

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5633 OF 2014

Bharmopal Panchal and another	... Petitioners
v/s	
Union of India and others	... Respondents

Mr. Prakash Shah with Mr. Jaydeep C Patel, Mr. Jas Sanghavi i/b Yogesh Rohira for Petitioners.

Mr Pradeep S. Jetly, Advocate, for the Respondents.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA JJ.**

Reserved On : 14th September, 2015
Pronounced On : 9th October, 2015

JUDGMENT [Per B.P. Colabawalla, J] :-

1. Rule. Respondents waive service. By consent of parties, Rule made returnable forthwith and heard finally.

2. This Writ Petition under Article 226 of the Constitution of India challenges the final orders passed by the Settlement Commission dated 29th January, 2014 and 31st January, 2014

respectively (Exhs. 'A' and 'B' to the Petition), and to direct the Settlement Commission to *de novo* consider the Settlement Applications of the Petitioners, by affording them a reasonable opportunity of hearing.

3. The order dated 29th January, 2014 (Exh. 'A' to the Petition) arises out of Show Cause Notice dated 7th December, 2012 and the order dated 31st January, 2014 (Exh. 'B' to the Petition) arises out of Show Cause Notice dated 29th / 31st January, 2013. In a nutshell, it is the case of the Petitioners that after common investigation in the matter, three Show Cause Notices dated 15th October 2012, 7th December, 2012 and 29th / 31st January, 2013 were issued to issued them. To settle the claims in these three Show Cause Notices, the Petitioners filed separate Settlement Applications before the Settlement Commission. In respect of first Show Cause Notice dated 15th October 2012, the Settlement Commission allowed the Settlement Applications of the Petitioners vide its Final Order No.03/FINAL/ORDER/CUS/SK/2014 dated 29th January, 2014. However, vide the impugned orders (Exhs. 'A' and 'B' to the Petition), the Settlement Commission erroneously rejected the balance Settlement Applications arising out of the second and third Show Cause Notices dated 7th December, 2012 and 29th /31st

January, 2013 respectively. Challenge is laid to these impugned orders on the ground that they violate the constitutional mandate enshrined in Article 14 of the Constitution and that they are arbitrary, unjust, erroneous on merits and passed in denial of the principles of natural justice. It is in these circumstances that the Petitioners are before us.

4. Before dealing with the rival contentions it would be necessary to advert to the brief facts of the case. Petitioner No.1 is the proprietor of M/s Jagdamba Crane Services and Petitioner No.2 is the son of Petitioner No.1. Respondent No.1 is the Union of India. Respondent No.2 is the Additional Director General, Director of Revenue, Mumbai Zonal Unit, 13, V.T. Marg, New Marine Lines, Mumbai. Respondent No.3 is the Commissioner of Customs (Import), New Custom house, Ballard Estate, Mumbai 400 001. Respondent No.4 is the Additional Commissioner of Customs (Import), New Custom House, Ballard Estate, Mumbai 400 001.

5. In October 2010, the Directorate of Revenue Intelligence commenced investigations into the imports of old and used cranes by the proprietorship firm of Petitioner No.1. Pursuant to these investigations, a Show Cause Notice dated 15th October, 2012 (for

short, the “**1st SCN**”), in respect of four such cranes which had been imported by Petitioner No.1 at the Mumbai Port, came to be issued to the Petitioners. In the 1st SCN it was inter alia alleged that the said cranes were undervalued and on that score, proposed to demand differential duty of Rs.45,70,075/- under section 28 of the Customs Act, 1962 (for short the “**said Act**”) alongwith interest in terms of section 28AB thereof, and to confiscate the offending goods and impose penalty on the Petitioners.

6. On or about 2nd January, 2013 Petitioner No.1 filed a Settlement Application dated 31st December, 2012 under section 127B of the said Act for settlement of the case arising out of the 1st SCN dated 15th October, 2012 by admitting the entire amount of differential duty of Rs.45,70,075/-. Similarly, Petitioner No.2 as Co-Applicant, on 26th August, 2013 also filed a separate Settlement Application. In the said Applications, it was clarified that since section 28AB no longer remained on the statute book, no interest under the said section was paid/deposited before filing the Applications. However, the Petitioners assured that interest liability would be paid/deposited as and when determined by the Hon'ble Settlement Commission under section 28AA of the said Act.

