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IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 05.11.2012

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WP (C) 10449/2009 & CM No.9147/2009 (Stay)

COMMISSIONER OF CUSTOMS Appellant
Through: Mr. Mukesh Anand, Advocate.

versus

ASHOK KUMAR JAIN & ANR. Respondents
Through: Mr. Piyush Kumar & Ms. Shikha Sapra, Advocates.

WP (C) 6746/2012 & 17698/2012 & 17699/2012 (Stay)

ASHOK KUMAR JAIN Appellant
Through: Mr. Sumit Bansal with Mr. Jeetendra Singh and
Mr. Vineet Trehan, Advocates.

Versus

COMMISSIONER OF CUSTOMS (I & G)
AND ANR. Respondents
Through: Mr. Pramod Bahuguna, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The Commissioner of Customs, in WP(C) No.10449/2012 seeks a direction for quashing of an order of the Customs and Central Excise Settlement Commission dated 6th may, 2009, in respect of an application filed by the first respondent (hereinafter referred to as the applicant). In the second writ petition being WP(C) No.6746/2012, the said applicant seeks a direction for release of

three watches for which the order of settlement was made by the Commission. The applicant claims to be Chairman and Managing Director of M/s Meera Exim Limited with its office in Delhi. Upon his arrival at IGI Airport during the intervening night of 27/28.01.2008 with his son, the Customs Authorities seized three watches and other miscellaneous goods from his possession. The Customs department issued a show cause notice in July 2008 proposing demand of duty, confiscation and imposition of penalty to the applicant. Similar allegations were made against the applicant's son through another show cause notice dated 23.07.2009. However, in respect of the latter, by an order of the Joint Commissioner of Customs dated 18.09.2009 (No 35 of 2009) further proceedings were dropped and matter attained finality. Upon receiving the show cause notice in respect of three wrist watches for which different customs duty, penalty and confiscation as proposed, the applicant moved the Settlement Commission under Section 127(1) of the Customs Act. The Commissioner of Customs resisted the proceedings contending that the issue could not be gone into by the Commission as it did not constitute "*case*" under Section 127 (C) of the Act. The merits of the application too were resisted. It was contended that the applicant had not filed bill of entry and the case was one of outright smuggling. The Commission in its order (impugned by the Customs Authorities) in the earlier writ petition rejected the objections of the Customs Department about maintainability of the application. After considering the rival submissions, the Commission settled the case under Section 127(C)(5) by directing payment of customs duty of Rs.16,16,728/- with specified amount of interest. Its order further directed confiscation of the watches and allowed redemption on payment of Rs.2,50,000/-. Furthermore, the Commission imposed penalty of Rs. 2,00,000/- on the applicant.

The applicant had deposited Rs. 22,50,000/- before the Addl. Chief Metropolitan Magistrate, New Delhi, in the meanwhile. The amounts directed to be paid by him were ordered to be appropriated by the said deposited amount.

2. The Revenue contended that the Commission failed to appreciate that the applicant's case was not one under Section 127(A) as he did not file any bill of entry or shipping bill under Section 127(C). It was also not a case of short levy on account of mis-declaration or undervaluation or inapplicability of exemption notification. In these circumstances, the Commission lacked jurisdiction to even entertain or proceed further with the matter. It was contended by the Counsel that the applicant's case squarely fell within the head of "*baggage*" where he had given a declaration under Section 77 of the Act, mandatory to all passengers arriving in India. The declaration had several columns and one of which belong to value of goods brought in as a baggage comes within the purview of Section 77. This was entirely different from the bill of entry or shipping bill which alone attracted the provisions of Section 127 (B) in order to confer jurisdiction with the Settlement Commission. It was emphasized that the goods in this case were not even entered in the disembarkation card filed by the applicant.

3. It was next urged by the Customs Authorities that the Commission fell into an error in not appreciating that the show cause notice issued under Section 124 is different from the show cause notice under Section 28 to the extent of nature of the offence. In both cases, undoubtedly, duty is demanded on the goods imported. However, the term "*has not been levied*" cannot be confused with the mis-declaration of smuggling. In other words, Section 28 covers goods where duty has not been levied in the normal course, for instance, due to wrong

application of exemption notification or due to undervaluation of goods etc. A mis-declaration show cause notice issued under Section 124 read with Section 125 can propose confiscation even though duty is demanded under Section 28. Counsel also emphasized that this embarkation form cannot any circumstance be meant to be filed within the description “*entry*” under Section 2(16) of the Act.

