

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.09.2019

Coram :

THE HONOURABLE Dr.JUSTICE ANITA SUMANTH

W.P.Nos.1004, 1821, 1535 and 3053 to 3055 of 2009

& M.P.Nos.1,1,1,1,1 and 1 of 2009

& M.P.Nos.1,1 and 1 of 2011

W.P.No.1004 of 2009:

Shri Krishna Ashtekar Petitioner IN W.P.1004/2009

M/s.Balaji Telefilms Ltd.,
Rep by its Chief Financial Officer,
Mumbai.Petitioner in W.P.No.1821 of 2009

Shri Rajendra Agarwal
Mumbai.Petitioner in W.P.1535 of 2009

Raymond Limited
Mumbai.
Rep by General Manager,
Mr.Kurian JosephPetitioner in W.P.No.3053 of 2009,
3054 of 2009 and 3055 of 2009

सत्यमेव जयते
Vs.

- 1.The Customs and Central Excise
Settlement Commission, Additional Bench,
Narmada Block, 2nd Floor,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.
- 2.The Commissioner of Customs
Custom House,
Willingdon Island,
Cochin - 682 009. ... Respondents in all Writ Petitions

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, calling for the records of the Respondents in and connected with (i)Final Order No.39/2008-Cus dated 12.12.2008 passed in S.A.(C) No.31/2008 (ii)Order No.43/2008 Cus dated 12/12/2008 passed in S.A.(c) No.43/2007-2008 SC dated 12/12/2008 (iii)Order No.36/2008 Cus dated 10/12/2008 passed in S.A(C)No.36/2008(iv) order No.08/2008-Cus dated 10/12/2008 passed in S.A(C) No.41/2007-2008 SC dated 10/12/2008 (v)Order No.09/2008- Cus dated 10/12/2008 passed in S.A (C) No.42/2007-2008 SC Dated 10/12/2008 (vi) Order No.38/2008-Cus dated 12/12/2008 passed in S.A (c) No.40/2007-2008 SC dated 12/12/2008 respectively of the 1st Respondent, The Customs, Excise Settlement Commission Additional Bench, Chennai, quash the same.

For Petitioner : Mr.B.Satish Sundar
(In all WPs)

For Respondents:Mr.T.Pramod Kumar Chopda
Senior Standing Counsel
(in WP.Nos.1821, 1004, 1535/2009)

Mr.Rajasekar
(in WP.Nos.3053 to 3055 of 2009)

COMMON ORDER

This batch of writ petitions can be divided into two sets (i)W.P.Nos.1004, 1821, 1535 and 3055 of 2009 and (ii) W.P.Nos.3053 and 3054 of 2009. A common order is passed in both sets of matters since the material factual as well as legal position in all writ petitions is more or less similar.

2.Heard the submissions of Mr.B.Satish Sundar, learned counsel for the petitioners, Mr.T.Pramod Kumar Chopda, learned Senior Standing Counsel for the respondents in WP.Nos.1821, 1004, 1535 of 2009 and Mr.Rajasekar, learned counsel for the respondents in WP.Nos.3053 to 3055 of 2009.

3.The facts that arise for determination in W.P.No.1004 of 2009 are taken to be representative of the facts and legal questions that arise in the four writ petitions constituting the first set of matters.

4.The petitioners challenge orders of the Settlement Commission dated 10.12.2008 (W.P.Nos.1535, 3053 and 3054 of 2009) and 12.12.2008 (W.P.Nos.1004, 1821 and 3055 of 2009) rejecting the applications filed by them in terms of Section 127 (C) (5) of the Customs Act, 1962 (in short 'Act').

5. The petitioner had purchased a used Toyota Prado vehicle (in short 'vehicle'). The facts leading to the import of this vehicle are that, one, Kottayil Ahmmed had imported the vehicle bearing Chassis number KZ J 95 0151130 under a Bill of Entry bearing No.121795 dated 07.01.2003 under the Transfer of Residence Rules. The assessable value was declared at a sum of Rs.3,32,284.95 and upon payment of duty of Rs.6,03,730/-, the vehicle was cleared.