7. Pursuant thereto, on or about 9th January 2013, a Statutory Notice under section 127C of the said Act was issued to Petitioner No.1 wherein the above Settlement Application dated 31st December, 2012 was registered as Application No.SA(C)-06/2013 and the discrepancies noticed therein were pointed out to Petitioner No.1. In the said notice, it was inter alia pointed out that Petitioner No.1 has not paid interest on the admitted duty liability which was a pre-condition for making an application under section 127B, failing which the Application was liable to be rejected. In this view of the matter, Petitioner No.1 was called upon to explain in writing as to why the Settlement Application filed by him should be allowed to be proceeded with. A similar notice under section 127C dated 28th August, 2013 was also issued to Petitioner No.2 wherein his Settlement Application dated 26th August, 2013 was registered as Application No.SA(C)-556/2013.

8. In reply to the aforesaid notices issued under section 127C, the Petitioners filed a detailed explanation inter alia submitting that since section 28AB of the said Act no longer remained on the Statute book, no interest under the said section had been deposited before filing the Settlement Applications. It was

however submitted that they would pay/deposit the interest liability as and when determined by the Settlement Commission under section 28AA of the said Act.

9. Accordingly, by its letter dated 21st January, 2013 (in relation to Petitioner No.1) and 12th September, 2013 (in relation to Petitioner No.2), the Settlement Commission allowed the Petitioners' Application No.SA(C)-06/2013 and SA(C)-556/2013 to be proceeded with, subject to payment of interest on the admitted duty liability within 7 days from the date of receipt of the said letter. In compliance of the same, the Petitioners paid the balance amount of Rs.13,78,448/- towards interest in respect of these Settlement Applications.

10. In the meanwhile, another Show Cause Notice dated 7th December, 2012 (for short the "**2nd SCN**") was issued to the Petitioners in respect of one crane with accessories, proposing to demand differential duty of Rs.18,38,658/- under section 28 of the said Act alongwith interest in terms of section 28AB thereof and also proposing confiscatory and penal action under section 111(m) and 112(a) of the said Act.

11. After the issuance of the 2nd SCN, another Show Cause Notice dated 29th / 31st January 2013 (for short, the **“3rd SCN”**) came to be issued to the Petitioners inter alia proposing to demand differential duty amounting to Rs.1,62,70,028/- leviable on 17 consignments of used cranes and accessories alongwith interest in terms of section 28AB of the said Act. We must mention here that in the 3rd SCN, an ex-parte decision of the Additional Director General, Directorate of Revenue Intelligence, was also communicated to the Petitioners vide paragraph 25(xii) thereof whereby Respondent No.2 had appropriated a sum of Rs.41,79,324/- (out of Rs.50,00,000/- paid by Petitioner No.1 during the course of investigations) towards alleged duty liability on the cranes imported and assessed more than five years before the date of the 3rd SCN. Since it was the case of the Petitioners that this appropriation was towards a time barred claim, this ex-parte decision to appropriate the said amount of Rs.41,79,324/- was subjected to a challenge before the statutory authorities. Whilst this limited challenge was pending, on 24th May, 2013 an addendum to the 3rd SCN was issued by Respondent No.2 under which Respondent No.2 recalled its erroneous ex-parte decision

communicated vide the said 3rd SCN. Thus it is the case of the Petitioners that its limited challenge became infructuous and therefore there is no question of any appeal pending in relation to the 3rd SCN before any Tribunal or Court.

12. Be that as it may, with a view to settle the claim even under the 2nd SCN and the 3rd SCN (as amended), on 26th August, 2013 the Petitioners filed separate Applications under section 127B of the said Act before the Settlement Commission by admitting the entire amount of differential duty as demanded in the said 2nd and 3rd SCNs of Rs.18,38,658/- and Rs.1,62,70,028/- respectively and inter alia submitted that since section 28AB of the said Act no longer remained on the statute book, no interest under the said section was paid/deposited before filing the Settlement Applications. These Applications, on behalf of Petitioner No.1 were signed by his son - Petitioner No.2. This was done because Petitioner No.1 was detained under COFEPOSA since 14th August, 2013.

13. The settlement Applications arising out of the 2nd and 3rd SCNs were numbered as SA(C)559-560/2013 and SA(C)557-558/2013 respectively. With reference to these Settlement

Applications, a statutory notice dated 29th August, 2013 under section 127C of the said Act was issued by the Settlement Commission to the Petitioners wherein the above Applications were registered and certain common discrepancies were noticed and it was pointed out that the Petitioners had not paid interest on the admitted duty liability. Payment of admitted duty liability alongwith applicable interest was a pre-condition for making an Application under section 127B of the said Act failing which the Application was liable for rejection. The Petitioners were therefore inter alia called upon to explain in writing as to why the Applications filed by them should be allowed to be proceeded with.