4. Counsel for the applicant argued that each of the submissions made by the Customs Department had been urged in great detail and considered by the Commission by its elaborate order. The counsel emphasized that the Commission after examining the show cause notice stated that it had invoked both demands of additional duty and re-determination of value of the allegedly undervalued goods and held that demand of duty therefore brought the goods within the ambit of its jurisdiction. Counsel highlighted the fact that the Settlement Commission had followed the decision of Madras High Court in *V.C. Mohan Vs. Commissioner of Customs*, 2008 (222) ELT 344. A similar interpretation was adopted by the Bombay High Court in *Commissioner of Customs, Mumbai Vs. Manish Kalvadiya* 2008 (228) ELT 342. It was submitted that so far as the question of applicability of Section 123 and case not being within the jurisdiction of the Commission was concerned, the impugned order itself revealed detailed consideration of facts under Section 77. The Commission had examined the decision and noticed that passengers had to give proof of check in, hand baggage and the total value of dutiable goods. In such circumstances, the items lose their specific value under the tariff and are charged to duty under chapter heading 98.03 of the Customs Tariff Act, 1985. The Commission had further noticed that even the Revenue had computed the duty and 35% ad valorem relating to

baggage. In these circumstances the Commission held that Section 123 was inapplicable.

5. This Court has considered the submissions of the parties. The relevant provisions of the Customs Act are as under:

“SECTION 28. Recovery of duties not levied or short-levied or erroneously refunded. — (1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful misstatement or suppression of facts,—

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,—

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.

SECTION 77. Declaration by owner of baggage. — The owner of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer.

SECTION 78. Determination of rate of duty and tariff valuation in respect of baggage. — The rate of duty and tariff valuation, if any, applicable to baggage shall be the rate and valuation in force on the date on which a declaration is made in respect of such baggage under section 77.

SECTION 124. Issue of show cause notice before confiscation of goods, etc. – No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter :

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.

SECTION 127A. Definitions.— In this Chapter, unless the context otherwise requires,

(a) “Bench” means a Bench of the Settlement Commission;

(b) “case” means any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 127B is made :

Provided that when any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause;

SECTION 127B. Application for settlement of cases. - (1) Any importer, exporter or any other person (hereinafter referred to as the applicant in this Chapter) may, in respect of a case, relating to him make an application, before adjudication to the Settlement Commission to have the case settled, in such form and in such manner as may be specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification or otherwise and such application shall be disposed of in the manner hereinafter provided :

Provided that no such application shall be made unless, —

(a) the applicant has filed a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer;

(b) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and

(c) the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB :

Provided further that no application shall be entertained by the Settlement Commission under this subsection in cases which are pending in the Appellate Tribunal or any court:

Provided also that no application under this sub-section shall be made in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed :

Provided also that no application under this sub-section shall be made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975 (51 of 1975).

(1A) Notwithstanding anything contained in sub-section (1), where an application was made under sub-section (1) before the 1st day of June, 2007 but an order under sub-section (1) of section 127C has not been made before the said date, the applicant shall within a period of thirty days from the 1st day of June, 2007 pay the accepted duty liability failing which his application shall be liable to be rejected.

(2) Where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under section 110, the applicant shall not be entitled to make an application under sub-section (1) before the expiry of one hundred and eighty days from the date of the seizure.

(3) Every application made under sub-section (1) shall be accompanied by such fees as may be specified by rules.

(4) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

SECTION 127J. Order of settlement to be conclusive. - *Every order of settlement passed under sub-section (5) of section 127C shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.*

6. The Revenue's contention was that proceedings in relation to "baggage" brought in by the passengers after declaration under Section 77 do not fall within the description "case", was rejected by the Commission. The impugned order held that the applicant was asked to show cause why amounts towards the duty and interest under Section 28(A)(1) could not be determined and demanded; also was asked to explain why the value of one of the watches should not be re-determined. Thus a plain reading of the show cause notice revealed that it had invoked both the demands – additional duty and re-determination of the value of goods. Consequently, the show cause notice itself revealed the case to be one of short levy as a result of undervaluation. The Commission further held that Section 28 covers not only those cases where duty had been short levied and where duty has not been levied; the provision is broad enough to clothe the Revenue with the power to issue notice for the recovery of duty. In this regard, the Commission relied upon the ruling of the Madras High Court in *V.C. Mohan case (supra)* where it was held that:

