

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2017

CORAM:

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM

W.P.No.31537 of 2016 & W.M.P.No.27375 of 2016

Orders reserved on 23.10.2017	Orders pronounced on 22.11.2017
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M/s.Venkata Sai Ram Traders,
rep. by its Proprietor,
Ground Floor, Lakshmi Apartments,
Beside Sriven Hospitals,
Near Malaysian Township Circle,
VI Phase, KPHB, Hyderabad. ... Petitioner

Vs.

1.The Customs, Central Excise &
Service Tax Settlement Commission,
Rep. by its Vice Chairman,
Additional Bench, Second Floor,
Namada Block, Custom House,
No.60, Rajaji Salai, Chennai-600 001.

2.The Commissioner of Customs,
Hyderabad-II Commissionerate,
7th Floor, Kendriya Shulk Bhavan,
L.B.Stadium Road, Basheerbagh,
Hyderabad-500 004.

.. Respondents

Petition filed Under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records of the respondent No.1 in pursuance to order made in Final Order No.34/2016-Cus. dated 18.08.2016 and quash the same and consequently, direct the respondent No.1 to consider the application of the petitioner afresh.

For Petitioner : Mr.A.R.L.Sundaresan,
Senior Counsel,
For Mr.S.Senthil Nathan

For Respondents : Mrs.Hema Muraliskrishnan
Senior Standing Counsel

C O M M O N O R D E R

The petitioner has filed this writ petition challenging the proceedings of the Customs, Central Excise & Service Tax

Settlement Commission (hereinafter referred as "the Settlement Commission"), in order No.34/2016-Cus, dated 18.08.2016.

2.The facts leading to the impugned order are that a show cause notice dated 31.03.2014, was issued to the petitioner by the Additional Director General, DRI, Chennai, demanding differential duty to the tune of Rs.1,33,95,654/- along with applicable interest, as the goods which were imported by the petitioner did not conform to the declaration made in the bill of entry, but, what was imported was an insecticide. The show cause notice dated 31.03.2014, proposed to amend the description of the goods imported by the petitioner, vide bill of entry dated 28.09.2013, as "Abamectin" instead of "Solid Epoxy Resin" and consequently, to declare the clarification adopted by the petitioner and to declare the value of the goods by rejecting the value declared by the petitioner. On receipt of the show cause notice, the petitioner filed an application before the Settlement Commission on 11.11.2015, accepting the duty amount of Rs.38,00,498/- as per the working sheet appended as Annexure-1 and Rs.4,21,582/- as interest as per the working sheet appended as Annexure-2 and enclosing proof of payment of the aforesaid amounts as per the working sheet appended as Annexure-3. The application was entertained by the Settlement Commission and comments were called for from the Jurisdictional Commissionerate, which were furnished by the second respondent along with letter dated 11.01.2016.

3.The Settlement Commission by order dated 18.08.2016, in exercise of its power conferred under Section 127-I (1) of the Customs Act, 1962, sent the case back to the adjudicating authority for adjudication in accordance with the provisions of the Customs Act. The correctness of this order is challenged before this Court. The reason for sending back the case to the adjudicating authority is on the ground that the petitioner has not made true and full disclosure of the duty liability and have failed to provide cooperation to the Settlement Commission to settle the case in a true spirit of settlement. Though the Settlement Commission stated that there is no true and full disclosure of the petitioner's duty liability, I find that there is no specific reasons assigned by the Settlement Commission, as to why, it came to the conclusion that there was no true and full disclosure. However, with regard to lack of cooperation, the Settlement Commission in paragraphs 7.4 and 7.5 has recorded its finding.

4.Mr.A.R.L.Sundaresan, learned Senior Counsel representing Mr.S.Senthil Nathan, learned counsel for the petitioner submitted that the petitioner is not canvassing the matter on merits and all that the petitioner pleads is to give one more opportunity to him to go before the Settlement Commission and contest the matter on merits.