14. In reply thereto, the Petitioners on 3rd September, 2013 replied to the aforesaid notice and gave their detailed explanation inter alia submitting that since section 28AB of the said Act no longer remained on the statute book, no interest under the said section had been paid/deposited before filing the said Applications. It was however submitted that the Petitioners would deposit the interest liability as and when determined by the Settlement Commission under section 28AA.

15. After the aforesaid explanation, by two separate letters

both dated 13th September 2013, the Petitioners' Applications in relation to the 2nd and 3rd SCNs (SA(C)559-560/2013 and SA(C)557-558/2013 respectively) were allowed to be proceeded with by the Settlement Commission without imposing any condition to deposit any interest under section 28AA or 28AB of the said Act.

16. Thereafter all the Settlement Applications filed by the Petitioners (arising out of the 1st, 2nd and 3rd SCNs) came up for hearing before the Settlement Commission on 3rd December, 2013. By its Final Order No.03/FINAL/ORDER/CUS/SK/2014 dated 29th January, 2014 the Settlement Commission allowed the Settlement Applications filed by the Petitioners arising out of the 1st SCN dated 15th October, 2012 on the terms and conditions mentioned in the said order. However, the Settlement Applications arising out of the 2nd SCN dated 7th December, 2012 and the 3rd SCN dated 29th / 31st January, 2013 came to be rejected by the Settlement Commission vide its orders dated 29th January, 2014 and 31st January, 2014 respectively (Exh 'A' and 'B' to the Petition).

17. Whilst rejecting the Settlement Applications of the Petitioners arising out of the 2nd SCN dated 7th December 2012, the Settlement Commission by its order dated 29th January, 2014 (Exh

'A' to the Petition) opined that in view of the fact that the Petitioners had failed to comply with the express provisions of section 127B of the Act, the said Settlement Applications were not admissible. The Settlement Commission opined that by its notice dated 29th August, 2013 it was pointed out to the Petitioners about the non-payment of interest by them and also stated that the said Applications would be liable for rejection on that count. Since the Petitioners had not paid any interest whilst submitting their Settlement Applications on 26th August 2013, the mandatory provisions of section 127B were not complied with, and therefore, rejected the said Settlement Application Nos.SA(C)559-560/2013. Similarly, whilst rejecting the Settlement Application Nos. SA(C)557-558/2013 arising out of the 3rd SCN dated 29th /31st January 2013, the Settlement Commission opined that the Petitioners had failed to fulfill the following two conditions of section 127B, namely, (i) that no Appeal relating to the case was pending before the Appellate Tribunal; and (ii) the interest payable on the admitted duty liability had not been paid. In these circumstances, even Settlement Application Nos.SA(C)557-558/2013 were rejected by the Settlement Commission vide its order dated 31st January, 2014 (Exh 'B' to the Petition). Being aggrieved by these two orders, the Petitioners have approached us

in our writ jurisdiction under Article 226 of the Constitution of India.

18. In this background, Mr Prakash Shah, learned counsel appearing on behalf of the Petitioners, submitted that the impugned orders dated 29th January, 2014 and 31st January, 2014 were passed on a totally incorrect interpretation of the law. He submitted that though section 127B, as it stood on the date of filing of the above Settlement Applications (i.e. on 26th August, 2013), inter alia provided that no Settlement Application shall be made unless the Applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB of the Act, section 28AB was deleted from the Act with effect from 8th April, 2011 and was substituted by section 28AA. Despite section 28AB being deleted from the Act with effect from 8th April 2011, reference to the said section erroneously continued in section 127B(1). In fact, reference to “section 28AB” in section 127B(1), was substituted with “section 28AA” only by the Finance (No.2) Act, 2014 with effect from 6th August, 2014. Since section 28AB was deleted from the Act with effect from 8th April, 2011 and their Settlement Applications were filed only thereafter, the Petitioners were not required to statutorily deposit / pay any amount towards

interest under section 28AB before filing their Settlement Applications under section 127B, was the submission. Therefore, the Settlement Applications of the Petitioners could not have been rejected on the ground that no interest was paid/deposited along with the Settlement Applications as contemplated under section 127B, was the submission of Mr Shah. Mr. Shah submitted that this was brought to the notice of the Settlement Commission by the Petitioners by their letter dated 3rd September, 2013 and after considering this letter, the Settlement Commission, vide its letters dated 13th September, 2013 ordered that Settlement Application Nos. SA(C)559-560/2013 (arising out of the 2nd SCN) and Settlement Application Nos. SA(C)557-558/2013 (arising out of the 3rd SCN), were allowed to be proceeded with, without imposing any condition to pay/deposit any interest under sections 28AA or 28AB of the said Act. Once having so ordered, the Settlement Commission could not have rejected the Applications on the ground that the Petitioners had not paid/deposited interest as required under section 127B of the said Act, was the submission of Mr. Shah.