"18. A contention has been raised on behalf of the Department that under Section 127-A, the terminology "case" has been defined to mean "any proceeding under this Act or any other Act for the levy, assessment or collection of customs duty or any proceeding by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before the proper officer or Central Government, can only be regarded as a case coming within the purview of Section 127-B, since the present case is one of prima facie smuggling, there is no question of levy, assessment and collection of customs duty and as such the dispute will not come within the purview of Section 127-B, which contention was found in favor of the Department by the learned Single Judge. We are not able to

countenance this contention also for the reason that as per second limb of Section 125 of the Customs Act, if the goods confiscated are not prohibited goods, an option has to be given to the importer to pay, in lieu of confiscation, such fine, i.e. the redemption fine. In such case, the importer has to pay duty and charges payable in respect of such goods. In order to arrive at the duty and charges payable under Section 125, an assessment has to be made, the duty and charges payable under Section 125, an assessment has to be made, the duty has to be levied and collection has to be made for the purpose of giving effect to the second limb of Section 125. For the aforesaid reasons, the contention that the dispute in the present case does not involve levy, assessment and collection has to be rejected and the same is rejected. The Division Benches of the Bombay High Court in the case of Union of India v. Hogenas India Limited reported in 2006 (199) ELT 8 and Tata Teleservices (Maharashtra) Limited v. Union of India reported in 2006 (201) ELT 529 have also taken a similar view with which we are in complete agreement.”

7. The Commission rejected the arguments on the ground that the case to be covered under Section 127 (A) to clothe it with the jurisdiction to regulate import where a bill of entry is filed under Section 46 alone would be applicable. It was noticed that the applicant arrived as a passenger and brought some goods with him. He was required to fill in disembarkation card which he did and in it he declared value of the goods imported as “*baggage*”. On account of Section 77 and Chapter under which it fell, he was not expected to file bill of entry. In this background the Commission held:

“..... He was not required to file a bill of entry for the goods imported by him as baggage. If it was so required, the proper officer, i.e. the officer, who was required to allow clearance of baggage, could have asked him to file a bill of entry. Since there was no such requirement, and since the applicant was required only to fill in a DC, no fault can be found with him on this score. Importation of goods as baggage is only one of the modes of importation and as such if a bill of entry is allowed to be filed in baggage cases, even this requirement can be met with. But in the baggage cases, as a matter of facilitation, passengers are required to fill in only a DC. Under Section 46 of the Customs Act, 1962, a bill of entry can be filled at any time after delivery of import manifest or import report, as the case may be. It is not the case of the Revenue that the applicant was

required to file a bill of entry on his arrival and as he has not done so, he cannot file a bill of entry now. The filing of a bill of entry is a procedural requirement under the law, for assessment and clearance of goods. In the case of import of regular merchandise through seaports or air cargo complex, etc., importer is required to file a bill of entry. Goods can also be imported through other means, such as through post, courier service or as baggage. It is difficult to appreciate that such imports through post, courier service or baggage should be denied settlement of disputes merely because they have chosen a particular mode for importation of goods and have filed some other document instead of a bill of entry. In fact, in respect of goods imported through post sub-section (16) of Section 2 deems the label or declaration accompanying the goods which contains the description, quantity and value thereof to be treated as an entry for import or export. In the case of baggage, Section 77 of the Customs Act, 1962 requires the owner of any baggage, for the purpose of clearing it, to make a declaration of its contents to the proper officer.....”

8. It appears from the reading of the impugned order that the Commission took a broad view of its jurisdiction under Sections 127 (A) and 127 (B) of Act. This Court is conscious of the fact that being a Tribunal of limited jurisdiction the Commission could not have forayed that amounts so demanded do not fall within the jurisdiction of “case”. However, a plain reading of the provisions of Section 127 (A) and 127 (B) would reveal that there is no bar/express or implied – in respect of entertaining applications by the passengers which bring in goods through their baggage.