5.Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents raised a preliminary

objection with regard to the maintainability of the writ petition on the ground that the writ petition is liable to be dismissed on the Doctrine of Forum Conveniens, as substantial and intrinsic cause of action has arisen in the State of Andhra Pradesh and has not arisen within the jurisdiction of this Court. The jurisdiction conferred on the Chennai Bench of the Settlement Commission in respect of matters arising under the Settlement Commission Central Excise Act and Finance Act (Service Tax) and covers the States of Andhra Pradesh, Karnataka, Kerala, Tamil Nadu and Lakshadweep and this jurisdiction is for the administrative convenience only.

6. It is further submitted that the events leading to filing of the application before the Settlement Commission was the search and seizure operations conducted by the DRI, Hyderabad and the show cause notice issued by the Commissioner of Customs at Hyderabad, both of whom are outside the territorial jurisdiction of this Court. Thus, the significant part of the cause of action arises in the State of Andhra Pradesh and this Court should refuse to entertain this writ petition.

7. Further, it is submitted that the cause of action cannot be said to arise within the territorial jurisdiction of this Court, merely because, the order under challenge has been passed by the Chennai Bench of the Settlement Commission. In support of her contention, the learned counsel for the respondents placed reliance on the following decisions:

(i) Kusum Ingots & Alloys Ltd. vs. Union of India reported in (2004) 168 ELT 3 (SC)

(ii) M/s. Zeenath International Supplies vs. Commr. Of Customs & others reported in (2014) 304 ELT 491 (Mds)

(iii) Sun Pharmaceutical Industries vs. Union of India & others reported in (2007) 216 ELT 495 (Bom)

(iv) West Coast Ingots (P) Ltd., vs. Commr. Of Central Excise reported in (2007) 115 ECC 84 (Del).

8. The learned Senior Counsel for the petitioner was directed to address arguments on the preliminary objection and also make his submissions with regard to the prayer for remanding the matter to the Settlement Commission for fresh decision. Thus, the Court did not examine the matter on merits and has heard the parties only with regard to maintainability of the writ petition and if the writ petition is held to be maintainable, should the petitioner be given an opportunity once again before the Settlement Commission.

9. The Learned Senior Counsel referred to the Full Bench decision of this Court in the case of Sanjos Jewellers v. Syndicate Bank referred in (2007) 5 CTC 305 and submitted that in the said case, the original authority viz., the Bank was situated in Hyderabad, the appellate authority was situated in Chennai, and the order of the appellate authority was

challenged before this Court and after referring to other decisions of the Hon'ble Supreme Court including the decision relied on by the revenue viz., Kusum Ingots (supra), held that the petitioner is entitled to challenge the order passed by the Debt Recovery Tribunal has merged with the order passed by the Debt Recovery Appellate Tribunal situated in Chennai, which gives a cause of action to file the writ petition before this Court.

10.Learned Senior Counsel further referred to the following decisions to substantiate his contention that the writ petition is maintainable before this Court:

(i) Union of India vs. Adani Exports Ltd., reported in (2002) 9 SCC 567 and

(ii) M/s.Ambica Industries vs. Commissioner of Central Excise reported in (2007) AIR SCW 7714.

11.Relying on the above decisions, it is submitted that the question, which arises for consideration in this writ petition is whether the subject matter of the show cause notice issued to the petitioner is a fit case for settlement before the Commission. Admittedly, all the records are available in Chennai, in the office of the Settlement Commission and the petitioner has sought for issuance of writ of certiorari, to quash the order passed by the Settlement Commission, which was passed at Chennai and this Court has got jurisdiction to entertain this writ petition.

12.The learned Senior Standing Counsel for the revenue on the other hand sought to distinguish the decisions cited by the learned Senior Counsel and in particular, the decision of the Hon'ble Full Bench in Sanjos Jewellers (supra), by contending that in the said case, the doctrine of merger applied and the order passed by the Debt Recovery Tribunal merged with the order passed by the Debt Recovery Appellate Tribunal at Chennai, and the Hon'ble Full Bench did not go into the aspect of Forum Conveniens and the entire cause of action except the place where the Settlement Commission is situated, is outside the jurisdiction of this Court and therefore, the petitioner if aggrieved by the order should approach the High Court of Andhra Pradesh.