19. Mr. Shah additionally submitted that though not required by law, the Petitioners themselves had given an undertaking that they would pay interest under section 28AA as

and when determined by the Settlement Commission. He submitted that with reference to the Settlement Applications arising out of the 1st SCN, the exact same undertaking was given and the Settlement Commission in that case directed the Petitioners to pay/deposit a sum of Rs.13,78,448/- towards interest, which was duly paid/deposited by the Petitioners. This is how the Settlement Application Nos. SA(C)-06/2013 & No. SA(C)-556/2013 arising out of the 1st SCN came to be allowed by the Settlement Commission. As far as the Settlement Applications arising out of the 2nd and 3rd SCN are concerned, he submitted that admittedly the Settlement Commission did not impose any condition on the Petitioners to pay/deposit any interest (as was done with reference to the Settlement Applications arising out of the 1st SCN), and therefore, the Petitioners did not pay/deposit any interest. Mr Shah submitted that if the Settlement Commission had imposed any condition for payment of interest (as was done with reference to the Settlement Applications arising out of the 1st SCN), the Petitioners would have paid/deposited the same. In fact, Mr. Shah very fairly submitted that even today if the Settlement Commission imposes a condition to pay interest as determined it, the Petitioners would pay/deposit the same before their Settlement Applications are heard *de novo* by the Settlement Commission. Looking to all this,

Mr. Shah submitted that there has been a gross miscarriage of justice which ought to be rectified by us. He, therefore, submitted that both the impugned orders dated 29th January, 2014 and 31st January, 2014 ought to be set aside insofar as they hold that the Settlement Applications stand rejected for non payment of interest.

20. As far as the impugned order dated 31st January, 2014 is concerned, Mr Shah submitted that the Settlement Application Nos. SA(C)557-558/2013 (arising out of the 3rd SCN) were rejected on an additional ground, namely that the Petitioners had suppressed the fact that with reference to the 3rd SCN, an Appeal was pending before the CESTAT. He submitted that this finding of the Settlement Commission was totally contrary to the record before it and bordered on perversity. In this regard, Mr Shah was at pains to point out that in the 3rd SCN, vide paragraph 25(xii) thereof, Respondent No.2 had sought to appropriate a sum of Rs.41,79,324/- (out of Rs.50,00,000/- paid by Petitioner No.1 during the course of investigations), towards alleged duty liabilities on the cranes imported and assessed more than five years before the date of the 3rd SCN. It was this ex-parte decision and not the 3rd SCN that was subjected to a challenge before CESTAT. He submitted that a bare perusal of the Appeal would establish that the

3rd SCN was not the subject matter of the Appeal at all. He pointed out that in the said Appeal, it was specifically averred as follows:-

“The Appellant once again clarified that no part of any proposal in the Show Cause Notice pending adjudication is subject matter of the instant Appeal, which is restricted only to findings and decision as contained in para 25(xii), extracted hereinabove.”

21. Whilst this Appeal was pending, on 24th May, 2013 an Addendum to the 3rd SCN was issued by Respondent No.2 under which Respondent No.2 himself recalled his erroneous ex-parte decision communicated vide the said 3rd SCN. He, therefore, submitted that the Appeal before the CESTAT had become infructuous and in fact the said Appeal has been subsequently withdrawn. In light of this, Mr. Shah submitted that there was no violation of the provisions of section 127B which inter alia stipulate that no Settlement Application shall be entertained by the Settlement Commission in cases which are pending in the Appellate Tribunal. It was only after the addendum dated 24th May, 2013 was issued, that the Petitioners (on 26th August, 2013) filed these Settlement Applications under section 127B of the said Act for settlement of the case arising out of the 2nd and 3rd SCN (as amended). In this factual background, the learned counsel

submitted that the Settlement Commission was totally in error whilst dismissing the Petitioner's Settlement Application Nos. SA(C) 557-558/2013 arising out of the 3rd SCN, on this ground. For all the aforesaid reasons, Mr Shah submitted that the impugned orders were unsustainable and ought to be set aside by us in our writ jurisdiction under Article 226 of the Constitution of India and the Settlement Applications arising out of the 2nd and 3rd SCNs be remanded back to the Settlement Commission for a *de novo* consideration.