9. Although provisions relating to baggage fall under Chapter 11 of the Customs Act, the provisions relating to confiscation - which are invoked in the present case are general in nature and apply to all classes of imports - made either where goods are sought to be cleared under Chapter 7 or under Chapter 6 as in the present case. This observation of the Court is strengthened by the fact that Section 127 (B) itself enumerates the kinds of cases which cannot be entertained by the Commission, for instance listed in third proviso of Section 127

(B)(i). Having regard to these and the observations of the Madras High Court in *Commissioner of Customs vs. Customs & Excise Settlement Commission*, 2008 (222) ELT 344 and that of *Manish Kalvadiya*, this Court is of the opinion that the argument of the Revenue on this aspect lacks in merit. It would be worthwhile in this context to notice the observations of the Bombay High Court which are as follows:

“8. Mr. Jetly, learned counsel appearing on behalf of the revenue in Writ Petition No. 9171 of 2005 submitted twofold arguments. Firstly, he submitted that in the absence of filing of bill of entry as contemplated under the proviso to Section 127C(1) of the Customs Act, the Settlement Commission has no jurisdiction to entertain the application filed by Manish Kalvadiya. Secondly, he submitted that when M/s. I.P. Patel & Co. had filed a separate application in respect of 34147.66 carats of cut and polished diamond, the Commission could have held the reliefs granted to Manish Kalvadiya in respect of 5877 carats of cut and polished diamonds would apply to M/s. I.P. Patel & Co. as a co-noticee.

9. The first argument of Mr. Jetly that in the absence of filing of bill of entry, the application filed by Manish Kalvadiya was not maintainable is wholly misconceived, because, in the present case, initial by the very same argument was advanced by the revenue before the Settlement Commission and the Settlement Commission vide its order dated 16th August, 2004 had accepted the said argument and dismissed the applications as not maintainable. However, on a writ petition bearing no. 2430 of 2004 filed by Manish Kalvadiya, this Court by its judgment and order dated 21st July, 2005 set aside the order of the Settlement Commission dated 16th August, 2004 and held that the application was maintainable. It is the case of the Revenue that the Special Leave Petition filed against the decision of this Court dated 21st July 2005 is pending before the Apex Court. Therefore, when this Court has already ruled that the application filed by Manish Kalvadiya is maintainable, it is not open to the revenue to contend that the Settlement Commission was in error in entertaining the application filed by Manish Kalvadiya. Accordingly, the first argument of Mr. Jetly is liable to be rejected.

10. As regards the second argument of Mr. Jetly, on perusal of the show cause notice, it is seen that there were two issues (one) relating to confiscation of 5877 carats of cut and polished diamonds seized from Manish Kalvadiya and (two) confiscation of 34147.66 carats of cut and polished diamonds seized from the

office premises of M/s. I.P. Patel & Co. Admittedly, said Manish Kalvadiya and M/s. I.P. Patel have filed independent applications before the Settlement Commission. It is pertinent to note that in the application filed by M/s. I.P. Patel & Co. relating to 34147.66 carats of cut and polished diamond no additional amount of duty has been disclosed and they have referred to the amount of Rs.8,53,829/- offered by Manish Kalvadiya in respect of 5877 carats of cut and polished diamonds. By the impugned order, the Settlement Commission has held that in view of composite show cause notice issued, the reliefs granted to Manish Kalvadiya in respect of 5877 carats of cut and polished diamond will be applicable to M/s. I.P. Patel & Co. as a co-noticee in respect of 34147.66 carats of cut and polished diamond.”

10. In rejecting the further submissions of Section 77, the Commission noticed that baggage is a specific item under Chapter heading 98.03 of the Customs Tariff Act 1985. It rested its conclusion on the fact that the duty computed by the Revenue in the show cause notice itself was 35% ad valorem which related to baggage. The Commission relied upon its Special Bench order in *Idris Y Porbunderwala*, 2005 (186) ELT 356.

11. For the foregoing reasons, this Court is of the opinion that on a careful reading of Section 127(A) and 127(B) the Revenue's contention that since the applicant had not filed bill of entry or that the case was one relating to baggage and therefore did not involve short levy or non-levy is without force. The provisions that confer jurisdiction on the Settlement Commission cannot, in the opinion of the Court, be construed as narrowly as it sought to be urged by the Revenue. If parliamentary intention is to exclude adjudication by Customs Authorities in respect of baggage claim, from the purview of the Commission's jurisdiction, surely such intention would have been more clearly manifested like in the case of 3 proviso of Section 127 (B)(i).

12. For the above reasons, this Court is of the opinion that the writ petition No. 10449/2009 lacks in merit, it is accordingly dismissed. Consequently, in WP(C) No.6746/2012 the petitioner or its authorized representative shall be present before the concerned authority i.e. Additional Commissioner of Customs Import in General New Customs House, IGI Airport on 10th December, 2012 when the goods shall be released. The writ petition is allowed in the above terms.

(S.RAVINDRA BHAT)
JUDGE

5th November, 2012

(R.V. EASWAR)
JUDGE