6. Subsequent investigation appeared to reveal that the Chassis number had been temporary, the actual Chassis number being KZ J 95-0091013. The date of manufacture was 04.03.1998. The assessable value as well as the duty were re-worked on the basis of the investigation at a sum of Rs.5,25,130/- and Rs.9,54,113/- respectively. The duty had thus been short-paid to an extent of Rs.3,50,383/-. The investigation conducted revealed that the petitioner was in possession of the vehicle and that the vehicle had been purchased by the petitioner under a lease agreement entered into with the importer with the assistance of an intermediary. Since this sequence of events was in contravention of Public Notice bearing No.3 dated 31.03.2000, the vehicle was seized on 22.11.2006 and provisionally released on 23.11.2006 upon the deficit duty being remitted. A bank guarantee for a sum of Rs.3,87,500/- and an indemnity bond had been furnished along with the remittance of provisional duty.

7.Upon conclusion of investigation, the Director of Revenue Intelligence at Mumbai issued show cause notices to the petitioner, the importer and others connected with the transaction of import and sale of the vehicle, in terms of Sections 128 and 28(1) of the Act on 04.01.2008. As far as the petitioner is concerned, the relevant portion of the show cause notice reads as follows:

'(E) Shri Krishna Ashtekar, the possessor of the said vehicle has also contravened the provisions of Public Notice No.3 dated 31st March, 2000 inasmuch as he had purchased the subject Toyota Prado vehicle in the guise of lease agreement. He had by his such acts as discussed at Para 13(F) supra rendered the subject vehicle liable to confiscation under Section 111(o) of the Customs Act, 1962. As per the provisions of Section 125 (2) of the Customs Act, 1962. "Where any fine in

lieu of confiscation of goods in imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods". In the case of Commissioner of Customs (Import), Mumbai Versus Jagdish Cancer & Research Centre 2001 (132) ELT 257 (SC), the Supreme Court has also observed that the duty is recoverable under Section 125(2) of the Customs Act, 1962 from the owner of such goods. In view of above the Customs duty short paid to the tune of Rs.3,50,383/- is required to be recovered from Shri Krishna Ashtekar along with the interest. The penalty under Section 112/114A is also required to be imposed on him.

16. Now therefore,

1. Shri Kottaiyil Ahmmmed, Shri Haren Choksey and Shri Krishna Ashtekar are hereby called upon to Show Cause to Commissioner of Customs (Import), Cochin Customs House, Cochin within 30 days of the receipt of the notice as to why:-

(i) The date of manufacture and first date of Registration of the used Toyota Land Cruiser Prado vehicle imported vide Bill of Entry No.121795 dt. 7.01.2003 should not be taken as 4.3.1998 and 25.3.1998 respectively.

(ii) Why the value of the vehicle should not be determined by adopting residual method under Rule 8 of the Customs Valuation Rules, 1988 as per details given in Annexure 'A' which works out to Rs.5,25,130/-.

(iii) Why the duty amount of Rs.3,50,383/- short paid at the time of import by willful mis-statement and suppression of facts should not be demanded and recovered under proviso to section 28(1) of the Customs Act, 1962 and interest as applicable should not be demanded and recovered on the same under the provisions of section 28AB ibid.

(iv) The imported Toyota Prado bearing registration No.MH-06-T-9950 having declared chassis No.KZJ95-0151130 and of ascertained value as given in Annexure "A" to thus notice should

not be confiscated under Section 111(m) and 111(o) of the Customs Act, 1962, independently without prejudice to each other.

(v) Penalty should not be imposed upon them under Section 112(a) and/or 112(b) and Section 114A ibid.

(vi) the duty amount of Rs.3,61,592/- paid by Shri Krishna Ashtekar should not be appropriated towards the differential duty demanded in this show cause notice.

(vii) the bank guarantee, provisional duty bond and indemnity bond referred to in para 6 hereinabove, should not be enforced."