22. On the other hand, Mr Jetly, learned counsel appearing on behalf of the Respondents, sought to support the impugned orders on all counts. On the issue of non-payment of interest, Mr Jetly contended that section 127B in categorical terms stipulates that no Settlement Application shall be made under the said section unless the Applicant has paid the additional amount of duty accepted by him alongwith interest due under section 28AB of the said Act. Mr Jetly contended that in the facts of the present case, admittedly no interest was paid by the Petitioners before filing the Settlement Applications arising out of the 2nd and 3rd SCNs. In these circumstances, the Settlement Commission was fully justified in rejecting Settlement Application Nos.SA(C)559-560/2013

(arising out of the 2nd SCN) and Nos.SA(C)557-558/2013 (arising out of 3rd SCN).

23. It was the submission of Mr Jetly that merely because section 28AB of the said Act was not on the statute-book on the date when the above mentioned Settlement Applications were filed, makes no difference. He submitted that section 28AB, though deleted w.e.f. 08-04-2011, was substituted by section 28AA which also provides for payment of interest. He submitted that taking into consideration the spirit behind the provisions of section 28AB and section 28AA of the said Act, the Petitioners were bound to pay interest on the additional amount of duty accepted by them in the aforesaid Settlement Applications. Not having done so, the Petitioners had not complied with the mandatory provisions of section 127B and therefore, the Settlement Commission cannot be faulted in rejecting the above mentioned Settlement Applications.

Mr Jetly also relied upon the following three judgments :-

- (a) Uttam Chand Sawal Chand Jain v/s Union of India, reported in 2014 (299) E.L.T. 45 (Bom.) (Para 8);**
- (b) Union of India v/s K. Amishkumar Trading Pvt.Ltd., reported in 2011 (273) E.L.T. 49 (Bom.) (Para 9);**

**(c) Union of India v/s Valecha Engineering Ltd.,
reported in 2010 (249) E.L.T. 167 (Bom)
(Para 12).**

24. With the help of learned counsel, we have perused the papers and proceedings in the Writ Petition including the impugned orders dated 29th January, 2014 and 31st January, 2014 respectively. To understand the controversy raised in the present Writ Petition, it would be necessary to make note of the relevant provisions of the Customs Act.

25. Chapter XIV-A of the Customs Act, 1962 deals with settlement of cases. This Chapter contains sections 127A to 127N and was inserted w.e.f. 01-08-1998 by section 102 of Finance (No.2) Act, 1998 (21 of 1998). The object for inserting this Chapter was that the door to settlement with an errant and defaulting tax-payer should be kept open, keeping in mind the primary objective to raise revenue. The Legislature was of the view that a rigid attitude would inhibit a one-time tax evader or an un-intending defaulter from making a clear breast of his affairs and unnecessarily strain the investigation resources of the Government. The settlement machinery was thus meant for

providing a chance to a tax-evader who wants to turn a new leaf as recommended by the Direct Taxes Inquiry Committee, popularly known as the 'Wanchoo Committee'. Keeping the aforesaid objective in mind, this Chapter viz. Chapter XIV-A was inserted in the Customs Act, 1962 under which the Settlement Commission is constituted.

26. Having set out in brief the object for which Chapter XIV-A was inserted in the Customs Act, 1962, we shall now turn our attention to some of the statutory provisions of the said Act. The first provision is section 28AB which deals with payment of interest on delayed payment of duty in special cases. We must mention here that sections 28AB was deleted from the Act and replaced with section 28AA w.e.f. 08-04-2011. Before its deletion, section 28AB read as under:-

“28-AB. Interest on delayed payment of duty in special cases.—
(1) Where any duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 28, shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section

(2), or sub-section (2B), of section 28, till the date of payment of such duty:

Provided that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 151-A, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid.

(2) The provisions of sub-section (1) shall not apply to cases where the duty or interest had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

Explanation 1.—Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2.—Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.”

27. With effect from 08-04-2011, section 28AB was deleted and replaced with section 28AA, which reads thus:-

“28-AA. Interest on delayed payment of duty.—(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be

liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,—

- (a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151-A; and*
- (b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.”*

28. Despite the fact that section 28AB was deleted and replaced with section 28AA w.e.f. 08-4-2011, no corresponding amendment was carried out in section 127B. In other words, even though section 28AB no longer remained on the statute book, a reference to the said section (28AB) continued in section 127B.

29. On the dates when the Settlement Applications arising out of the 1st, 2nd and 3rd SCNs were filed by the Petitioners (i.e. in

2012 & 2013), section 127B read as under:-

“127-B. 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, undervaluation 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 28-AB:*

Provided further that no application shall be entertained by the Settlement Commission under this sub-section 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).

(1-A) 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 127-C 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.”