13.It is further submitted that if the Settlement Commission is deleted from the array of parties in this writ petition, the writ petition would not be maintainable against the second respondent alone, as he is outside the jurisdiction of this Court.

14.Heard the learned counsel for the parties and carefully perused the materials placed on record.

15.In Kusum Ingots (supra), one of the questions considered by the Hon'ble Supreme Court was regarding Forum

Conveniens and it was pointed out that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit and in appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of Forum Conveniens.

16. In *Sun Pharmaceutical Industries (supra)*, before the Bombay High Court, the challenge was to an order passed in a writ petition holding that this Court has no territorial jurisdiction to entertain and try the writ petition, since the order was passed by the Settlement Commission, Mumbai. It was pointed out that the order passed by the adjudicating authority did not merge into the order of the Settlement Commission and the order of the Settlement Commission can neither be said to be an order in appeal or revision and it is altogether a different special forum created under the Customs Act for settlement of disputes. The question before the Court was whether the Court lacks jurisdiction to entertain the writ petition. It was held that the Court certainly has jurisdiction and the real question is whether the Court should entertain the petition only because a small part of cause of action arises within the jurisdiction of the Court. Thus, the question framed for consideration was whether the Court (Bombay High Court) should decline to entertain the writ petition considering the doctrine of Forum Conveniens when the substantial and intrinsic cause of action arisen within the jurisdiction of the Madras High Court. After noticing the decision of the judgment in *Kusum Ingots (supra)*, it was held that it is for the High Court to decide on the facts of each case, whether it is required to exercise jurisdiction; if a part of cause of action arises within its territorial jurisdiction.

17. The Hon'ble High Court of Delhi in *Sterling Agro Industries Vs. Union of India* reported in (2011) 270 ELT 477 (Delhi), taking note of decisions of the Hon'ble Supreme Court in *Ambica Industries vs. Commissioner* reported in (2007) 213 ELT 323 (SC) and *Union of India vs. Adani Exports Ltd.*, (2001) 134 ELT 596 (SC), held that while entertaining a writ petition, the doctrine of Forum Conveniens and the nature of cause of action are required to be scrutinised by the High Court depending upon the factual matrix of each case.

18. Reference was also made to the decision of the Hon'ble Division Bench of this Court in the case of *Zeenath International Supplies vs. Commissioner of Customs* in CMA No.1336 of 2006 dated 03.03.2014. However, the said decision would not be applicable to the facts of this case, as the said decision arose out of an appeal filed under Section 130 of the Customs Act, and not a writ petition.

19. Learned Senior Standing Counsel for the revenue referred to the decision in M.S.Kazi vs. Muslim Education Society and others reported in (2016) 8 SCALE 139 (SC), wherein it was held that if the Settlement Commission is deleted from the array of parties, then the writ petition against the second respondent would not be maintainable. As it has been held in the said decision that an order passed by a Tribunal is capable of being tested in exercise of power of judicial review under Articles 226 and 227 of the Constitution and when such a remedy is invoked, the Tribunal is not required to step into arena of conflict for defending its order and hence, the Tribunal is not a necessary party to the proceedings. Therefore, it is submitted that the Settlement Commission should not have been impleaded as the first respondent and if the Commissioner of Customs, Hyderabad is the sole respondent, the writ petition is not maintainable.

20. Thus, the legal principle deducible from the above decisions are while entertaining a writ petition, the doctrine of forum conveniens and the nature of cause of action are required to be scrutinised by the High Court depending upon the facts of each case.

21. Bearing the above legal principle in mind, we have to test the correctness of the impugned order. As pointed out earlier, the petitioner has filed the writ petition for issuance of writ of certiorari, to call for the records on the file of the first respondent, Settlement Commission and to quash the same and to re-consider the application afresh. By issuance of rule NISI, the Court would call for all the records from the concerned authority or Tribunal and the authority/Tribunal is to forward all the records for consideration of this Court. Thus, when a rule is issued by this Court in this Writ petition, the Settlement Commission has to place all the records in original before this Court for being decided as to its correctness and validity. By efflux of time and owing to various other factors, the Court as a matter of practice while issuing rule under Article 226 of Constitution of India does not retain the records, but would direct production of the same as and when required.

