above quoted judgment squarely applies to the facts of the present case. The POA in this case is qualified under the 1984 Regulation.

10. In the present case, there is yet another difference. The licence has already been issued and valid till 2015. It is only a case of reconstitution of the firm into a company. Therefore, while considering the application under Regulation 15, the petitioner's request cannot be denied on the above stated issue (i.e.) the POA has not passed the examination under the 2004 Regulation. That portion of the letter/order is, therefore, contrary to the 2004 Regulations and the decision of the Apex Court referred to above. Accordingly, the same is set aside and the authority is directed to reconsider the issue on all other aspects for which the petitioner is willing to respond on merits with relevant material.

11. The writ petition is allowed as indicated above. No costs.

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Sd/-

Deputy Registrar (Admn)

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Sub Asst. Registrar

To

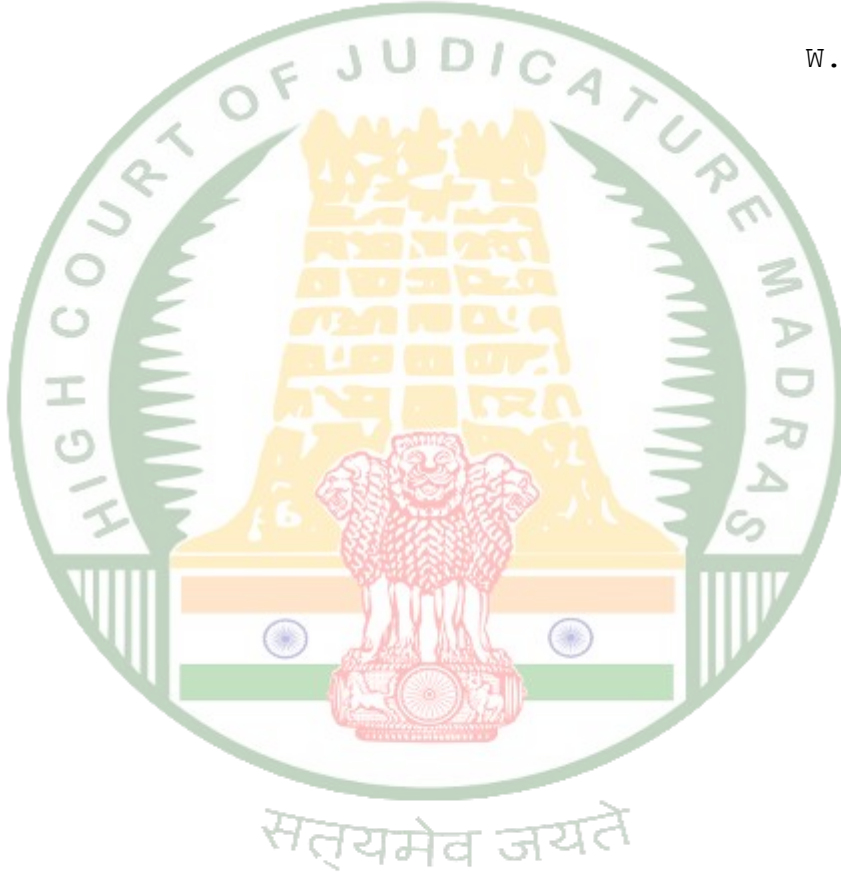
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+ 1 cc to M/s. Hari Radhakrishnan, Advocate SR No.72875

MRD(CO)
SR/7.12.2012.

Order in
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