(emphasis supplied)

30. As can be seen from the above reproduction, section 127B(1) gives an opportunity to a person to approach the Settlement Commission to settle a case relating to him before the same is adjudicated, and have the same settled. For this purpose, the said person has to make an Application before the Settlement Commission in such form and in such manner as specified by the 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 is incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as

may be specified by the Rules. Clause (c) of the 1st proviso to sub-section (1) of section 127B clearly stipulates that no such Settlement Application shall be made unless the Applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB. What is important to note is that despite section 28AB being deleted and replaced with section 28AA w.e.f. 08-04-2011, clause (c) of the 1st proviso to section 127B(1) even thereafter continued to state that no Settlement Application could be made unless ***“the applicant has paid the additional amount of customs duty accepted by him along with interest due under section 28AB”***. In other words, even though section 28AB was deleted and replaced with section 28AA, no corresponding amendment was carried out in clause (c) of the 1st proviso to section 127B(1). In fact, to bring it in line with the other provisions of the Act, section 127B was also thereafter amended by Finance (No.2) Act, 2014. The notes on clauses of the Finance (No.2) Bill, 2014 inter alia mentions that clause 78 of the Bill seeks to amend clause (c) of the 1st proviso to sub-section (1) of section 127B to substitute the figures and letters “28AA”, for the words and figures and letters “section 28AB” to align it with the existing provision on interest on delayed payment of duty. Section 127B after its

amendment in 2014, and in so far as it is relevant for our purposes

reads as under :-

“127-B. 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, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported or exported through post or courier, as the case may be, and in relation to such document or documents, 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 28-AA**:*

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

(1-A)

- (2)
- (3)
- (4)”

(emphasis supplied)

There have also been further amendments to this section in 2015, but the same are not relevant to decide the controversy in this Writ Petition.

31. Be that as it may, on a conjoint reading of the aforesaid statutory provisions, two things become clear. Firstly, section 28AB was deleted from the Act w.e.f. 08-04-2011 and was substituted by section 28AA. Despite the fact that section 28AB was deleted, a reference to the said section continued in clause (c) of the 1st proviso to section 127B(1), till 06-08-2014. It was only when section 127B(1) was amended, by Finance (No.2) Act, 2014, that reference to “section 28AB”, in clause (c) of the 1st proviso to section 127B(1) was substituted with “section 28AA”.

32. In the present case, admittedly the Settlement Applications were filed by the Petitioners in the year 2012-2013. On the date when these Applications were filed under section 127B, section 28AB no longer remained on the statute-book and therefore

it was impossible for the Petitioners to comply with the condition as set out in clause (c) of the 1st proviso to section 127B(1) which continued to stipulate that no Settlement Application could be made unless the Applicant had paid the additional amount of customs duty accepted by him along with interest due under section 28AB. It was in these circumstances and as rightly submitted by Mr Shah, that the Petitioners brought to the notice of the Authorities that since section 28AB no longer remained on the statute-book, no interest was paid by them under the said section. Despite this, the Petitioners had undertaken that they would pay interest under section 28AA as and when determined by the Settlement Commission. Admittedly, the Settlement Commission, whilst ordering that the Settlement Applications (arising out of the 2nd and 3rd SCNs) are allowed to be proceeded with, did not impose any condition or direct the Petitioners to pay any interest. In these circumstances, we are clearly of the view that the Settlement Commission was in error in rejecting these Settlement Applications of the Petitioners on the ground that the Petitioners had failed to pay the interest due under section 28AB as stipulated under section 127B. If section 28AB did not remain on the statute-book at all, there was no question of asking the Petitioners to pay interest under the aforesaid provision. This is more so in the peculiar facts

of the present case inasmuch as the Petitioners had undertaken that they would pay interest under section 28AA, as and when determined by the Settlement Commission. In fact, this course of action was itself undertaken by the Settlement Commission in respect of the 1st SCN when it ordered that the Settlement Applications arising out of the 1st SCN were allowed to be proceeded with subject to payment of interest on the admitted duty liability within seven days from the date of receipt of the said order. In compliance of the same, the Petitioners in fact paid the balance amount of Rs.13,78,448/- towards interest in respect of the Settlement Applications arising out of the 1st SCN. Whilst ordering that the Settlement Applications arising out of the 2nd and 3rd SCNs are allowed to be proceeded with, no such condition was imposed upon the Petitioners. In these circumstances, the Petitioners cannot be faulted for non payment of interest and we are of the opinion that the Petitioners' Settlement Applications could not have been rejected on that ground. Considering that Mr Shah very fairly stated before us that even today they are willing to pay the interest due under section 28AA as and when determined by the Settlement Commission, we think that it would just, fair and in the interest of justice if Settlement Application Nos.SA(C)559-560/2013 and SA(C)557-558/2013 (arising out of 2nd and 3rd SCNs) are remanded

back to the Settlement Commission for a *de novo* consideration. It is accordingly so ordered. Before the aforesaid applications are *de novo* heard by the Settlement Commission, it would be open to the Settlement Commission to impose a condition on the Petitioners for payment of interest determined by it under section 28AA of the Act.