22. As rightly pointed out by the Learned Senior Standing Counsel for the respondents, the order passed by the Settlement Commission is not an order in appeal or an order in revision. Therefore, the question of the said order merging with the order passed by the second respondent does not arise. This is more so in the instant case because, there is no order passed by the second respondent and at the stage, when show cause notice was issued, the petitioner has filed an application under Section 127B of the Customs Act. This provision empowers an importer or exporter before adjudication of the case make an application to the Settlement Commission to have the case settled in the manner and form described under the rules and there are certain conditions and prerequisites to be complied with before such application is

entertained. Thus, the process of settlement of case is independent of the other provisions of the Act as this provision fall under Chapter XIV-A of the Customs Act. Therefore, the decision of the Hon'ble Full Bench in the case of Sanjos Jewellers (supra), would not be applicable to the facts of the present case.

23. Having steered clear of this legal principle vis-a-vis, the facts of this case, what remains to be decided is as to whether this writ petition can be entertained or the petitioner should be relegated to avail other remedies available before the appropriate forum. As pointed out above, the present writ petition is for writ of certiorari and the correctness of the order passed by the Settlement Commission is to be decided. The impugned order has not been passed on the merits of the petitioner's claim for settlement, but the application has been rejected on the ground that the petitioner failed to provide the required cooperation to the Settlement Commission to settle the case in a true spirit of settlement. The facts recorded by the Settlement Commission in paragraph 7.4 shows the conduct of the petitioner. It appears that the authorized representative, who was engaged by the petitioner, did not extend full cooperation. That apart, there has been change of the authorized representative.

24. Therefore, I find every justification on the part of the Settlement Commission for having refused to entertain the application. However, one more reason assigned by the Commission in Paragraph 7.8 of the impugned order is that the petitioner failed to make full and true disclosure in the application for settlement. However, this conclusion is not supported by adequate findings. Thus, it can be safely concluded that the application was rejected for non-cooperation. In such circumstances, it cannot be stated that the revenue would be prejudiced or put to difficulty for appearing before the Settlement Commission at Chennai, especially when the respondents admit that the Chennai Bench of the Settlement Commission exercises jurisdiction over the State of Andhra Pradesh. That apart, after the application was entertained, the second respondent has filed a report before the Settlement Commission. Thus, all required facts were available before the Settlement Commission for being considered. Therefore, considering the hard facts and going by the settled legal principle that on account of the fault committed by a counsel or an authorized representative or that matter a Court or a Tribunal, a party or a litigant should not suffer, this Court is inclined to exercise its discretion in entertaining these writ petitions challenging the order passed by the Settlement Commission.

25. The learned Senior Counsel has given an undertaking before this Court that the petitioner assures that he will extend fullest cooperation before the Settlement Commission and the Court may also fix a time limit for the Commission to complete the proceedings and also impose strict timelines on

the petitioner. The Settlement Commission has been holding regular sittings and there is no necessity for fixing of any time limit.

26. For the above reasons, the writ petition is allowed, the impugned order is set aside and the matter is remanded to the respondent for fresh consideration with a specific direction to the petitioner to extend the full cooperation for the disposal of the matter by the Settlement Commission without seeking for adjournment on vexatious or untenable grounds. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

abr
To

1. The Vice Chairman,
The Customs, Central Excise &
Service Tax Settlement Commission,
Additional Bench, Second Floor,
Namada Block, Custom House,
No.60, Rajaji Salai, Chennai-600 001.
2. The Commissioner of Customs,
Hyderabad-II Commissionerate,
7th Floor, Kendriya Shulk Bhavan,
L.B.Stadium Road, Basheerbagh,
Hyderabad-500 004.

+lcc to Mr.S.Senthilnathan, Advocate sR.no.83026/17
+lcc to Mr.Hemamuralikrishnan, Advocate Sr.no.83332/17

orders made in
W.P.No.31537 of 2016

SJ(CO)
sm:8.12.2017

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