8. The petitioner, upon receipt of the show cause notice approached the Settlement Commission (in short, 'SC' or 'Commission') by way of an application for settlement. The SC, upon receipt of the application, issued notice dated 17.03.2008 calling upon the petitioner to show cause as to why the application should be permitted to be proceeded with and not rejected in limine. The grounds raised for response were whether (i) the criteria as laid down under Section 127B of the Act had been complied with and (ii) the bar under Section 127L of the Act would be attracted in its case. The specific discrepancy noticed was that the payment of interest, which is mandatory for maintaining the settlement application before the Commission, had not been effected. No other bar in terms of Section 127B was cited against the petitioner. The notice stated that if no written reply was received or if the discrepancy was not rectified within seven (7) days, the Commission would be at liberty to decide the matter on the basis of the materials contained in the Application.

9. Thereafter, the petitioner, vide reply dated 21.03.2008, reiterated that all criteria for settlement of the matter, including maintainability of the application, had been met by it and that the application contained a full and true disclosure of all relevant material. According to the petitioner, the interest under Section 28AB could only be demanded from the importer and not the petitioner. Reliance was placed, in this regard, on an order of the Bombay Bench of the Settlement Commission dated 07.01.2008 (Final Order No.04/Cus/RKT/2008) to the effect that the applicant, being a subsequent purchaser, could not be construed to be an importer and hence would not suffer liability to interest. There was no further communication or order from

the Commission and the Application is thus deemed to have been held to be maintainable.

10. The Application came to be listed thereafter for final hearing before the SC and resulted in the passing of the impugned order dated 12.12.2008. The SC notes and narrates the relevant facts including the specific submission of the petitioner to the effect that interest in terms of Section 28AB could be demanded only from the importer and reliance placed by him on the judgement of the Supreme Court in the case of Collector of Customs Vs. Trivandrum Rubber Works Ltd. (106 ELT 9) and upon the order of Settlement Commission dated 07.01.2008. Thereafter, the Commission extracts the provisions of Section 127 B which deals with 'Application of settlement of cases' and the proviso thereto. The Commission notes that one of the conditions for maintainability of the Settlement Application was that the additional amount of customs duty offered along with interest under Section 28AB ought to have been paid at the time of filing of the Application itself, and the condition regarding the remittance of interest was not complied with in the petitioners' case.

11. The Commission proceeds on the basis that the petitioner was liable to the levy of interest and the plea to the contrary was not maintainable. The decision of the Bombay Bench of the Settlement Commission in the case of Puneet Bhatia relied upon by the petitioner was distinguished on the ground that the assessee therein, had not colluded with the importer. Thus, in the present case, the conclusion appears to be that the petitioner had, clearly, colluded with the importer and as such could not seek the benefit of the order in that case.

12. The petitioner had also brought to the notice of the Commission that a writ petition involving facts similar to this case had been filed by another applicant before the Madras High Court. The petitioner had thus requested the Bench to await the decision thereupon before proceeding further. Citing the mandate under Section 127C(6) to the effect that the Settlement Application was to be disposed within a period of one year from the date of its filing, which in this case expired in December 2008, the request to keep the matter in abeyance was also rejected. In conclusion, the application was dismissed as not maintainable in terms of clause (c) to the proviso of Section 127B(1) of the Customs Act.

13. The question of maintainability, on the specific aspect of non-compliance with the condition regarding deposit of interest, had been raised by way of a query by the Registry of the Settlement Commission even at the first instance, on 17.03.2008, and had been answered by the petitioner. In its

response to the defect memo, the petitioner had argued that the petition was maintainable and that there would be no liability to interest, on merits. Reliance had been placed by the petitioner even at that juncture on the decision of the Mumbai Bench of the Settlement Commission dated 07.01.2008 in the case of Puneet Bhatia. It was only thereafter, and upon consideration of response dated 21.03.2008 that the application for Settlement had been listed for final disposal.