33. Having dealt with the issue of non payment of interest, we shall now turn our attention to the additional ground on which Settlement Application Nos. SA(C)557-558/2013 (arising out of the 3rd SCN) were rejected. In the impugned order dated 31st January, 2014 (Exh 'B' to the Petition), the Settlement Commission held that apart from non-payment of interest, the Petitioners had not complied with an additional mandatory requirement as set out in the 2nd proviso to section 127B(1) viz. that no Settlement Application can be entertained by the Settlement Commission in cases which are pending in the Appellate Tribunal or any Court.

34. In this regard, Mr Jetly submitted that the Settlement Commission was fully justified in coming to the aforesaid conclusion because admittedly the subject matter of the 3rd SCN was subjected to an Appeal before the CESTAT. According to Mr Jetly, the 2nd proviso to section 127B(1) clearly stipulates that no Settlement

Application shall be entertained by the Settlement Commission in cases which are pending in the Appellate Tribunal or any Court. This being a mandatory provision and admittedly since the Appeal of the Petitioners was pending before the CESTAT, the Settlement Commission was fully justified in holding that the Petitioners had failed to fulfill the condition that no Appeal relating to the case was pending before the Appellate Tribunal.

35. On carefully perusing the papers and proceedings in Writ Petition, we find that this argument is wholly fallacious. Firstly, the 3rd SCN dated 29/31-02-2013 has not been adjudicated at all. In the said SCN, an ex-parte decision of the Additional Director General, Directorate of Revenue Intelligence was communicated to the Petitioners vide para 25(xii) thereof whereby Respondent No.2 had appropriated a sum of Rs.41,79,324/- (out of Rs.50,00,000/- paid by Petitioner No.1 during the course of investigations) towards the alleged duty liability on the cranes imported and assessed more than five years before the date of the 3rd SCN. It was this ex-parte decision, and not the 3rd SCN that was subjected to a challenge before the CESTAT. Whilst this limited challenge was pending, on 24th May, 2013, an addendum to the 3rd SCN was issued by Respondent No.2 under which Respondent No.2

recalled its earlier ex-parte decision communicated vide the said 3rd SCN. Therefore, even the challenge to the said decision became infructuous and as stated earlier, the said Appeal pending before the CESTAT was subsequently withdrawn. This being the case, we find that in the facts of the present case, the Settlement Commission was totally in error in coming to the conclusion that the Petitioners' Settlement Applications could not be entertained because an Appeal was pending before the CESTAT. As stated earlier, the Appeal before the CESTAT was not against the 3rd SCN but was against the ex-parte decision of the Authorities to appropriate a sum of Rs.41,79,324/- towards a time barred claim. There was therefore no Appeal that was pending with reference to the subject matter of the 3rd SCN under which the statutory authorities demanded differential duty amounting to Rs.1,62,70,028/- and which was admitted by the Petitioners in their Settlement Applications. In this view of the matter, we find that the Settlement Commission ought not to have rejected Settlement Application Nos.SA(C)557-558/2013 (arising out of 3rd SCN) on the ground that the Petitioners' Settlement Applications did not fulfill the condition set out in the 2nd proviso to section 127B(1).

36. Having come to the conclusion that the Settlement Commission was in error in rejecting the Settlement Applications of the Petitioners arising out of the 2nd and 3rd SCNs, we shall now deal with the judgments cited by Mr Jetly. The first judgment cited by Mr Jetly was in the case of ***Uttam Chand Sawal Chand Jain (supra)***. The question raised in that case was whether the Customs and Excise Settlement Commission was justified in rejecting the Petitioners' application for settlement under the Customs Act, 1962 merely on the ground that the Petitioners had not filed a Baggage Declaration Form. In the facts of that case, the Settlement Commission had dismissed the Settlement Application of the Petitioners on the ground that the Petitioners did not fulfil the condition precedent for entertaining the Settlement Application as provided in clause (a) of the 1st proviso to section 127B(1) of the said Act. This was on the ground that the Baggage Declaration Form required to be filed, was not filed by the Petitioners, thus disentitling the Petitioners from making an application for settlement before the Settlement Commission under section 127B(1) of the Act. In the facts of that case, this Court found as a matter of fact that no Baggage Declaration Form was filed by the Petitioners before the Settlement Commission and therefore this Court held

that the Settlement Commission was justified in not entertaining the application for settlement filed by the Petitioners therein. We fail to see how this judgment can be of any assistance to the revenue in the facts of the present case. The statutory provision under consideration in the said case was clause (a) of the 1st proviso to section 127B(1). In the facts of the present case, the Revenue contends that clause (c) of the 1st proviso to section 127B(1) has not been complied with. As discussed earlier, we have rejected this argument. We therefore find that the reliance placed on this judgment is wholly misplaced.

