THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.12.2015

+ W.P.(C) 8354/2015

THE COMMISSIONER OF CUSTOMS ... Petitioner

versus

AVINASH DAWAR & ANR ... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr S. K. Dubey with Mr Rajmangal Kumar and Ms Shushma Yadav
For the Respondent No. 1 : Mr D. S. Chadha

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)
CM 17713/2015

Allowed subject to all just exceptions.

W.P.(C) 8354/2015 & CM 17712/2015

1. This petition is directed against the final order No.F-2348/CUS/2015-SC (PB) dated 17.04.2015 passed by the Custom and Central Excise Settlement Commission, whereby the respondent No.1's settlement application was finally decided under Section 127C (5) of the Customs Act, 1962 in the following manner:-

"9. In the instant case, the goods seized within a Customs area and, therefore, there is no doubt regarding the fact that they are imported. There is also an admission of illicit import by the applicant. There is, therefore, no doubt regarding the fact that they are imported. The shifting of burden of proof as contemplated under section 123 of the Customs Act, 1962 is not required. The settlement application is, therefore, maintainable on both the counts. Moreover, these issues are already settled in the order passed by the Commission in the matter of Shri Ashok Kumar Jain and the said order was upheld by the Hon'ble Delhi High Court and the Hon'ble Supreme Court.

9A. The Bench has carefully considered the material available on record and submissions made by the applicant at the time of hearing. The Bench observes that the applicant has cooperated in the settlement proceeding and made full and true disclosure of their duty liability. The applicant has admitted and deposited Rs. 4,86,305/- as Customs duty. In view of the above and considering the facts and circumstances of the case, the Bench finally settles the case under Section 127C (5) of the Customs Act, 1962 on the following terms and conditions:-

Customs Duty: The Customs Duty in this case is settled at Rs. 4,86,3051-. An equivalent amount already deposited by the applicant is ordered to be appropriated towards settled amount of duty. Nothing further remains to be paid on this count.

Interest: The interest amount is settled at Rs. 49,200/- (Rupees forty nine thousand two hundred only). The interest amount of Rs. 49,200/- already paid by the applicant is ordered to be appropriated against the settled amount of interest. Nothing further remains to be paid on this count.

Penalty: In the facts and circumstances of the case, Bench imposes a penalty of Rs. 75,000/-(Rupees seventy five thousand only) on the applicant under the provisions invoked in the SCN and grants him immunity from penalty in excess of the said amount.

Fine: The Bench orders a sum of Rs. 75,000/- (Rupees seventy five thousand only) to be paid as fine in lieu of confiscation.

The gold kada and chain collectively weighing 466.90 gms. should be released to the applicant after payment of redemption fine and penalty.

Prosecution: Subject to the payment of the aforesaid amounts, the Bench grants immunity to the applicant from prosecution under the Acts and Rules made thereunder insofar as this case is concerned.

11. The above immunities are granted under Section 127H (I) of the Act. Attention of the applicant is also drawn to sub-section (2) & (3) of the Section 127H of the Act. This order shall be void and immunities withdrawn if the Commission finds, at any time, that the applicant has concealed any particular material to the settlement or has given false evidence or had indulged in fraud and mis-representation of facts for obtaining the settlement order.

12. A copy of this order is given to the applicant herein and to the jurisdictional Commissioner for their use in the implementation of this Order. No one should use this Order in any other manner or for any other purpose without the written permission of the Commission."

2. Mr Dubey, the learned counsel appearing on behalf of the Commissioner of Customs, states that the application of the respondent No.1 could not have been proceeded with and no final settlement could have been passed by the Settlement Commission because the subject matter pertained to 'gold'. He placed reliance on the decision of this

Court in the case of ***Additional Commissioner of Customs v. Shri Ram Niwas Verma**:2015 (323) E.L.T. 424* decided by this Bench on 25.08.2015. In that case also, an issue arose as to whether a settlement could have been arrived at by the Settlement Commission, where the subject matter was 'gold'. Section 127 B and Section 123 of the Customs Act were examined. The said provisions read as under:-

> "**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 :
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> **Provided that** no such application shall be made unless,—
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> (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;
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> (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 28AA:

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).

(1A) xxxx xxxx xxxx xxxx

(2) xxxx xxxx xxxx xxxx

(3) xxxx xxxx xxxx xxxx

(4) xxxx xxxx xxxx xxxx"

(underlining added)

"123. **Burden of proof in certain cases**.—(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."

(underlining added)

3. After examining the said provisions, this Court observed as under:-

"7. On a plain reading of the third proviso to Section 127B(1) of the said Act, it is evident that no application for settlement can be made if it relates to goods to which Section 123 applies. Section 123 sub-section (2) specifically provides that the said Section applies to, *inter alia*, gold. It is, therefore, clear that when the two provisions are read together, no application under Section 127B(1) can be made in relation to gold. This case clearly pertains to gold. The respondent made an application, nevertheless, to the Settlement Commission which has entertained the same and has also rejected the plea raised by the Revenue that it did not have jurisdiction to entertain such an application. We agree with the submission made by the learned counsel for the Revenue that the Settlement Commission did not have the jurisdiction to entertain such an application as there was a complete bar provided in the third proviso to Section 127B(1) read with Section 123 of the said Act."

4. In that case as in the present case also, the respondent sought to place reliance on the decision of this Court in ***Commissioner of Customs***

v. Ashok Kumar Jain*: 2013 (292) ELT 32 (Del)**. But, the decision in ***Ashok Kumar Jain *(supra)* was distinguished inasmuch as the issue of Section 123 had not been considered at all. It was finally observed, upon a plain reading of the provisions, that an application under Section 127B cannot be made in respect of, *inter alia*, 'gold' which is specifically an item to which Section 123 applies. That being the position, the application filed by the respondent under Section 127B could not have been proceeded with at all. The learned counsel for the respondent No.1 submitted that the petitioner/revenue never objected before the Settlement Commission and even accepted the penalty and fine which were imposed by the Settlement Commission. It was also contended that the petitioner had gone to the extent of issuing a release letter dated 08.06.2015 subsequent to the order of the Settlement Commission. But, we cannot agree with this submission of the learned counsel for the respondent No.1 inasmuch as there cannot be any estoppel against the statute. Once the statute is clear that where the subject matter is 'gold', the Settlement Commission would not have any jurisdiction to entertain the application under Section 127B, any order passed in contravention of the statute cannot be sustained on the ground of estoppel.

5. Consequently, we allow this writ petition. The impugned order is set aside. The respondent No.1 would be relegated to the stage when he had been issued the show cause notice dated 29.08.2014. The respondent No. 1 would be entitled to file a reply to the said show cause notice before the adjudicating authority within one month. Subsequent thereto, the adjudicating authority, after giving an opportunity of hearing to the respondent No.1, shall complete the adjudication process and pass an order within two months thereafter. All amounts paid by the respondent No.1 by way of customs duty, penalty, fine and interest, would be adjusted against any amounts found payable, if any, by the respondent No.1 upon adjudication. In case any refund is due to the respondent No.1, the same shall be paid forthwith upon adjudication.

The writ petition stands allowed, as above.

BADAR DURREZ AHMED, J

DECEMBER 03, 2015 **SANJEEV SACHDEVA, J**
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