IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.11.2017

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.35796 of 2007
and M.P.No.1 of 2007

M/s.Mercantile Impex,
Proprietor Hakimuddin S.Porbundarwala
Soharab House, 3rd Floor,
B-Block, Khambata Lane,
Mumbai - 400 027. .. Petitioner

..Vs..

1.The Customs and Central Excise
Settlement Commission, Additional Bench,
Ministry of Finance, Department of Revenue,
Government of India, Narmada Block,
2nd Floor, Custom House, 33, Rajaji Salai,
Chennai - 600 001.

2.The Additional Director, Directorate of
Revenue, Intelligence, Ministry of Finance,
Department of Revenue, Government of India,
No.25, Gopalakrishna Road, T.Nagar,
Chennai - 600 017.

3.The Additional/Joint Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the 1st respondent in File No.VIII/10/149/2007-SC dated 28.09.2007 made vide final order No.19/07-Cus, quash the same and further direct the 1st respondent to admit and allow the settlement application of the petitioner in terms of Section 127B of the Customs Act, 1962 as amended.

For Petitioner : Mr.B.Satish Sundar

For Respondents : Mr.V.Sundareswaran
Senior Panel Counsel

O R D E R

Heard Mr.B.Satish Sundar, learned counsel appearing for the petitioner and Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the respondents.

2.The petitioner has filed this writ petition challenging an order passed by the Settlement Commission dated 28.09.2007 holding that the application is not maintainable in view of third Proviso to Sub-Section (1) of Section 127B of the Customs Act, 1962 (hereinafter referred to as "the Act") and accordingly, rejected the same under Section Section 127C(1) of the Act. Section 127B deals with application for settlement of cases. Under third Proviso to Section 127B(1), no application under sub-section (1) of Section 127B 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. Section 123(1) of the Act stated that where any goods to which the said section applies are seized under the Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be (a) in the case where such seizure is from the possession of any person; (i) from whose possession the goods were seized; and (ii) if any person other than the person from whose possession goods were seized, claimed to be owner thereof also on such other person; (b) any other case on the person, if any, claims to be the owner of the goods so seized.

3.The facts of the case on hand is as follows:

The petitioner filed Bill of Entry dated 26.09.2006 for clearance of consignment of Polyster Fabrics containing 85% or more by weight of non-texturized polyster filament yarn and for the purpose of availing customs duty exemption under Notification No.14/2006-Cus, the petitioner had remitted a duty amount of Rs.2.29 lakhs. On 04.10.2006, the DRI drews samples from the consignment which was sent to Central Silk Technological Research Institute, Bangalore for testing. The test report reveals that the fabric which was imported is made up of 100% polyster filament yarn and the percentage of non-texturized filament yarn is 0%. Based on the report, on 25.10.2006 the goods were seized. It is thereafter the petitioner had paid a sum of Rs.19.20 lakhs on 30.11.2006 which being the differential duty amount and bond was also furnished. Subsequently, show cause notice dated 02.03.2007 was issued calling upon the petitioner to show cause as to why the classification of goods as made in the Bill of Entry dated 26.09.2006 should not be rejected and the goods imported classifiable under Chapter heading 54075290 claiming for basic custom duty exemption under Notification No.14/2006 should not be denied and why duty amount of Rs.21.15 lakhs should not be demanded, etc. The petitioner did not submit its objections to the show cause notice but chose to file an application before the Settlement Commission under Section 127B of the Act. This application has been rejected by the impugned order.

4.The learned counsel appearing for the petitioner would contend that the Settlement Commission relied upon the order passed by the Special Bench of the CESTAT in Special Bench Order No.1/2005-CUS dated 07.06.2005 to which the matter which was referred pertain to seizure of the goods in the godown of the importer. In the instant case, the consignment was still in the customs barrier and the petitioner has also remitted the differential duty and therefore, it is a fit case where the matter can be taken up for settlement before the Commission. Further, it is submitted that the party in the Special Larger Bench case was one Idris Y.Probunderwala and after the Special Bench laid down the legal position, regular Bench took up the matter and they set aside the order passed by the Commission and directed the matter to be taken up for settlement. Therefore, it is a fit case where the Court should interfere with the impugned order.

5.The learned Senior Panel Counsel appearing for the revenue on the other hand would submit that water has flown after the decision of the Special Bench of CESTAT and relied upon the recent decision of the High Court of Delhi in the case of Additional Commissioner of Customs vs. Ram Niwas Verma reported in 2015 (323) ELT 424 (Del), wherein the Court after considering the scope of Section 123 and Section 127B of the Act allowed the appeal filed by the revenue and set aside the order of Settlement Commission as being without jurisdiction. Reliance was also placed on the decision of the Karnataka High Court in the case of C.S.India vs. Additional Director General, DCEI, Bangalore reported in 2015 (323) ELT 91 (Kar) which has distinguished the decision of the Division Bench of this Court in the case of V.C.Mohan vs. Commissioner of Customs (air), Customs House, Chennai-1 reported in 2007-TIOL-700-HC-MAD-CUS. Reliance was also placed on the decision of the High Court of Gujarat in the case of Dharmesh Devchand Pansuirya vs. Union of India reported in 2016 (336) ELT 402 (Guj.).

6.After elaborately hearing the learned counsels for the parties and carefully perusing the materials placed on record, to decide the correctness of the impugned order the first and foremost to be done is to refer to Section 123(1) of the Act which reads as follows:

> "SECTION 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."

7.A reading of Sub-Section (1) of Section 123 of the ACt shows that the place, time and manner of seizure of the goods under the provisions of the Act is immaterial as the section only contemplates that "Where any goods to which this section applies are seized". Therefore, no distinction can be made between seizure during the course of examination of cargo or seizure of the goods after they left the customs barrier, etc. This is precisely what the petitioner wants the Court to do which is impermissible under the Statute.

8.The above contention has been raised by the petitioner presumably impressed by the observations made in the case of Idris Y.Probunderwala. In fact this decision was considered by the Division Bench of the High Court of Gujarat and it was held that once the goods to which Section 123 of the Act applies, the Settlement Commission would have no jurisdiction to deal with the matter. The law on the issue being well settled in the decisions relied on by the revenue, it has to be necessarily held that the impugned order passed by the Settlement Commission is just and proper and calls for no interference.

9.For the above reason, the writ petition fails and hence, dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True copy//

Sub Assistant Registrar

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To

1.The Customs and Central Excise
Settlement Commission, Additional Bench,
Ministry of Finance, Department of Revenue,
Government of India, Narmada Block,
2nd Floor, Custom House, 33, Rajaji Salai,
Chennai - 600 001.

2.The Additional Director, Directorate of
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No.25, Gopalakrishna Road, T.Nagar,
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3.The Additional/Joint Commissioner of Customs,
Custom House, New Harbour Estate, Tuticorin.

+1cc to Mr.V.Sundareswaran, Advocate SR.No.80313
+1cc to Mr.B.Sathish Sundar, Advocate SR.No.80411

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GMR(CO)
GN(29/11/2017)