37. The next judgment relied upon by Mr Jetly is in the case of ***K. Amishkumar Trading Pvt. Ltd. (supra)***. In this judgment, a Division Bench of this Court has held that the conditions prescribed by the 1st proviso to section 127B(1) are mandatory in nature and have to be cumulatively fulfilled. Absence of compliance of these conditions, leads to a threshold bar to make an Application under section 127B, is what is laid down in the said decision. There is no quarrel with the aforesaid proposition but we fail to see how the same can be applied to the facts of the present case. As narrated earlier, the interest due under section 28AB was not paid by the

Petitioners in view of the fact that when they filed their Settlement Applications under section 127B, section 28AB did not remain on the statute-book at all [even though a reference to the same continued in section 127B(1)]. In fact, though not required by law, the Petitioners had fairly given an undertaking that they would deposit interest under section 28AA as and when determined by the Settlement Commission. Whilst ordering that the Petitioners' Settlement Applications (arising out of the 2nd and 3rd SCNs) are allowed to be proceeded with, the Settlement Commission did not impose any condition for payment of interest. In this view of the matter, the Petitioners did not pay any interest. Further, the order of the Settlement Commission allowing the Settlement Applications of the Petitioners to be proceeded with, has not been challenged by the Revenue in any proceedings. In this view of the matter, we fail to see how the aforesaid judgment can be of any assistance to the Revenue.

38. The last judgment relied upon by Mr Jetly is in the case of ***Valecha Engineering Ltd. (supra)***. The facts of this case reveal that a Show Cause Notice was issued to the Respondent therein under section 124 read with section 28 of the Customs Act, 1962.

The demand in the said Show Cause Notice was for duty under the Act along with interest. On receipt of the said Show Cause Notice, an Application came to be filed by the Respondent therein under section 127B. In this Application, the Respondent had specifically given details of the admitted duty liability, the interest thereon and the payment made. In the prayer clause of the Settlement Application, the Respondent prayed for immunity from prosecution for any offence under the Customs Act, 1962, imposition of any penalty and grant of immunity from imposition of any fine. There was no relief sought for refund of interest paid, or for waiver of interest. The Settlement Commission, after considering the contention that there was no power to waive interest, was pleased to direct that the interest paid by the Respondent could not be charged and therefore had to be refunded within 30 days. It was this direction of refund that was challenged by the Union of India before this Court. After considering the facts in that case, the Division Bench held that the Settlement Commission suo motu could not have ordered refund of interest in the Settlement Application of the Respondent who had not even sought for refund of interest paid, or for waiver of interest. In the facts of that case, this Court found that interest was payable under the Act, and therefore there was no question of the Settlement Commission

exercising jurisdiction, directing refund of interest. This judgment, according to us, is wholly inapplicable to the facts of the present case as the issue decided therein is totally different from the one that arises before us. Be that as it may, it would be important to note that this Court, after relying upon a decision of the Supreme Court in the case of ***India Carbon Limited and Others v/s The State of Assam [(1997) 6 SCC 479]***, held that interest, penalty or fine is only payable if there is a substantive provision in the Act for payment of the same. In the absence of any statutory provisions, an authority would be acting without jurisdiction in demanding the payment of interest where otherwise no interest is payable.

39. In view of our discussion earlier, the impugned orders dated 29th January 2014 and 31st January 2014 (Exhs.'A' and 'B' to the Petition) are hereby set aside and the Petitioners' Settlement Application Nos.SA(C)559-560/2013 and SA(C)557-558/2013 are restored back to the file of the Settlement Commission for a *de novo* consideration and in accordance with law. Before passing orders on the aforesaid Settlement Applications, the Settlement Commission shall give a reasonable opportunity of hearing to all concerned, including the Petitioners. Before hearing the Petitioners *de novo*,

the Settlement Commission shall be at liberty to impose a condition for payment of interest as determined by it under section 28AA of the Act, which the Petitioners shall be obliged to pay before its Settlement Applications are *de novo* considered. Rule is accordingly made absolute in the aforesaid terms. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

(B.P. COLABAWALLA, J.)

(S.C.DHARMADHIKARI J.) **

**** CERTIFICATE:**

Certified to be a true and correct copy of the original signed Judgement/Order.