14.No order in terms of Section 127C(1) has been passed in this matter, rejecting the Application at the threshold. However, as the Application has been allowed to be proceeded with for final hearing, it is deemed to have been admitted in terms of the Proviso to Section 127(1). The legal and logical result of this sequence of events is that the Application has been found to be proper and maintainable, the SC presumably being satisfied prima facie with the explanations offered at that stage. No doubt, the question regarding payment of interest on merits will stand reserved for detailed decision at the time of final hearing.

15.The peculiarity in these writ petitions is that the very issue raised by the petitioner on merits, being nil liability to interest in terms of Section 28AB of the Act, would be relevant to determine the maintainability of the application as well. Had the Commission proceeded to decide the issue of liability to interest on merits and held the same in favour of the petitioner, then, the deemed order of admission would, in retrospect, have been reiterated as proper. If, on the other hand the Commission rejects the plea of the petitioner on merits, which, in fact, it has done, then, the Application will also be rendered non-maintainable, in the light of the bar under Clause (c)/first proviso/Section 127H. Thus a catch 22 situation presents itself.

16.Mr.Chopda draws attention to the facts involved, pointing out that the petitioner had clearly colluded with the importer in violating the terms and conditions of the Notification. He argues that having colluded with the importer, the petitioner cannot now state that he is entitled to waiver of interest and all liability connected to the imposition and remittance of duty in respect of the imported car that are attracted in the case of the importer would necessarily attach to the petitioner as well.

17.That might well be so. However, since the condition for both maintainability, as well as the legal issue raised on merits, are one and the same in this case, I am of the view that the Commission ought to have adjudicated the matter on merits in full and rendered a speaking order on this issue. This has not

been done in the present case and the Commission concludes against the petitioner on the question of maintainability of the application, without really having adjudicated the issue on merits in detail.

18. At this juncture and after prolonged hearing Mr.Satish Sundar, learned counsel states upon instructions, that all petitioners are willing to remit the interest component forthwith and without further demur. In such an event, I am of the view that in the light of substantial justice and the events as narrated above, the matter may be remanded to the Settlement Commission that will consider the waiver of penalty and prosecution alone, in accordance with law. In the light of the order as above, I refrain from referring to submissions on the merits of the matter including case law referred to. The legal issue of liability of a purchaser to interest in terms of Section 128AA of the Act is kept open to be decided in some other case.

19.As far as the respondents in WP.Nos.3053 and 3054 of 2009 are concerned Mr.Rajasekar, learned counsel appearing for these respondents, fairly states that the impugned order rejecting their Applications for settlement passed by the Settlement Commission is on the erroneous basis that the petitioner had approached the Commission ever earlier in relation to the same cause of action. He states that this understanding is factually incorrect and that the matter may be directed to be heard by the Commission de novo.

20. Recording this submission, W.P.Nos.3053 and 3054 of 2009 are allowed.

21. In fine, I set aside all the impugned orders of the Settlement Commission and remit the matters back to its file. Let the parties appear before the Commission on Friday, the 25th of October, 2019, by which time the interest payable in each case shall be computed by the Department and communicated to the petitioners for remittance by them. Upon satisfying itself that the interest component has been remitted by the petitioners in

full, the Settlement Commission shall consider the question of waiver of penalty and prosecution alone in all applications, in accordance with law. Let orders in this regard be passed by the Commission within a period of four weeks from date of completion of personal hearing.

22.Writ Petitions in W.P.Nos.1004, 1821, 1535 and 3055 of 2009 are disposed in the aforesaid terms. No costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Customs and Central Excise
Settlement Commission, Additional Bench,
Narmada Block, 2nd Floor,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Commissioner of Customs
Custom House,
Willingdon Island,
Cochin - 682 009.

+6cc to Mr.B.Sathish Sundar, Advocate Sr.83806, 83807, 83808

+3cc to Mr.T.Pramodkumar Chopda, Advocate Sr.83465, 83466, 83467

W.P.Nos.1004, 1821, 1535 and 3053 to 3055 of 2009

sr[co]

srg 25/10/2019